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Aristotle on Natural Law

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WHEN DISCUSSING LAW AND JUSTICE philosophers and historians almost invariably claim that Aristotle[1] is the father of natural law. The truth of this claim will not be contested here. However, without a clear understanding of what Aristotle meant by the expression "natural law," the claim that he was the father of natural law has little significance.

I

1. Aristotle did not coin the term *δίκαιον φυσικόν*, nor was he the first person to relate 'justice' to 'nature.' It is important to stress this in order to appreciate fully the way he approaches the problem of natural law in its various aspects. Largely through the teachings of the Sophists the expression *δίκαιον φυσικόν* had become quite popular by the time of Aristotle.[2] Despite considerable doctrinal differences in various dicta of the Sophists concerning the *δίκαιον φυσικόν* they all share a polemical character. Aristotle's treatment of this subject is polemical too; but what distinguishes him from his predecessors is the fact that he endeavors to overcome a purely negative attitude, thereby turning a slogan into a serious problem. In sum, by clarifying the idea of justice as a whole, he seeks a constructive approach to the problem of *δίκαιον φυσικόν*.

The far-reaching significance of his achievement has not yet been fully appreciated. Hence a new and unbiased inquiry seems to be desirable.[3]

Only a classical philologist could determine the manner in which the various Aristotelian writings on natural law are related to one another; and only he could determine the chronological order of these writings. Solutions to

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1. The following abbreviations are being used in the footnotes:
   An. Pr.: *Analytica Priora*
   C.: *Categories*
   E.E.: *Eudemian Ethics*
   E.N.: *Nicomachean Ethics*
   M.: *Metaphysics*
   M.M.: *Magna Moralia*
   Poe.: *Poetics*
   Pol.: *Politics*
   Rh.: *Rhetoric*
2. See my essay, *Der Begriff des Naturrechts bei den Sophisten,* 32 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE (Rom. Abt.) 129.
3. Of my own publications I refer to: DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, published under the name Max Salomon (1937); *Von den Dingen, die sich auch anders verhalten können,* 5 ARCHIV FÜR PHILOSOPHIE 305 ff.; *Der Begriff des Naturrechts in der Grossen Ethik,* 41 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 422 ff. This essay is full of misprints and other mishaps, for I was, sorry to say, not given the opportunity to read the proofs.

these philological questions would be of considerable importance. They would determine whether there was, in Aristotle's thought, a development toward a deeper conception of the problem of natural law, corresponding to the development of his insights in the realms of sociology and history.

Aristotle's authorship of the *Nicomachean Ethics,* the *Politics,* and the *Rhetoric* cannot reasonably be challenged. However, the same cannot be said of the *Magna Moralia.* It has been argued by some that this work was composed by a disciple either of Aristotle or possibly of Theophrastus. Others regard Aristotle himself as the true author. These are moot questions[4] not yet answered to everyone's satisfaction; but whatever the ultimate answer may be, the *Magna Moralia* exhibits the thought of Aristotle and his school. Hence it is of utmost importance to examine thoroughly the treatment in the *Magna Moralia* of the idea of justice and of the question of natural law. On certain points there is a close affinity between the *Nicomachean Ethics* and the *Magna Moralia.* For instance, one finds the problem of changeability and the reference to right-handed and ambidextrous people in both works. But the basic meaning of the term "natural law" as used in the *Magna Moralia* differs fundamentally from that in the *Nicomachean Ethics.*

The doubtful authorship of the *Magna Moralia* may be the reason why discussions of Aristotle's views on natural law center upon the *Nicomachean Ethics,* the *Politics,* and the *Rhetoric.* This is a great mistake. Whether we can attribute the *Magna Moralia* to Aristotle himself is, from a systematic point of view, of little importance. For did not Socrates inform Charmides that it is not as important to determine who said certain words as it is to determine whether they are true or not? [5]

Ignoring for the time being the purely philological problems of authenticity, it is our aim to use the statements about natural law in the four texts mentioned as a means to a better understanding of the complex problem of natural law in particular and of justice in general. (The *Eudemian Ethics,* it will be noted, does not make an independent contribution to the discussion. The passages on justice found there are the same as those contained in the *Nicomachean Ethics.*)

Having thus established the limits of our subject, we now begin the discussion of it.

2. As for the terminology in general, it cannot be denied that the term *δίκαιον φυσικὸν* is more satisfactory than the more equivocal expression

4. See the most instructive work by SCHAECHER, STUDIEN ZU DEN ETHIKEN DES CORPUS ARISTOTELICUM (1940); and the German translation of the *Magna Moralia* by Gohlke (1951).

5. PLATO, CHARMIDES 161B.

'natural law.' We make a clear statement when we say: "of justice part is natural, part is legal." [6] Such a statement cannot easily be misunderstood; it declares that the second part, namely, legal justice, is man-made justice. Conversely, it makes natural justice an eternally open question, unsolved and maybe unsolvable. Because of the close affinity of 'legal' and 'law,' the term 'natural law' is more likely to be confounded with man-made law than the term 'natural justice.' Also, at times it might be safer to approach the whole problem of natural law in terms of whether a certain conduct accords with natural justice. However, since the term 'natural law' is commonly used, we shall follow the established tradition and speak, though with some hesitation, about natural law and legal law.

Similar difficulties are inherent in the Greek term *νόμος*. To translate it simply as 'law' leads to considerable misunderstanding. We would have to stretch the meaning of 'law' unduly in order to arrive at the correct meaning of the Greek term. The term *νόμος* refers not only to what we commonly call 'law,' but also to the principles of customs, morals, manners and habits — to everything which is a principle of order within social life. Thus we read in the *Rhetoric*[7] that courage, as well as temperance and justice, is based on the *νόμος*, and that they are in accord with the dictates of the *νόμος*.[8] The *νόμος*, so to speak, is at work wherever people submit to, and feel bound by, propositions deciding the worthiness or unworthiness of a certain behavior within a given community. Although the English language, too, uses the term 'law' in a fairly broad sense, encompassing the rules of nature as well as the rules of games, it is still too restricted a concept to express the fullness of the Greek *νόμος*. 'Norm,' on the other hand, is probably a more satisfactory translation.

Whether such a norm is written or not is unimportant. The decisive characteristic of a norm is that it is fixed (in some way) and enacted. Aristotle repeatedly refers to the 'lawgiver,' the *νομοθέτης*. But when using this expression he does not have in mind the actual 'writer' or the author of a specific norm. The *νομοθέτης* is not a mythical entity either: he is quite simply that authority which in the accepted sense has the power to lay down a norm.

This being so, our subsequent remarks will focus on the terms *justice, natural law, legal law,* and *norm.*

6. E.N. 1134 b 18, translation by W. D. Ross.
7. Rh. 1366 b 10 ff.
8. *ὡς ὁ νόμος κελεύει.*

II

1. According to traditional opinion, Aristotle's 'true' meaning of natural law has been laid down in unequivocal terms in the *Rhetoric*. Since it is never advisable completely to ignore traditional views, let us consider whether we have to read only the *Rhetoric* in order to understand Aristotle's conception of natural law. The *Rhetoric,* to be sure, contains important references to natural law, although the term itself is rarely used. It is here that we are told that the law is either particular or general:[9] particular law is that law which is applied by a particular state in administering justice; general law is that law which, being acknowledged and recognized by everybody, is not confined to a particular state. The latter is logically unwritten law.

This dualism is later examined[10] through the following two questions: What is the special character of each of the two kinds of law? What does each of them signify? We are told by way of a restatement of the previous definition that particular law is restricted to the people who enacted it. General law is defined as that law which is κατὰ φύσιν or 'according to nature.'[11] In this manner the term κατὰ φύσιν is introduced into the discussion of natural law. Once again we are confronted with the problem of written *vs.* unwritten in connection with all laws, whether particular or general. While it is taken for granted that a general law can only be unwritten, a particular law is described as being either written or unwritten.[12] In order to understand the teachings of the *Rhetoric* great pains should be taken not to confuse general with particular unwritten laws.

In the context of Aristotle's discussion in the *Rhetoric* the term 'unwritten law' is used in at least four distinct ways:

(a) In human life as well as in theory there is always the possibility of excess. It is here that we have to seek the distinction between virtue and vice.[13] How does the written law operate in such cases? The answer can only be that it is silent; it does not envisage such a problem. Since we cannot help trying to find a solution to the problems involved, we turn to unwritten laws. But how do we explain that the written law, any written law, is not capable of coping with these difficulties? The answer can only be that the actions in question are not within the purview of written law.

In this connection the term 'law' has a dual meaning: a wider one expressed by the term of 'unwritten law,' and a more restricted one referred

9. ἴδιος — κοινός. Rh. 1368 b 8.
10. Rh. 1373 b 4.
11. Rh. 1373 b 6.
12. Rh. 1373 b 5.
13. Rh. 1374 a 21 ff.

to by the term 'written law.' If this were not so, the unwritten law would not be capable of facing a problem at the point where the written law must fail by its own standards or limitations as a law. Evidently the meaning is (1) that the action in question lies beyond the reaches of justice proper; (2) that the unwritten law is a norm (as explained above) but not a law; and (3) that it aims at moral, ethical, and possibly religious values or whatever takes their place, but not at justice in the usual and more specific meaning of the term. In order to understand these thoughts we may refer to the explicit distinction, found in the *Nicomachean Ethics,*[14] between justice in a wider and in a narrower sense. Justice in its comprehensive meaning knows only one norm: to act and to behave like an honest and decent man — *"honeste vivere."* This norm, whatever its content, cannot, of course, be written law.

The difference between written and unwritten laws is to be found not in the way laws approach the reality they are supposed to control, but in the system of values (of which justice is a member) which is applied to this reality. Individual problems of evaluation themselves express the conditions for applying the system or systems of values used in evaluation. As far as justice itself is concerned this kind of unwritten law does not refer to justice at all, unless — as is always possible — this term is stretched beyond its limits.

(b) In another connection[15] we learn, by way of an apparent anomaly, that there is a kind of particular law that is supposed to be unwritten law. Particular law, Aristotle restates here,[16] is a special agreement made by the community and concerning that community; hence it is binding only upon that particular community. But where a definite agreement exists, the law, too, must be definite (or written). An unwritten (indefinite) law which has expressly (definitely) been agreed upon is a contradiction in itself. Thus a law is necessarily a written law if its source is a definite agreement. Aristotle, however, gives neither examples nor further explanations of particular unwritten laws.

It is quite possible, therefore, that here he may have equity in mind. Only the rule of equity is at the same time particular and general. Unwritten laws in the form of particular laws would then play the same role as general laws do in the entire realm of justice. At this point it is advisable to discuss Aristotle's concept of equity.

(c) Whenever Aristotle discusses equity at greater length he posits a direct relation between equity and the unwritten law: written and unwritten laws are no longer contrasted but are placed parallel to one another. It is

14. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra,* note 3 at 10 ff.
15. Rh. 1373 b 6.
16. Rh. 1374 b 19.

clearly stated that equity is justice, but a justice "alongside" the written law (*τὸ παρὰ τὸν γεγραμμένον δίκαιον*).[17] Now the word *παρὰ* does not have the meaning of 'above' or 'against,' as it has often been rendered. Equity plays a special role with regard to written laws by making up for the deficiencies or human shortcomings of the legislator. This recalls what we said before about the personality of the 'legislator.'

One aspect of the legislator's deficiency can be accounted for as follows. A legal term is used to refer to an indefinite number of situations, no two of which are identical in all relevant aspects. A whole lifetime would not suffice to enumerate these situations.[18] Thus, a definition proposed for a legal term by a legislator will in all likelihood fail to give precise limits to the application of the term. Accordingly, either the need for new definitions will be recognized[19] or the lawgiver will overlook the inadequacy of his proposals, thinking that they will serve in all situations. In either event unanticipated circumstances are bound to arise. Hence there must be something to make up for this deficiency.

Reading the text of the *Rhetoric* up to this point, one can hardly see how equity, called upon to fill an unavoidable gap in the written law, may be able to tell us anything about natural law, which is obviously 'unwritten law.' Problems arising from the practical application of the written law, however, have to be met, we are advised, by the legislator. The spirit of the written laws as well as the values they express should be honored and treated as a guide. And the written laws should never be overturned. In this way no 'new' kind of justice will be created. Neither will anything be decided contrary to the fixed (or written) law. This is exactly what the idea of natural law demands.

Thus far the concept of an unwritten law contributes little to our understanding of what natural law actually means. Aristotle, however, has still more to say about equity. We know from practical experience that in certain instances a specific conduct may be "illegal" and still be "equitable"; that is, in accordance with the principles of justice and righteousness. In such cases we should not adhere to the wording of the law, but look at the intentions of the lawgiver and settle the dispute by "arbitration." Does this imply that legal justice should be abolished and replaced by something else called "equity"? Far from it. When we check Aristotle's statements we see quite another picture. No one has a right to be judged by any other standard than justice. Hence Aristotle does not suggest that in certain cases the court should apply

17. Rh. 1374 a 25.
18. Rh. 1374 a 33.
19. Rh. 1374 a 27.

"equity." He suggests that the plaintiff, the person or party whose legal rights were infringed upon and, hence, who has an actionable claim (in the language of the *Nicomachean Ethics,*[20] he has *τὸν νόμον βοηθόν* — he is backed by justice) should renounce his rights and change from an *ἀκριβοδίκαιος* to *μὴ ἀκριβοδίκαιος* by putting reason above his legal right, equity above justice.[21]

The "norms" or "rules" of equity are not of the kind that could be written down. That is their very essence. Here once more we encounter a form of "unwritten law." But this kind of "unwritten law" is not natural law. Nor does it help to solve the real problem of natural law.

(d) Previously we have used the expressions "particular law" and "general law." In the *Rhetoric,*[22] where the unwritten law is identified with natural law, these two terms are dealt with in more detail. Natural law exists without an agreement, and it does not require any form of association.

The "general law," we are told, contains more justice and gives more truth and expediency and accomplishes the work of the law better than its counterpart, the written (or "particular") law.[23] Being general, it does not undergo any changes,[24] while the written law frequently varies.[25] These are also the arguments, according to Aristotle, by which Antigone justifies her disregard of Creon's order. Sophocles calls the law she follows 'eternal.'

In this context the terms "eternal" and "unchangeable" evidently mean something not limited by territorial boundaries, not changing from country to country. It is not immediately evident why the unwritten law should serve justice better simply because it is not subject to change. On this point, however, the *Rhetoric* offers no further explanations. We shall see later that the problem of changeability plays an important role in the discussions of natural law in the *Eudemian Ethics* and in the *Magna Moralia.* Not being enforceable by sanctions, the unwritten law is definitely at a disadvantage.[26] The question of compulsion, on the other hand, is closely related to the questions of certainty and dependability. Thus for the 'higher' form of justice there is no evidence in the form of a proof. The analogy with equity is not convincing. The idea of an eternal, never changing law stirs our imagination and appeals to our emotional feeling. This is not true, however, of the written law — the rigidly strict norm, unmerciful in particular circumstances. But is it really

20. E.N. 1138 1 ff.
21. Rh. 1373 b 4.
22. *κοινὸν δὲ τὸν κατὰ φύσιν.* Rh. 1373 b 6.
23. *ὡς δικαιοτέροις.* Rh. 1375 a 28.
24. *ἀεὶ μένει καὶ οὐδέποτε μεταβάλλει.* Rh. 1375 a 32.
25. *πολλάκις.* Rh. 1375 a 33.
26. *ἐξ ἀνάγκης.* Rh. 1375 a 18.

the task of justice to be merciful and accommodating? Only a truly philosophical or scientific approach can decide between the law based on fixed norms and the law based on 'nature.'

2. So far, however, these questions cannot be fully answered. In order to understand what Aristotle really says, his statements should not be read out of context.

The method of the *Rhetoric* is, of course, bound to be scientific. Its conclusions obviously are not supposed to be *aporiae* or "fictions." Its subject, however, is not science or ethics or anything of the kind. Neither the truth of scientific statements nor the moral value of clearly defined actions is scientifically explored here. For there is one thing that the *Rhetoric* definitely does not do: it does not weigh values. Its aim is to demonstrate something quite different, namely, the most efficient manner of 'persuasion' [27] in the interest of certain ends which are taken for granted and are not examined in themselves. In themselves these ends are not necessarily related to scientific truth or to moral values. No one knows better than Aristotle the difference, for instance, between statesmanship and rhetoric. Merely to call attention to values and value judgments without discussing or judging their merits is, for Aristotle, pure sophistry.

There are, Aristotle insists, five 'nontechnical' means of persuasion characteristic of forensic oratory (where undoubtedly we have to deal with the idea of justice). One of these is the laws, and others are witnesses, contracts, torture, and oaths. Since we are actually confronted with a dual "set" of laws, namely, fixed laws and unfixed laws, a forensic orator is faced with the alternative of invoking either the one or the other. But he cannot appeal to both at the same time.

It might be helpful to translate the relevant paragraphs from the *Rhetoric* into the language of our time.

"Students of the law or lawyers-to-be, if you wish to win your case in the law courts, remind 'the jury' that it is their sacred duty to do justice — justice and nothing else; that while giving their verdict in this particular case they are serving the most sacred idea the world has ever known. When they are thus truly impressed and are convinced that by their vote they decide the fate of justice, then you may concentrate on your special case (up to this point you cannot go wrong by using identical words and sentences). If the law is in your favor, you must then argue that this sacred justice rests on nothing else but the law which is open to everyone's inspection and verification, as well as on the respect towards the wisdom and greatness of the rules

27. Rh. 1355 b 27.

that have been transmitted to us by our forefathers or promulgated by a wise and impartial government. How can anyone be permitted to trifle with such institutions![28] However, should the law be against your client's case, then plead exactly the other way round,[29] but still display the same air of conviction: stress the insufficiency and the logical limitations of statements contained in rigid generalities, and their inability to cope adequately with the unforseeable complexity of the concrete problem at issue. Whatever your case may be, this leads you immediately to claim that the jurors cannot but decide in your favor, adhering alternatively to the fixed law or to the natural law. And always, of course, to the *γνώμη ἡ ἀρίστη*.[30] In both instances you appear clearly to act as the devoted and humble servant of justice whose plea is motivated solely by his love of justice and nothing else. But in both instances your arguments make justice a servant of your particular interests. This is the best way to win your case."

We may also transfer this advice from law to politics, from how to win a legal argument to how to win an election. If the candidate belongs to the party in power, one would argue that the existing tradition has stood the test, that there is an inherent danger in new experiments, and that there is a duty to repay faith by faith. From the other side we would hear about the danger of permitting a situation to stagnate, and about the desirability of electing new people with new ideas. The campaign motto would be: "It is time for a change." Such slogans are known to everyone. This raises the question: Are the speech writers concerned with truth or are they merely interested in effective campaign oratory? To what extent is the sociologist who describes effective oratory concerned with the rightness or wrongness of such oratory?

These examples are designed to illustrate, by the use of modern terms, the teachings of the *Rhetoric*. Aristotle, to be sure, was not discussing the morality of such arguments. He merely revealed the weakness of human emotions and, what is even more relevant, how this weakness can be exploited. Undoubtedly, people want to win lawsuits or electoral contests. It is no secret that certain procedures help and others do harm. If we intend to study the reactions to rhetorical methods, we should be candid.

Aristotle knew that some persons held certain views about natural law, and that others held diametrically opposed views. The *Rhetoric,* however, does not prove or even discuss the validity of either of the opposed positions. The allusions to natural law in the *Rhetoric* neither estimate its moral value nor establish the relationship of "legal" law to natural law. Hence these allu-

28. *οὐ παρὰ τὸν νόμον δικάζειν.* Rh. 1375 a 30.
29. *μὴ παντελῶς χρῆσθαι τοῖς γεγραμμένοις.* Rh. 1375 a 30.
30. Cf. LIPSIUS, 1 DAS ATTISCHE RECHT UND RECHTSVERFAHREN 152 (1905).

sions cannot possibly contain Aristotle's 'real' views on natural law. The aim of the *Rhetoric,* in regard to natural law, is to show that the term natural law is in vogue and that from a certain point of view it is considered an advantage to make use of its emotional appeal.

To sum up: In the *Rhetoric* Aristotle intends neither to assert nor to prove that the natural law holds any kind of superior position. No judgment is passed on natural law. He merely introduces us to a catchword without discussing its moral significance. Hence what he says here is neither an exaltation nor a depreciation of natural law.

III

1. "Insofar as law is not 'by nature' but is merely human enactment it is not the same everywhere. It is not even the case with regard to constitutions that they are everywhere the same, though there is only one constitution which is — by nature — everywhere the best." [31] This is the last sentence of the chapter on natural law contained in the *Nichomachean Ethics.* Here natural law plays the role of deciding questions of justice and, in so doing, it also judges the law that is actually in force. Now we can readily understand why Aristotle's authority is traditionally called upon to defend, and to glorify, the idea of natural law. The sentence quoted above contains the term ἡ ἀρίστη (the best).[32] Aristotle does not use such predicates as 'useful' or 'recommendable' or 'most serviceable'; neither does he call "the best constitution" 'right' or 'correct.' The term ἡ ἀρίστη assigns the statement to the realm of ethics or ethical judgments. The most important parts of the *Politics,* like those of the *Nicomachean Ethics,* are based on ethical valuations. The term ἡ ἀρίστη has the same ethical meaning in the *Nicomachean Ethics* and the *Politics* as it has in the *Eudemian Ethics,* a fact which closely relates these works.[33] The teachings of the *Politics* — and the same applies to the *Nicomachean Ethics* — do not aim at mere descriptions, except where we are presented with a collection of facts which are necessary to demonstrate how at different times certain problems have been dealt with. Politics and ethics are sciences, or to be more exact, axiomatic sciences defining, by the use of a scientific method of judgments and values, what should be and ought to be; what is bad and what is good. Hence the above sentence merely tells us what kind of constitution is the best according to the science of ethics.

There are many different constitutions which do not measure up to the

31. E.N. 1135 a 3-5.
32. E.N. 1135 a 5.
33. E.N. 1181 b 13 ff.

standard of "the best." Nevertheless, they are enforced as well as binding upon the citizens. This, we are told, is in conflict with the fact that general laws of nature must be, and are, everywhere the same. "Fire burns in exactly the same way in Persia as in other countries." [34] Hence in contrast to the laws of (physical) nature, legal laws may be valid but not in force, or in force but not valid (validity being a characteristic quality of natural law).

The distinction between "being in force" and "being valid" is one between two different spheres of spiritual being. The key to this problem can be found in the use of the term φύσις, in the *Nicomachean Ethics.* When we call a constitution "the best" — that is, when we declare it valid whether in force or not — we must realize that "being in force" and "being valid" have nothing to do with each other. A single law may have both of these properties or it may have one and lack the other; but this does not affect the properties themselves. 'Nature' belongs to another plane. What is valid by nature may actually be in force; but this "being in force" might be merely accidental.

When we select a single constitution and assert that it is the best of all constitutions, past and present, real or imaginary, then the other constitutions are not only not the best: they are bad, inferior, poor or whatever other value we wish to assign to them. It may be possible to show higher or lower degrees of adequacy. We see in the *Politics* that a bad form of government is always considered a perversion of the good form of government and, accordingly, opposed by the latter.[35] According to the more elaborate and evidently later teachings of the *Nicomachean Ethics,* it should not be difficult to indicate at least two contrasting "forms" opposed to the good "form" and, also, opposed to each other as "too much" [36] and "too little." [37] The good "form," it may be maintained, is the mean between two evils, or perhaps better, between two imperfect forms. We know that the problems of politics arise out of the problems of ethics. The judgment we pass on constitutions is "science" in the same way as moral teaching is science. But whereas it is not difficult to show, e.g., that liberality [38] is the mean between prodigality and meanness, and pride[39] the mean between vanity and humility, the definition of the "best government" offers some difficulty. The proof of what is the best government sometimes relies on the magic word "nature," or, as in the *Politics,* employs as a criterion the "common good," [40] without, however, linking this "common good" to "nature."

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34. E.N. 1134 b 26.
35. Pol. 1279 a 23 ff.
36. ὑπερβολή. E.N. 1108 b 12.
37. ἔλλειψις. E.N. 1108 b 12.
38. E.N. 1119 b 21 ff.
39. E.N. 1123 a 33 ff.
40. Pol. 1279 a 30.

According to the *Nicomachean Ethics,* one can demonstrate which kind of constitution is best. But the same cannot be said for the examples which Aristotle gives for law that is "not natural."[41] There is no way of deciding whether the rites for certain offerings should be a goat or two sheep. Or what the ransom should amount to. Here we have nothing like the 'best' solution.

The "nonnatural" (or "legal") law is referred to by a variety of names and descriptions: it is "not by nature";[42] "promulgated";[43] "based on agreement[44] and convenience";[45] or "merely human."[46] What is called "promulgated law" is that law which could possibly have been quite different.[47] Before it was promulgated,[48] there were several alternatives as to how this law might read.[49] But once promulgated,[50] it is "fixed." Thus we distinguish between the law that has actually been promulgated and the law that might have been promulgated.

This last description is the most important. But did not Aristotle mention changeability as a criterion of nonnatural law? It is mentioned[51] only to be denied the status of an essential characteristic. Promulgated law, to be sure, changes. But natural law may also change. Hence, seen from this point of view, no conspicuous difference exists between natural law and "nonnatural" law. However, the reasons for change in each kind of law differ. Therefore, when we see that laws undergo changes, this in itself does not indicate whether they are or are not "according to nature." The characteristic of changeability cannot be our criterion, although in itself natural law is *ἀκίνητον* — unchangeable.[52]

In connection with this argument of changeability, reference is made to the example of people becoming ambidextrous.[53] Even if every right-handed person learned to use the left hand with the same efficiency as the right hand, it would still be correct, Aristotle contends, to say that the right hand is "by nature" stronger than the left hand. It is hard to understand what this example means and what it is supposed to prove. The statement that even in the case of ambidextrous people the right hand is "by nature" (*φύσει*) stronger than the left hand is discussed at length and more clearly in the

41. E.N. 1134 b 21 f.
42. *τὰ μὴ φυσικά.* E.N. 1135 a 3.
43. *ὅταν δὲ θῶνται.* E.N. 1134 b 21.
44. *τὸ δοκεῖν ἢ μή.* E. N. 1134 b 20.
45. *τὰ δὲ κατὰ συνθήκεν.* E.N. 1134 b 35, 1134 b 32.
46. *ἀνθρώπινα.* E.N. 1135 a 4.
47. *οὐδὲν διαφέρει.* E.N. 1134 b 21.
48. *ἐξ ἀρχῆς.* E.N. 1134 b 20.
49. *οὕτως ἢ ἄλλως.* E.N. 1134 b 21.
50. *διαφέρει.* E.N. 1134 b 21.
51. E.N. 1134 b 25 ff.
52. E.N. 1134 b 25.
53. E.N. 1134 b 34 ff.

Magna Moralia.[54] There we are told the significance of the statement, "a possible change does not necessarily affect what is 'in accordance with' (or 'by') nature." But this is true only if the expression "according to nature" is used in the sense given it in the *Magna Moralia,* where its meaning is quite different from that found in the *Nicomachean Ethics.* The *Magna Moralia* holds that being "according to nature" means to be generally valid and not merely temporarily so. To become ambidextrous or to become left-handed does not change what is "according to nature," namely, the greater strength of the right hand. We may assume that this illustration, if not directly taken from the *Magna Moralia,* has been used by Aristotle's successors when they discussed the problem of the changeability of the natural law. It is also possible that the reference to this illustration was carried over into the φύσις-notion of the *Nicomachean Ethics* without being adapted to the profounder meaning it acquired there. In any case, all these discussions fail to shed any light on the real meaning of natural law in the *Nicomachean Ethics.*

We have already seen that the δίκαιον νομικὸν cannot be proved in the same way as the δίκαιον φυσικὸν can be proved. On the other hand, an enacted law could very well have been one way or another, something which is not true of a constitution. In addition, it is not true that all enacted laws, no matter what their subject may be, can be adjusted and improved to such a degree that they become natural laws. The enacted law is characterized by its original indifference towards its content — οὕτως ἢ ἄλλως, whereas natural law from the beginnning aims at being 'the best.'

2. The difference between δίκαιον φυσικὸν and δίκαιον νομικὸν does not arise because of human limitations; hence it cannot be overcome by greater efforts to grasp the truth. There are always good and bad constitutions; but they are good or bad "according to nature." The difference between a good and a bad constitution is not so great as that between laws which can be good or bad by nature and those which cannot be evaluated according to nature. This appears to be the central problem of Aristotle's theory in the *Nicomachean Ethics:* the difference between enacted law and natural law does not lie in the fact that the former gives the right and the latter gives the wrong solution to the same legal problem. This is the usual but erroneous interpretation of the difference between enacted and natural law. However, this difference is related to structural differences between the problems appropriate to each. A law which has the character of a natural law is different from the "mere human" law, not because the latter may be wrong "according to nature," but because the "human" law deals with a problem concerning which

54. See *infra,* IV.

it makes no sense to ask for a solution based on nature. If a legal problem does not belong to the sphere of natural law, no conceivable effort can invest the solution with validity "according to nature." Thus the difference between two sets, not of answers, but of potential laws is the difference of the highest importance, although it has not yet been taken into full account.

Once the easily misleading argument from changeability has been removed, it remains to point out that natural law and human law differ in respect to the δύναμις.[55] Natural law has everywhere the same δύναμις: mere human law has not.

The meaning of the term is not readily understood because it is not explained in this context and is, in itself, ambiguous. We read in the *Nicomachean Ethics*[56] that the two kinds of justice — natural law and human law — are alike in that both are directed πρὸς ἕτερον,[57] and this property is called their δύναμις. This word is evidently used to point out one of their characteristics and essential qualities. We learn in the *Metaphysics* that the primary material is unchangeable ἐκ τῆς δυνάμεως τῆς αὐτοῦ.[58] We may presume that by claiming the same δύναμις everywhere for natural law, the word is being used metaphorically[59] in a more pregnant sense than it could have in connection with, e.g., geometry. It indicates a norm[60] immanent in things themselves, a norm which is not dependent upon human discretion.

Natural law has everywhere the same δύναμις; the mere human law could with equal propriety be different. Therefore, natural law is not capable of being different than it is; mere human law does not have everywhere the same δύναμις.

Things are either capable or not capable of being different than they are; *tertium non datur*. This idea is found in all the teachings of Aristotle. This may be the reason why no special explanation of it is given in the chapter on natural law, where, as we see, it plays a decisive role. However, the idea is dealt with in a later chapter of the *Nicomachean Ethics*.[61] In this description we find what Aristotle means by justice based on φύσις. Things that are capable of being other than they are,[62] are excluded as subjects of scientific knowledge.[63] Only the necessary can be a subject of scientific knowl-

55. E.N. 1134 b 19, 26.
56. See *infra*.
57. E.N. 1134 b 1.
58. M. 1014 b 28.
59. M. 1019 b 33, 1046 a 7.
60. M. 1078 a 28.
61. E.N. 1139 a 8 ff.
62. τῶν ἐνδεχομένων καὶ ἄλλως ἔχειν. E.N. 1134 b 31.
63. An. Pr. 88 b 32 ff.

edge.[64] Necessity is limited to things that cannot be otherwise,[65] or, from another point of view, it is limited to things whose basis and essence are not capable of being otherwise.[66] We can trace this dividing line even in the doctrine of essential and nonessential accidents. There can be demonstrative knowledge of essential accidents, but not of nonessential accidents.[67]

And so the doctrine of natural law is a science; its methods are the methods of a science. The doctrine of the other kind of justice has neither the dignity nor the rigor of a science; and its methods must be nonscientific.

This description of the doctrine of nonnatural law is negative. We have, however, other descriptions which are definitely positive. Only things that are capable of being other than they are permit reflection, deliberation, and decision.[68] Only in this area may questions be settled arbitrarily. In the field of science this is not true. Mathematics and physics do not allow decisions. We cannot deliberate on whether or not the angles of the triangle should be equal to two right angles[69] or if the diagonal of the quadrangle should be commensurable.[70] In this respect there is no room for resolution and decision, but only for recognition and proof. The same applies, as should be stressed at once, to the field of history. Concerning whether or not Troy has been destroyed, no decision is possible.[71] Things of the past are not capable of being otherwise. Insofar even the gods are bound.[72]

Accordingly, we can only recognize, but not decide upon, laws in force at a previous time or at present. In this respect we are faced by facts which we ourselves cannot change or influence. However, what the provisions of specific nonnatural law should be is not something for mere recognition but, on the other hand, requires reflection, deliberation, and decision.

3. The examples of mere human law in the *Nicomachean Ethics* (amount of the ransom, rites of sacrifices) are not representative of all nonnatural law. Natural law is not involved when rules are given for a singular and isolated case or when a plebiscite is involved.[73] The word "plebiscite" does not convey Aristotle's meaning precisely: *ψηφίσματα* are norms put into force on the spur of the moment, without due deliberation and without a full examination of their universal application. It is evident that such human laws are

64. E.N. 1140 b 32.
65. M. 1026 a 27 ff.
66. E.N. 1139 a 8.
67. An. Pr. 75 a 18.
68. Rh. 1357 a 6. Cf. E.N. 1112 a 19 ff.
69. See, for instance, E.N. 1140 b 26.
70. See, for instance, M. 1019 b 26.
71. E.N. 1139 b 8.
72. E.N. 1139 b 10.
73. E.N. 1134 b 23.

different from the previous ones. The lesson is clear. Natural law is not a law outside or beyond justice. Before a norm can be considered either a natural or a human law it must satisfy the conditions of justice as a whole.[74] Human justice is not a disfiguration of justice waiting to be corrected and improved by natural law. Human justice is justice — only not of the same kind as natural law.

And so there are certain conditions that must be fulfilled if a norm, be it natural or human, is to be a norm of justice, of justice proper and not of other ideas no matter how exalted. One essential characteristic of justice as a whole is its universality.[75] We always have a general rule[76] on the one hand and an infinite number of cases[77] falling under this rule on the other. This statement, of such high importance for the fundamentals of justice, occurs in the text of the *Nicomachean Ethics* without any visible link to the chapter on natural law. It can be understood only as an explanation of the previous observation that rules referring to only a single case cannot be taken as rules of justice. The honors accorded Brasidas[78] are outside the area of natural law, not because Aristotle disapproves of this commemoration or because he rejects deification in general (nothing of this kind is hinted at) but because the corresponding regulations do not belong to the realm of justice at all, whatever their aims may be. With regard to *ψηφίσματα*, the position of Aristotle is well defined.[79]

From all this it would follow that natural law is not present (a) where the answer to a problem depends upon our free moral decision and, hence, cannot be supplied by scientific proof; and (b) where no rule of a general character is involved.

Similarly, where there is no general rule there is no justice. We are approaching what can be called a general theory of justice or jurisprudence. Its role is to determine what the conditions and presuppositions are for a norm to be a norm of justice in the strict sense. When we set out to answer this question we are aware that it is not offered for our personal deliberations. We cannot decide at will if the limits of justice should be so or otherwise; what we have to do is to recognize them. We are in this respect exploring the "a priori" of justice.

Even though the problems relating to the "a priori" of justice are of a scientific character and would seem, therefore, to be confined to the area of

74. E.N. 1134 b 18.
75. *καθόλου*. E.N. 1135 a 8.
76. *'έκαστον 'έν*. E.N. 1135 a 8.
77. *τὰ . . . πραττόμενα πολλά*. E.N. 1135 a 7.
78. E.N. 1134 b 23.
79. Pol. 1292 a 20.

natural law, this is not the case. We must, however, realize that the term "natural law" is too often stretched in its application to the theory of the "a priori" of justice. Whether or not this is done, the fact remains that the subject of these problems is in any case completely different. In the language of Aristotle, the "a priori" of justice is called δίκαιον ἁπλώς.[80] The natural law does not pass judgment on the human law, for only something above both kinds of justice can do this.

The doctrine of the "a priori" of justice seeks to bring the foundations of justice to light, to show the premises of what is just. It neither tries nor is able to provide concrete answers to practical questions. It does not produce the 'best' solution to a specific legal problem, e.g., that of the best constitution. This is, so to speak, the curse of the theory; it appears 'useless' from a practical point of view, and it will always be neglected for just this reason. Exactly the same applies, however, to the theory of natural law as presented in the *Nicomachean Ethics*. Aristotle does not teach us how to prove that a law is a natural law, e.g., how to deduce the 'best' government from the higher principle and so to demonstrate that it is really the best. He follows the approach he uses to best advantage in all his teachings of ethics. He attempts to arouse in us a feeling for values and their quality, taking as a standard the honest and esteemed citizen of his age.

Accordingly, when he refers to natural law in his various writings he goes beyond mere formal declarations. He prefers here, as always, to show his methods in actual operation. An example of this is his observation that there are slaves by nature and slaves by mere norms.[81] Other examples are presented in the introductory remarks to the *Politics:* man is dependent on community life,[82] the home community is a natural frame for daily life,[83] the state is 'prior'[84] to individual men and the home.[85] All these propositions are clearly based on deductions from natural law. The same can be said for his observations about men's striving after knowledge,[86] or the fact that 'imitation'[87] is natural to man, or that he who confers a benefit[88] feels more attached to the receiver than vice versa. In all of these statements we are referred to φύσις as the explanation. Our insights into what can be proved and what cannot be proved will always change. Likewise, we can never know all

80. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra*, note 3 at 117 ff.
81. Pol. 1255 a 5.
82. Pol. 1253 a 2.
83. Pol. 1252 b 13.
84. C. 14 a 26 - 14 b 22.
85. Pol. 1253 a 19.
86. M. 980 a 21.
87. Poe. 1448 b 5. "Imitation" is the usual but not the correct translation of μίμησις.
88. E.E. 1241 a 40.

the conclusions which may be deduced from propositions established by natural law as "the best." It is obvious that by accepting a certain constitution as the best, the aspects of justice and the corresponding laws inherent in such a constitution are, to a high degree, fixed by mere logic.[89] But apart from this, whatever our human shortcomings in grasping and recognizing the truth, the fact still remains that there are two kinds of justice. It is a scientific truth that a line of division may be drawn between a law that can be proved and a law that cannot be proved but which bases its validity on nothing but an act of promulgation.

There will, of course, always be doubts as to whether a proposition declared to be a natural law will stand the test. We come, e.g., across the dogma that a certain kind of war is *φύσει δίκαιον*.[90] This 'deduction' may be correct. It depends upon another proposition of natural law to the effect that there are people created to render services similar to those of animals. These people are, therefore, meant to be slaves, and if they do not realize the 'truth' of this verdict and do not accept it, then they have to be shown their actual position by way of war. One is tempted to recall a remark of Heine, that it all depends on the proof of the statement that some men are born with saddles on their back, some with spurs on their feet.

4. There remains the question: What governs the laws which may be *οὕτως ἢ ἄλλως*? Regardless of their content, once they are promulgated, they are in force. The alternative solutions which might have been promulgated are of possible historical value but otherwise insignificant. So what is the justification for the provision actually chosen and promulgated?

One possible answer is that after a specific norm has become law it is 'proved' to be "the best" according to Aristotle's meaning, i.e., the best from a moral point of view according to a scientific proof. This would mean that originally the dictum of the law was not capable of being other than as it is and, hence, the law would not be of the kind we are presently considering. Such a 'proof,' accordingly, cannot be accepted.

In the chapter on natural law in the *Nicomachean Ethics* there is a hint of an answer to our question. We are told that we make use of large weights in buying wholesale quantities and smaller weights in the retail business; this evidently is the meaning of the passage involved, written in connection with the problem of changeability.[91] This variability in the use of weights also characterizes norm-laws. Both weights and norm-laws are based on conven-

89. See DER BEGRIFF DER GERECHTIGKEIT BEI ARISTOTELES, cited *supra*, note 3 at 119 ff.
90. Pol. 1256 b 26.
91. E.N. 1135 a 1 ff.

tion.[92] This reference to convention is not new; that norm-laws are characterized by this notion was mentioned before. Now, however, the rules of changing weights are related to the idea of usefulness[93] as well. The link drawn at this point between norm-law and usefulness does not explain much, just as the reference to the common-best[94] gives no help. It may be difficult to see in this remark the germ of a theory on how laws should be enacted when they do not belong to the sphere of natural laws.

Usefulness and "the best" always remain in different worlds. Natural law may mean the right solution of a problem wrongly solved by existing norms; in this case the right and the wrong solutions of an identical problem confront each other. In this case the existence of two different solutions to the same problem indicate the existence of a wrong and a right (or less wrong) natural law solution. There is always an antithesis between solutions based on scientific proof and solutions based on some other principle, possibly the principle of usefulness.

As we have seen, Aristotle is dealing with questions of jurisprudence. We should not blame him if a critique of lawgiving is not included in his essay. The whole Book E of the *Nicomachean Ethics* is designed as a discussion of justice as a virtue, in the same way that courage, temperance, or friendliness, for example, is a virtue. It is only by way of an appendix that attention is transferred from the subjective factors of human behavior to the objective conditions of justice, as incorporated in laws valid for a human community.

5. If we can accept Aristotle's insight into the difference between laws which can be proved (because they concern that which is not capable of being other than it is) and laws which are merely in force (because their content is capable of being other than it is) as being a lasting achievement of our scientific knowledge, then we cannot avoid the question as to whether there is a like distinction in other spheres of human relationship such as friendship, love, worship, comradeship, and partnership. According to Aristotle *φιλία*[95] and justice refer to the same persons and to the same objects. So it might be worthwhile to analyze the term *φιλία* and to investigate various relationships between man and man other than those belonging to the category of justice.[96] We might be able to demonstrate that in all social intercourse the same distinction is present. Here, too, there are things that can be proved

92. *κατὰ συνθήκεν*. E.N. 1134 b 35.
93. *τὸ σύμφερον*. E.N. 1134 b 35.
94. Pol. 1279 b 9.
95. E.N. 1159 b 25.
96. See my book, DAS SITTLICHE VERHALTEN ZUM MITMENSCHEN, IM ANSCHLUSS AN ARISTOTELES (1958).

valid scientifically and things for which deviations from rules are to be expected. Aristotle himself limits his ideas about natural law to justice.

The difficulties, of course, would be exactly the same as we encountered before. The scientific proof is dependent on the methods of ethics. These methods are not easy to describe and are even less easy to apply. There will always be people lacking what Nietzsche calls intellectual honesty[97] who will "prove" the norms which, for reasons of their own, they wish to have enforced. In so doing they ignore the fact that since these norms could easily be quite different, their "proofs" are a matter of discretionary decision rather than conclusive evidence.

Finally, there is one highly important question which Aristotle does not consider, the question of convictions and moral judgments transmitted from generation to generation, varying from country to country and adapted to the special aspects of the epoch. When working on a problem of (real) natural law we may always start *ab ovo*. In order to find the 'best' answer, we may not — or should not — be influenced by the contemporary solutions given to the problem involved. On the other hand, if we are to find a just solution to a problem in the realm of things which can be other than they are, we should not set aside contemporary solutions. Here, what is called 'common law' guides the application and evolution of justice.

This hint may suffice. Our aim is neither to decide upon the merits of natural law itself nor upon its limits, but only to discover the ideas which are explicit or implicit in Aristotle's teachings on this topic.

IV

1. We turn now to the *Magna Moralia*. Here again we find, in the chapters dealing with the problem of justice, the term φύσει δίκαιον. Here the meaning of this term differs completely from that in the *Rhetoric* and the *Nicomachean Ethics*. It is neither a slogan of propaganda nor an appeal to science and scientific proof. Rather, it acquaints us with another problem, a problem presented to us unavoidably by the idea of justice, or, more exactly, by our way of practicing justice.

It might be advisable to give a translation of the key passage.[98] The sentences, as Aristotle wrote them, are often no more than mere catch phrases and must be supplemented (as shown in the brackets) in order to be fully understood.

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97. *"Intellektuelle Rechtschaffenheit."*
98. M.M. 1194 b 30 - 1195 a 8.

> [What is called] justice is partly by nature, partly by statute. We must not think that [if there is anything like justice by nature at all] no change of it is feasible. [Quite generally speaking] what is by nature is [against convictions widely in vogue] liable to changes. I mean this: if we should all begin throwing with the left hand we would become ambidextrous; but even then the left hand remains the left hand, and the right hand is nevertheless superior to the left hand. You can disregard our succeeding to accomplish everything with the left in the same way as with the right hand. [So we see that in this respect we are allowed to disregard actual changes.] What is exposed to possible changes is not for this reason [already] opposed to its being by nature. Rather, when — as in most cases and for the greatest length of time — the left hand remains the left [usually that means the weaker] hand, and the right hand remains the right [usually that means the stronger] hand, then we have something that is by nature.
>
> Matters are exactly the same with justice by nature; when there are changes in consequence of our way of handling it [that is, of our way of putting justice into practice] then such a change does not transform the original law into a law 'not by nature.' It remains, rather, what it is [namely, justice by nature]. For what prevails generally is obviously justice by nature.
>
> On the other hand, what we lay down and promulgate as statutes is [no doubt] justice; but it is this only in consequence of our doing so, and we call it justice by statute, but what we are looking for [in our present treatise] is justice in the sense of public law, and this public law is based on statutes and not on nature. [Therefore, we do not include natural law in our discussions.]

In one respect this description coincides with the main thesis of the *Nicomachean Ethics:* natural law and legal law represent two different kinds of law, separated by an unbridgeable gap. Legal law is based on promulgation. According to the *Nicomachean Ethics,* there is a chance that natural law will be accepted as legal law and will accordingly be promulgated. Here in the *Magna Moralia* a promulgated natural law is itself a contradiction. This is a first indication that natural law in the *Magna Moralia* does not deal with the same problem we encountered in the *Nicomachean Ethics* and the *Rhetoric.*

In the *Magna Moralia* natural law is recognized as justice (of a certain kind) and is characterized as being in actual use, despite its incompatibility with promulgation. It is in use not here and there and from time to time, but for a certain duration of time and as an accepted rule.

At the start of the discussion we are told that the distinction between legal law and natural law is not to be found in a difference with regard to the possibility of change. We saw in the *Nicomachean Ethics* that the question of

changeability played a large part in the debates in which Aristotle participated. Whenever justice and φύσις were brought into a positive connection, one was always told that φύσις may be a cause of movement, but cannot be moved and changed itself. It is exempt from alteration. However, what is called justice based on φύσις is, like any other kind of law, given to changes, as is evident. Therefore, the expression φύσει δίκαιον cannot embody the meaning of the term φύσις; and so it is misleading to maintain that there is something like a natural law. The battle against the importance of natural law might well have been conducted in this way.

This may be the reason why, even before any serious demonstration takes place, great pains are taken in the *Magna Moralia* to straighten out this difficulty. This is done in a straightforward way: φύσις, we are told, has not the meaning of being unmoveable, at least not here in the discussion of justice and law. "What prevails generally, that is, what is based on nature" (generally, and so by nature)[99] is "what is valid in most cases and for the greatest length of time."[100] Such a change in the meaning of 'being by nature' gives us a completely different outlook and brings us face to face with new problems. These new problems are rendered even more difficult by the quite surprising remark at the end of the text, as quoted above, that natural law cannot and will not be dealt with in the *Magna Moralia*.[101] It is decisively excluded as a potential topic. Accordingly, it is not mentioned anywhere else in the *Magna Moralia*. We must be satisfied with the few remarks we have seen. But we cannot leave it at this time since the problem of natural law has been raised under such different circumstances, and also because of the declaration that natural law is 'superior' to legal law.[102]

2. Why this exclusion of natural law from the discussion in the *Magna Moralia?* Not for any reason connected with its being 'natural.' Rather, the reason is that it is not deemed to be justice at all in the meaning this term has in the *Magna Moralia*. We saw this before while discussing the *Nicomachean Ethics*. Unless a norm belongs to the sphere of justice, it cannot be a natural law. The problem of natural law lies outside the kind of specific law that is discussed in the *Magna Moralia;* and as the inquiry, we are told, is not to be extended to any outside norm, it has no place in the *Magna Moralia*.

At this point there is a decisive discrepancy between the *Magna Moralia* and the *Nicomachean Ethics*. Both books agree in that they contrast natural law and legal law. But in the *Nicomachean Ethics* natural law and legal law

99. τὸ γὰρ ὡς ἐπὶ τὸ πολὺ διαμένον τοῦτο φύσει δίκαιον προφανές. M.M. 1195 a 3.
100. ἐπὶ τὸ πολὺ καὶ τὸν πλείω χρόνον. M.M. 1194 b 35.
101. M.M. 1195 a 7.
102. βέλτιον. M.M. 1195 a 6.

are parts of public justice (*τοῦ πολιτικοῦ δικαίου*),[103] while in the *Magna Moralia* natural law and legal law are parts of justice (*τῶν δικαίων*).[104] This places natural law in one case within, in the other case without, public justice. Whether or not natural law is a part of public justice is not a superficial question. It is not merely a question of good or bad arrangement. In order to understand this we have to begin further back.

As in the *Nicomachean Ethics,*[105] the chapter on justice in the *Magna Moralia*[106] begins with the statement that there are two kinds of justice. It would be better to say that the word 'justice' has two meanings.

On the one hand the term characterizes a certain kind of behavior described as the acme of virtue.[107] The *Nicomachean Ethics*[108] goes one step further in this respect by adding the view that although it is the totality of virtue, it is such a totality only insofar as "directed towards fellowmen." It is therefore something more, or even other than, the sum of all the individual virtues. However, the *Magna Moralia* speaks only about a relationship *καθ' ἑαυτόν,*[109] as it is specific for virtue as a whole. In this way justice is confined to an amalgam of facts previously discovered in the analysis of the various virtues. This difference, however, does not matter here. The main point is that justice in this first sense is a definite attitude in our life, and this attitude is measured by conformity with, or deviation from, the *νόμος.*[110] To act in conformity with the law is to act justly;[111] to act contrary to it is to act unjustly. Considering the far-reaching meaning of *νόμος,* already mentioned above, it should not be overlooked that there is no direct connection between this kind of justice and either the ethical good called justice or legal law, judges, lawcourts and the like. Thus, in discussing natural law, consideration of a special kind of human character is of no assistance. Natural law cannot be explained as originating in human *ἕξεις.*

Another meaning of justice, recognized[112] in both works as directed *πρὸς ἕτερον,* is equality.[113] In the *Magna Moralia,* for example, it is said that justice is equality and equality is justice.[114] It may be equality of quan-

103. E.N. 1134 b 18.
104. M.M. 1194 b 30.
105. E.N. 1129 a 26.
106. M.M. 1193 b 2.
107. M.M. 1193 b 6.
108. E.N. 1129 b 26.
109. M.M. 1193 b 13.
110. M.M. 1193 b 2.
111. G. C. Armstrong, in his translation of M.M., misses the decisive point by calling *νόμος* a legal law: *νόμος,* it will be noticed, remains outside the sphere of both natural law and legal law.
112. M.M. 1193 b 19.
113. M.M. 1193 b 20.
114. M.M. 1193 b 33.

tity or of quality,[115] but it is in any case something that can be measured in a strictly mathematical sense. In this respect justice means something quite different from justice as the mark of a particular person, state of mind, or virtue. Justice in this respect is a principle, a rule, or a moral value.

It should not seem strange that, as explained in the *Magna Moralia,* and in more detail in the *Nicomachean Ethics,* the term 'justice' has a double meaning, especially if we consider that in everyday English usage it has the same double meaning. English 'justice' may mean a virtue as well as "the just" and lawful. In this respect the German language is substantially the same, since the term *'Gerechtigkeit'.* can be applied both to a characteristic of any individual who is *gerecht* and to anything denoted by the noun *'Recht.'* The *Nicomachean Ethics*[116] contains the important assertion that all that is lawful (justice in the first sense) is just (justice in the second sense), while not all that is just is lawful. Such an assertion is missing in the *Magna Moralia,* yet it would not have been incompatible with the teaching of the *Magna Moralia.* It is a very helpful sentence and proves that the dividing line between the two kinds of justice is correctly drawn. To act in accordance with what the norm prescribes indicates that one has a just character; a just character, however, concerns many things other than mere conformity with specific laws. As mentioned before, the norm that directs the behavior of a man deserving the name 'just' extends beyond the limits of any law (be it by statute or by nature).

Hence we conclude that the two meanings are actually identical.[117] It is only by trying to find the meaning of 'justice' that we can hope to cope with the problem of natural law. The *νόμος,* which is the basis of the virtue of *δικαιοσύνη,* does not lead us to natural law. The *Nicomachean Ethics* contains a profound study of this virtue. The question of how it is a mean (*μεσότης*) is mentioned (but not solved).[118] For the most part the *Magna Moralia* neglects to discuss this meaning of justice and concentrates on justice as equality (*ἰσότης*). In like manner it fails to treat of the *φύσει δίκαιον,* simply because the latter is not a part of the justice understood as equality. The *Magna Moralia* concerns itself with justice only insofar as it signifies equality. When this point of view is taken, then our subject can only be justice as expressed by public law since equality is the main feature of public law.[119] In the *Magna Moralia* it is taken for granted from the beginning that justice

115. *ἀναλογία.* M.M. 1193 a 6, 1193 b 37.
116. E.N. 1130 b 11.
117. C. 1 a 1.
118. E.N. 1108 b 9, 1129 a 4.
119. M.M. 1194 b 9.

is only public justice (*τὸ πολιτικὸν δίκαιον*).[120] Justice is what in the *πολιτική κοινονία*[121] keeps the community together,[122] provided the community is understood as a community of equals.

3. We encounter not only the term *ἰσότης* in these sentences, but also another expression for equality, *ὁμοιότης*, which may best be translated as 'parity.' "Citizens are joined together by some kind of community; they must have parity in relation to one another, although they are *de facto* different."[123] This sentence, striking in itself, is further complicated by the fact that here we encounter the *φύσις* again. The complete sentence can be read as an imperative: Citizens, strive after parity! What does *φύσις* mean in this connection?

There is another reference to *φύσις* in the *Magna Moralia*. Perhaps we can find a guide there. The passage in question[124] deals with the ethical problem of temperance and intemperance. The man who is unrestrained is characterized as bad by nature.[125] Evidently the meaning here is that the man is born bad and his bad character cannot be overcome, whereas acquired habits may undergo a change for the better. Here the natural (*φύσις*) is contrasted with the habitual (*τρόπος*) by associating unchangeability with the former. However, this meaning of *φύσις* cannot explain why parity should be related to it. Parity is clearly not something static like the restraint of the temperate man. Rather, it is the goal of our endeavor. People do not have parity. They want it; they all seek it. So we find no help here.

And so we can assume that in this connection the word *φύσις* means the same as in the passage about natural law, appearing after the argument that no other justice than *δίκαιον πολιτικὸν* manifests equality in its pure sense.[126] Equality in its meaning of "parity based on nature" is a reality even though people recognize their actual inequality. It signifies an equality that is as a matter of fact practiced. It is not created, but is acknowledged by the lawgiver (or refused by him). One is tempted to treat nature's impulse to develop equality into parity as a moral claim. However, Aristotle does not treat nature in this manner, and for him parity, though not fully realized, is a basic fact of life.

4. Accordingly, we come back to the question: Why is natural law elimi-

120. M.M. 1194 b 8.
121. M.M. 1194 b 28.
122. M.M. 1194 a 18.
123. *κοινονοὶ οἱ πολῖταί τινες, καὶ 'ὁμοιοι βούλονται εἶναι τῇ φύσει, τῷ δὲ τρόπῳ 'έτεροι.* M.M. 1194 b 9 ff.
124. M.M. 1203 b 24 ff.
125. M.M. 1203 b 23.
126. M.M. 1194 b 29.

nated from further discussion in the chapter on justice in the *Magna Moralia?*

We see that people speak about justice in the context of relationships between father and son, master and slave, husband and wife.[127] Later on the *Magna Moralia* includes,[128] among others, the relationship between citizen and non-citizen. These relationships, we are told, do not truly involve justice. When the term 'justice' is used in speaking of these relationships its meaning is not the same as it is in other connections.[129] When discussing justice in a scientific manner, the discussing should be confined to public law. The reasons given for the lack of equity in the various cases are, no doubt, interesting from a sociological or historical point of view, but we cannot deal with them here. Thus the term 'equality' is not univocal. Father and son, master and slave, husband and wife are not equals. We have here what the *Magna Moralia* leaves without a special name and is called in the *Nicomachean Ethics* δίκαιον καθ' ὁμοιότητα,[130] i.e., a kind of quasi-justice which is extensively dealt with in the *Politics*.[131] Even in the *Magna Moralia* the use of the expression δίκαιόν τι[132] shows that, even though the word 'justice' might not be proper, the relationship in question cannot be described or interpreted adequately without employing the idea of justice. This is confirmed by the fact that in varying degrees these relationships approach that which should be called justice. The relationship between husband and wife is nearer to it than the other ones.[133]

We now see that these matters in the area of quasi-justice, which are beyond the area of justice itself, are dealt with by that 'kind' of justice called natural justice. Natural law has a quite specific reality. It is not recognized as justice, but it occupies, in an effective way, an area that would otherwise be void of rules and norms.

Natural law covers the relationship of people who are, by the lack of parity and therefore of equality, excluded from the blessings and the protection of justice. There is no hint that such a replacement is natural in the sense in which the innate qualities or privileges of human beings are natural. Natural law, as described in the *Magna Moralia,* does not result from any moral claims. It denotes actual customs that govern certain relationships between people in a way very similar to that in which justice reigns. These customs must have been in active use as a general rule for a certain amount of time.

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127. M.M. 1194 b 5 ff.
128. M.M. 1211 a 8.
129. M.M. 1194 b 6.
130. E.N. 1134 a 30.
131. Cf. Chapter III and note 96, *supra.*
132. M.M. 1194 b 5.
133. M.M. 1194 b 25.

It is essential to realize that natural law (according to the *Magna Moralia*) is not common law (in the meaning this term has in England). It is not a right founded upon custom, and it is no *Gewohnheitsrecht*. Whenever such a common law is recognized as being on equal footing with promulgated law, it derives its validity, as does natural law, from actual practice over a given period of time when everybody concerned believes and trusts it to be legal law (e.g., right of way). Its validity is not based on moral or natural hypotheses. Such a common law does not increase the circle of civic peers, nor does it create a new kind of justice. The distinction in the *Magna Moralia* between natural law and legal law parallels the distinction in Roman law[134] between *ius civile* and *ius gentium*. Although the two pairs of terms are not identical in meaning, yet the comparison clarifies the distinction in the *Magna Moralia*. However, the πολιτικὸν δίκαιον excludes non-citizens in the same way as *ius civile* does. This means that there are certain groups in the population who are in commercial contact and who, therefore, seek protection as a 'natural' consequence of this living together. In both cases it is some kind of lack of legal provisions concerning non-citizens that has given rise to the tendency to create an analogue to the law that excludes non-citizens. The analogue is based upon the actual conduct of the members of the community over a given period of time.

Certain groups of people are not considered as fully participating in the existing legal order. If this is true, then the same is true of certain problems and certain questions that are not yet ready for final legislation. The reason all members of the community are not treated as equals is that, for the time being, no way can be found to extend equality to them in certain isolated areas such as housing, job opportunities, or social activities. Here, too, we see life being regulated by certain rules of behavior, valid for the greater number of cases involved during an extended period of time. These rules are accepted without any effort being made to find out the legal aspects of the situation. Finally, however, the concept of justice is brought to bear on these problems, and previous methods of treating them are, after examination, accepted or rejected.

These considerations lead us to regard the question of equality as the fundamental problem of justice. The way this problem is solved in the totality of the applicable norms reveals the stand we take towards the actual inequality of men. It should be the aim of our rational thinking to extend equality to all men in order to bring about what is 'just.' It is the tragedy[135] of justice to destroy to a certain extent the individuality of its subjects when its only

134. See, for instance, SOHM-MITTEIS-WENGER, INSTITUTIONEN 64 ff; VOGT, 1 DIE LEHRE VOM IUS NATURALE, AEQUUM ET BONUM UND IUS GENTIUM DER RÖMER 198.
135. See my DAS RECHT ALS IDEE UND ALS SATZUNG 31 (1929).

purpose is to serve these subjects. Natural law is the eternal doubt hovering over any solution that is given effect at a given time; but not more than a doubt.

On the other hand, we might ask if the fact that there are certain rules in actual use which are distinct from specific laws proves that these rules ought to be accepted as laws. Is the very existence of natural law (in the meaning of the *Magna Moralia*) enough to vindicate its transition into legal law? Certainly not. But we may ask if this potentiality of the natural law is the reason why it is called better (*βέλτιον*)[136] when compared with the statute law.

One is not persuaded by this argument. It would be hard to understand why in a treatise on ethics the 'better' law should be excluded from any discussion. It is more to the point, however, to consider that a few lines earlier[137] we find the same word ('better'), and it is not used here to make a moral judgment. The right hand, despite the possibility of the equal usefulness of the left hand, remains *βέλτιον*, and this "by nature" (*φύσει*). The meaning can only be that the right hand is, as a rule, and not only for a limited time of our experience, more apt, more serviceable, more fit to do what we are aiming at when using our hands. Suppose, as is highly probable, *βέλτιον* has the same meaning in both places. Then the meaning would be that natural law serves better the task of justice as a whole; it is capable of answering questions that are unavoidable in our social life, but are beyond the capacity of justice if we adhere only to our public laws. In a primitive society, natural law would cover our needs; in an advanced state of civilization legal law is inadequate as soon as it makes limiting suppositions.

The term 'equity' appears in the *Magna Moralia*.[138] This idea of equity, however, is not related to the problem of natural law as it is there understood. In similar lines in the *Nicomachean Ethics*[139] we learn how and under what conditions a man should be satisfied with less than what is due to him from a legal point of view.

V

We may sum up as follows. The *Rhetoric* gives a vivid picture of the popular opinions about natural law and its undeniable charm. We learn what might be said in favor of as well as against natural law. No judgment is passed on natural law, and its moral value is not compared with that of the

136. M.M. 1195 a 6.
137. M.M. 1194 b 36.
138. M.M. 1198 b 24 ff.
139. E.N. 1138 a 1.

law we encounter in daily life. Both the *Magna Moralia* and the *Nicomachean Ethics* go deeper than this. They reveal a very serious problem hidden behind a slogan. It might have been a temptation to build a theory starting from one of the meanings[140] of the term φύσις; but both works face the facts presented by the experiences of our daily life and try to analyze them. They differ fundamentally in the way they do this.

The *Magna Moralia* recognizes natural law as a permanent assault on a law which is in danger of becoming satisfied with the *status quo*. However, the *Magna Moralia* does not attempt to establish a dogma capable of leading to a concise doctrine of justice. Rather, it seeks to stimulate the confirmation of answers that might be given to vital questions.

The *Nicomachean Ethics* cuts through the uncertainty innate in the term. It surpasses the *Magna Moralia* in relating the isolated problem to the roots of philosophical thought. We are asked to rely on nothing but scientific proof when accepting a proposition as based on natural law. Otherwise we are to take the problem out of the purview of natural law. It is no small accomplishment to grasp the importance of the fact that we argue a great deal about things that may be οὕτως ἢ ἄλλως. We often do not realize that the 'right' answer to some questions cannot be proved in the way a thesis of science or morals can be proved.

When we see the problems in this perspective, we become aware that the "a priori" of justice is "prior" to the problem of natural law. The "a priori" of justice deals with the conditions that must be met by rules — whether or not they appear as laws or whether they appear as natural or legal laws — if they are to be called rules of justice. The problem of natural law is extremely complex. Aristotle's teachings provide us with significant answers; they leave us also with a better understanding of the magnitude of the problem.

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140. M. 1014 b 17 ff.