

THE PROBLEM OF NATURAL LAW IN ARISTOTLE

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In reading Aristotle's ethical, political, and jurisprudential writings we often come upon the term *physis*, which we may translate as "by the order of nature." In ancient political theory this term *physis* was often contrasted with *nomos* or "that which is by convention." I will argue in this paper that Aristotle's use of the term *physis* in certain ethical, political, and legal texts does not imply a natural law doctrine as it is usually understood. For to so interpret the term *physis* would render much of his ethical, legal, and moral philosophy incoherent.

We must now state how the term natural law will be understood in this paper. Admittedly natural law (*jus naturale*) has had a checkered and irresolute history. But I believe that I can claim for it at least the following elements: The doctrine holds that the enacted or the positive laws of a polity are suitable objects for moral evaluation. Such evaluation is conducted by reference to a "higher" or "natural law." The ethical-legal norms of this "higher law" are supposed to be universally valid and therefore natural. As such they are discoverable by reason alone. The natural law is understood as a set of precepts or rules against which positive laws can be measured for their moral validity. Because these rules or precepts are universal their proper understanding excludes conflicting moral judgments about any positive law to which they are applied. In principle, the natural law can nullify the positive laws of a state. The moral validity of positive law obtains only insofar as its content corresponds to the standards of the natural law. Finally, the doctrine usually claims that for the existence of a just social order the laws of nature must be exemplified in the positive law. With this at least tentative usage in mind we may now consider Aristotle and that which is "by nature" (*physis*) in his texts.

Aristotle's views of law are not easily determined. The sources are not uniformly located, and their meanings do not enjoy a scholarly consensus. But we can begin our quest for his views by noting the claim in the *Nicomachean Ethics* that the moral part of human behavior is understood as "reason prompted by desire." (ratiocinative desire).¹ While Aristotle also claims that moral virtue must involve the factor of habit, habit alone will not account for moral choice. It is also required that an intellectual virtue, or a practical wisdom be present. Indeed, this wisdom or *phronesis* is "indispensable to moral virtues and is implied by them."² Ethical wisdom as a variety of *phronesis* always involves action and choice, but its determinations are contingent and variable, or true for the most part and

adapted to particular situations. Aristotle opposes *phronesis* to theoretical wisdom (*theoria*) which is the understanding of the unchanging and necessary.³ *Theoria* is assigned to the provinces of metaphysics and natural science.

Of course, Aristotle's *Nicomachean Ethics* attempts to provide a method for determining the rules of right action. But the rules which he determines never supply any absolute or unchanging norms for the evaluation of human conduct. Aristotle has excluded from the realm of *theoria* the arts and the practical study which ethics is supposed to be. Law making is a subdivision of practical wisdom, and it cannot achieve the ethical or legal determinations which enjoy the status of *theoria*. But such a status would seem to be required if Aristotle's juristic norms are to be universally unchanging as our usage of the term natural law requires. Such a province of jurisprudence would require *theoria* for its rule formation. But Aristotle excludes this possibility.

But at this point Aristotle's texts present an issue which must be addressed: The *Nicomachean Ethics* speaks of a law which is unwritten and everywhere recognized which does "not exist by people's thinking this or that."⁴ Also, in the *Rhetoric* Aristotle speaks of a universal law, a *koinos nomos*, which is unwritten and everywhere recognized.⁵ If these references indicate in Aristotle the presence of natural law as we have defined it, then I would argue that we must face the following consequences: (1) parts of Aristotle's jurisprudential and political theories become incoherent because they contain strong positivistic features; (2) we must strongly suggest, and leave open for discussion, the possibility that Aristotle is alluding to something other than our notion of natural law. Due to lack of space this possibility will have to remain the subject of discussion.

In facing the possibility of our first consequent I will maintain that Aristotle's jurisprudence does not entail incoherence because Aristotle does not attempt to generate a *jus naturale* theory. His crucial texts will not support such a position. In the *Politics* it is the state which calls men's rights into existence and pronounces what is just and unjust. Justice can only exist between men whose relations are governed by law. Indeed, it is the positive law which is the determining factor for justice and injustice. In the *Politics* we find:

For justice exists only between men whose mutual relations are governed by law. . . and legal justice is the determination of the just and unjust.⁶

Justice as a virtue is assigned ethical priority only insofar as it involves a conception of all other virtues. The positive law is not derived deductively or inferentially from the prior conception of justice.

Positive laws, too, are not to be confounded with the principles of a constitution. Laws in Aristotle are rules by which magistrates should administer the state, and by which the state proceeds against offenders. All laws must be laid down to fit the various constitutions. They are posterior to the constitution. The constitution is not made to fit the laws.⁷ It is by reference to many kinds of constitutions, not to paradigms of natural law, that the legislator knows the best laws. It is also the case that the goodness or badness of laws is relative to the constitution for which they are made.⁸ Aristotle even suggests that the law may be understood as the will of a particular class.

In Book V of the *Nicomachean Ethics* Aristotle presents his famous analysis of justice and its various subdivisions. Here Aristotle refers only in passing to a “natural justice” for his focus is on political justice which he divides into complete or universal and particular justice. Since complete justice is identified with the whole of virtue and complete citizenship, there is apparently no implication here for natural law. Particular justice divides into distributive and corrective justice. Distributive justice allocates rewards according to merit and by service to the state. Natural law is nowhere used as a criterion for this distribution. Corrective justice determines rewards and punishments according to a mathematical formula which prescribes what is proportional in a given case. The appeal is never to a natural law. Here again Aristotle conceives the status of the law as mere positivity.

There is, however, some further material in the *Rhetoric* and the *Nicomachean Ethics* to which we must refer briefly. In the *Rhetoric* at 1373b Aristotle refers to a universal law and a natural justice which are binding on all men. But he gives no specific analysis of their nature and he assigns to these no status regulative of the positive law. But in the *Nicomachean Ethics* Aristotle claims that this justice by *physis* is subject to change.

This however is not true in the unqualified sense, but is true in a sense; or rather with the Gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable.¹⁰

Here it is difficult if not impossible to see how a law “by *physis*” which is subject to change can serve as a stable criterion by which positive law could be either nullified or sanctified.

In conclusion I have argued that Aristotle’s legal texts which are associated with *physis* do not support a doctrine of natural law. Neither can the *physis* passages act as a universal and constant set of criteria by which we judge the validity of positive law. We have seen that Aristotle recognizes

good and bad law, but good or bad positive law is nowhere denied the status of true law, as is sometimes the case in Plato. The ethical ends which law must serve are varied, and they are defined by *phronesis*. *Phronesis* is not assigned the task of revealing any unchanging criteria of natural law. Nor is *theoria* anywhere assigned this task. Indeed, part of the relevance and validity of positive law is determined “from above” as it were. But the higher agency here is the constitution, and the constitutional form varies from polity to polity. Law has no power to command obedience aside from the constitutional power of the state (*Politics* 1269a 20). Finally, the law has no status in the Platonic forms, or in the unity of goodness doctrine. If goodness is a unity which exists separately or absolutely, said Aristotle, it clearly will not be attainable by man.¹¹

Aristotle’s actual political theory makes it necessary, then, to re-examine those passages in which he speaks of a universal law and justice “by *physis*.” This paper does not propose that there are not social and even moral entities which are “by *physis*.” It only cares to examine the implications of a legal order “by *physis*” when we are intending natural law doctrine. Also this paper does not claim that those passages which refer to “universal law,” and “universal justice” are meaningless or that they have no systematic import. Their import can be explored in discussion if desired. Rather, I want to suggest that the “by *physis*” passages, when they are construed as an immanent of actual doctrine of *jus naturale*, render Aristotle’s teaching on politics, law and ethics problematic if not incoherent.

Notes

1. *Nicomachean Ethics* 1139b4.
2. *Nicomachean Ethics* 1144b20.
3. *Nicomachean Ethics* VI, 1-4.
4. *Nicomachean Ethics* V, 7, 18.
5. *Rhetorics* 1368b9.
6. *Politics* 1283a.
7. *Politics* 1289a15.
8. *Politics* 1309b35.
9. *Politics* 1296b35.
10. *Nicomachean Ethics* 1134b 25-29.
11. *Nicomachean Ethics* 1096b.

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