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ARISTOTLE'S CONCEPTION OF "EQUITY" (EPIEIKEIA).

In a previous article, "Aristotle's Conception of Justice,"¹ my friend David Osborn and I attempted a presentation of that well known Aristotelean concept which, in the annals of Jurisprudence, has become, without doubt, not only one of the most discussed problems, but also one of the most fertile notions.

Justice in its "legalistic meaning,"² also called "Justice in the narrower sense,"³ signifies, according to Aristotle, *Equality*;⁴ that is, a "fair mean"⁵ or "ideal mean"⁶ between excess and defect.⁷ It constitutes a definite national criterion⁸ for the administration of human conduct, a concept, in other words, which is primarily concerned with the proportionate ratio of "commensurable goods"⁹ and by means of which the "law in action" can more specifically be "evaluated." As such it deals with the examination of human actions as regards their effects upon others in the light of the criterion of whether they coincide with, or whether they exceed or fall short of that "fair mean"¹⁰ expressed by the principle of Equality.¹¹ The principle of Equality itself denotes a "social principle,"¹² since it refers to man's relations to

¹ In: "Notre Dame Lawyer," vol. XVII, No. 2 p. 129 f.

² See, for instance, 1108 a 6 f. (quoted from "Aristotelis Opera Omnia," edit. Academia Regia Borusica, Berlin, 1831, vol. II, page 1108, left hand column (a), line 6); 1130 a 15; 1130 b 5 f.; 8 f.

³ 1130 a 23; 1130 b 2; 30.

⁴ 1129 a 34; 1130 b 9; 16; 24; 33; 1131 a 10 f.; 12; 13; 14; 15; 16.

⁵ 1129 a 3; 1130 b 2; 1133 a 9 f.; 20 f.; Compare also 1129 a 33; 1129 b 10; 1130 a 26; 1133 b 31; 1134 a 4 f.; 7 f.

⁶ 1108 a 6; 1130 a 9; 22; 1130 b 14; 1131 a 14; 1132 a 22 f.; 29; 1132 b 4.

⁷ 1108 a 7 f.; 1129 b 6 f.; 1131 b 11; 12; 32 f.; 1133 a 9 f.

⁸ Compare, for instance, 1131 a 31 f.; 29; 19; 1131 b 4; 1132 a 17 f.

⁹ 1130 b 2; 1133 a 9 f.; 20 f.; also 1119 b 26; 1129 a 3.

¹⁰ See, for instance, 1130 a 9; 1130 b 14; 1131 b 14; 1132 a 2 f.

¹¹ 1131 a 17.

¹² 1130 a 3; 1129 b 26; 30 f.

others¹³ and, by embodying the "good of others,"¹⁴ does what is to the advantage of another.¹⁵ Thus Justice in the sense of Equality, being of social nature displayed in the form of "equitable fairness,"¹⁶ is but a principle of the "common good,"¹⁷ of the politically organized society¹⁸ and its general welfare. At the same time "Equality" or "Justice in the narrower sense" must be considered but one form in which the moral *virtue* of Justice,¹⁹ the "Justice in the wider sense" is manifested;²⁰ one of the forms in which this virtue may be displayed.

The principle of Equality has two main aspects, the first of which is exhibited in the act of "distributing"²¹ certain matters between two or more persons, or "adjusting" these matters to their proper ratios.²² This is called "*distributive Justice*,"²³ the principle of which demands that only equals be treated equally²⁴ and which always is "proportionate Equality," that is to say, a form of Justice which allots burdens according to the individual's ability to shoulder them and accords support in amounts which vary with the needs of each individual.²⁵ The other aspect of the principle of Equality is the so-called "*commutative Justice*" which in contradistinction to "distributive Justice" ignores the differences in rank and worthiness²⁶ of the persons involved,²⁷ being merely concerned with the proportionate ratio between two "commensurable goods" such as labor and wage, damage and re-

¹³ 1129 b 27; 32; 33; 35; 1130 a 2; 4; 7; 8; 13; 1130 b 1; 1130 a 2.

¹⁴ 1130 a 17.

¹⁵ 1130 a 3 f.

¹⁶ 1131 b 11; 1132 b 32 f.; 1133 a 9 f.

¹⁷ 1130 b 30.

¹⁸ 1129 b 26.

¹⁹ 1129 a 6 f.; Compare also 1130 a 18; 19; 30; 31.

²⁰ 1129 b 17 f.; 1130 a 2 f.

²¹ See, in general, 1131 a 9 f.; 1131 b 9; 15.

²² 1130 b 31; 1131 a 9 f.

²³ 1130 b 30.

²⁴ 1131 a 22; Compare "Politika," 1280 a 11 f.

²⁵ See, for instance, 1134 a 24.

²⁶ 1131 a 24 f.

²⁷ 1132 a 2 f.; 5.

covery.²⁸ The fundamental difference between "distributive Justice" and "commutative Justice" is to be discovered in the distinction between Equality with regard to the persons involved²⁹ and Equality without regard to the person and his rank;³⁰ between the notion that everyone should have his due according to his rank and worth and the notion that the same treatment applies to all persons irrespective of their rank or worth. This obvious dualism in the administration of Justice merely indicates two separate processes in the realization of the principle of Equality. The choice of the kind of Justice to be applied in each case, in other words, the question whether "distributive Justice" or "commutative Justice" should govern a case, will be determined, in the last analysis, by the nature of the facts and circumstances underlying this case.

No examination of the Aristotelean conception of Justice, however, could be called exhaustive without a thorough treatment of Aristotle's conception of "*Equity*" (EPIEIKEIA).

In order to comprehend the particular position held by the concept of "Equity" within Aristotle's system we first have to discuss its relation to Justice in general.³¹ We are instructed that "Equity," being itself a form of Justice or the "Just," is in some respects superior to "strict Justice," that is, to Justice in accordance with an established rule of strict law, to strict Common Law Justice;³² it is "superior to one sort of Justice (namely to strict Common Law Justice), but remains itself just, but is not superior to Justice as being generically from it." Thus "Justice and 'Equality' are one and the same thing, and both are good, though 'Equity' (in some respects) is the better."³³ They are, in

²⁸ Compare 1133 a 14 f.

²⁹ 1131 a 15 f.

³⁰ 1132 a 25.

³¹ 1137 a 32.

³² 1137 b 10 f.; 24.

³³ 1137 b 11 f.

other words, neither absolutely identical nor generically different,³⁴ that is, different in genus. For should these two concepts generically be different the "Equitable" could not be called "good" or "just."³⁵

The particular problem of the Aristotelean "Equity" consists in the realization that the "Equitable," which is but a different "*sort*" of Justice,³⁶ distinguishes itself from the strict Common Law Justice to the extent that, generally speaking, the latter always refers in a more defined way to whatever is just in a definite situation according to a definite rule of law, while "Equity" or the "Equitable" might be called a "universally just attitude"³⁷ *indefinite* in nature. Hence "Equity" or the "Equitable" is not superior to Justice in general, but merely and in some respects to what is styled as "just in a definite situation," to the Justice of the Common Law fixed by certain absolute rules.³⁸

We remember that "the several rules of . . . the strict (common) law are related to the actions conforming with them as universals to particulars."³⁹ The Common Law rule, the strict Justice, in consequence, always contains "a general statement"⁴⁰ which "lays down a general (universally valid) rule,"⁴¹ and which, for that very reason, cannot cover every concrete case,⁴² but must in certain instances be considered defective on account of its generality.⁴³ "In matters therefore where, while it is necessary to speak in general terms, it is not possible to do so correctly, the strict Common Law takes into consideration merely the majority of cases, although it is not unaware of the error this involves."⁴⁴

³⁴ 1137 a 33 f.

³⁵ Compare 1137 b 4; 10 f.

³⁶ Compare 1137 b 8.

³⁷ Compare 1137 b 29 f.

³⁸ 1137 b 24.

³⁹ 1135 a 5 f.

⁴⁰ 1137 b 12 f.; 20; 27.

⁴¹ 1137 b 20 f.

⁴² 1137 b 14.

⁴³ 1137 b 26; 21 f.

⁴⁴ 1137 b 14 f.; Compare also 1137 b 27 f.

Human actions with which the Common Law concerns itself are, on the other hand, manifold and diversified,⁴⁵ that is, "the materials of human conduct are essentially irregular"⁴⁶ and undetermined. The Common Law Justice proceeds by means of general and abstract pronouncements⁴⁷ which may, on account of this generality, prove defective in certain instances.⁴⁸ In the sphere of human actions situations arise which, nevertheless, must be taken up by the administration of Justice and which, for general Justice's sake, have to be considered as exceptions to these general pronouncements or rules laid down by the Common Law.⁴⁹ Instances may occur where it is necessary to decide on general terms, but nevertheless impossible to apply an otherwise universally valid rule of law;⁵⁰ where it becomes impossible to subsume the particular under the universal.

Now Aristotle simply and without further explanation assumes that certain cases or matters may not be dealt with adequately by a general rule of the Common Law, but needs be considered an *exception* to any such general rule. This exception to the general rule of the strict Common Law constitutes the Aristotelean "Equity" which is but a "rectification of the strict Common Law, particularly wherever the latter proves itself defective because of its generality."⁵¹ "When therefore the strict Common Law lays down a general rule, and thereafter a case arises which is an exception to this general rule, it is then right and just, where the lawgiver's pronouncement because of its abstract absoluteness proves itself defective and erroneous, to rectify this defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have legislated if he had

⁴⁵ 1135 a 7 f.

⁴⁶ 1137 b 19.

⁴⁷ 1135 a 7 f.; 1137 b 12 f.; 20; 27.

⁴⁸ 1137 b 26 f.; 21 f.

⁴⁹ 1137 b 20 f.

⁵⁰ 1137 b 14 f.

⁵¹ 1137 b 26 f.; 12.

been cognizant of the case in question.”⁵² And because of this inability of the strict Common Law rule, of the “general pronouncement” to cope with the “indefiniteness”⁵³ of some cases, because of the impossibility in every instance and for every case to lay down a general rule of law, a special “*ordinance*” or order becomes necessary⁵⁴ which is made to fit the circumstances.⁵⁵ “Equity” is, therefore, itself “just” or Justice, and as such “superior to one sort of Justice; it is, however, not superior to Justice in general, to absolute Justice, but only to the possible errors which might occur due to the absolute pronouncements of the Common Law Justice;”⁵⁶ it is, in the last analysis, an “indefinite standard” made to fit the circumstances of a particular case in itself indefinite.⁵⁷ Now we also understand the meaning of Aristotle’s statement that “Equity” “is not legal Justice but a rectification of legal (that is, Common Law) Justice.”⁵⁸

Even as an exception to the general rule of the strict Common Law “Equity” as well as any special “ordinance” or order issued in the interest of bringing about an “equitable” and just decision in a particular situation has to *conform* to the general notions of Law and Justice. For “Equity” must always remain subservient to the Idea of Justice. Only in some extreme instances the strict Common Law rule may be supplanted by those special “ordinances” or orders.⁵⁹ No further elaboration on the particular nature of these “ordinances” or on the guiding principles underlying them, however, is to be found in Aristotle. We are merely informed that these special “ordinances” essentially distinguish themselves from the rules of the strict Common Law by the ab-

⁵² 1137 b 19-24.

⁵³ Compare 1137 b 29.

⁵⁴ 1137 b 27 f.

⁵⁵ 1137 b 32.

⁵⁶ 1137 b 24 f.

⁵⁷ 1137 b 29 f.

⁵⁸ 1137 b 12 f.

⁵⁹ 1137 b 29.

sence of universal applicability⁶⁰ as well as through their being inferior, in general, to the rule of the strict Common Law.⁶¹ For any such special "ordinance," which constitutes but the last resort wherever another satisfactory legalistic solution seems impossible, is solely an exception to the general rule of strict Common Law.⁶² The practical inferiority of the special "ordinance" over against the general rule of strict Common Law furthermore consists, according to Aristotle's observations, in the well known fact that any too frequently made substitution of the strict Common Law by such special "ordinances" or orders may, in its ultimate effects, undermine not only Law and Justice itself, but also the very existence and well being of the politically organized society.⁶³

So far we have been able to ascertain that the Aristotelean "Equity" is; (a) neither absolutely identical with, nor generically different from strict Common Law Justice;⁶⁴ (b) in some instances superior to one form of Justice [namely in some respects wherever the Common Law Justice must be considered unable to deal in a satisfactory manner with a definite case by a general pronouncement],⁶⁵ but not superior to absolute Justice in general,⁶⁶ being itself a sort of Justice,⁶⁷ that is, a form in which the Idea of Justice is manifested; (c) concerned with what is just as regards the manifoldness and irregularity of the different human actions wherever the general rule of strict Common Law proves itself defective or erroneous because of its absoluteness;⁶⁸ (d) a rectification of the "shortcomings" of the strict Com-

⁶⁰ "Politika," 1292 a 38.

⁶¹ 1137 b 24 f.; 8 f.

⁶² 1137 b 20 f.

⁶³ "Politika," 1292 a 32; According to Aristotle the repeated issuance of special "ordinances" or orders is characteristic to all political demagogues ("Politika," 1292 a 23).

⁶⁴ 1137 a 33.

⁶⁵ 1137 b 33 f.; 8 f.; 24.

⁶⁶ 1137 b 9; 25.

⁶⁷ 1137 b 8; 24; 33.

⁶⁸ 1137 b 21.

mon Law Justice⁶⁹ wherever the latter appears "defective" on account of its generality;⁷⁰ (e) an indefinite standard to fit the circumstances of a particular, indefinite case;⁷¹ (f) usually a special "ordinance" or order made to fit the circumstances of a special case.⁷²

"Equity" is, therefore, of the same genus ('generically not different') as the strict Common Law Justice.⁷³ It can never counteract or antagonize the principles of the latter, for it is not intended to discredit Justice according to a strict Common Law rule, but merely tries to complement or "improve" on the Common Law Justice wherever the latter, due to circumstances inherent to the particular nature of the case, seems to be insufficient to achieve its aims by its own means.⁷⁴ It endeavors to bring out more fully the true meaning of what is called "just," being itself a most efficient instrument of the administration of Justice,⁷⁵ the very instrument, that is to say, which assures a more perfectly functioning legal order. It is quite erroneous, however, to consider Aristotle's notion of "Equity" and "Equitable Justice" a mere rectification of the strict Common Law and its unavoidable shortcomings by certain indefinite standards⁷⁶ of the so-called "*Natural Law Justice*" valid above and beyond any established (positive) legal norm. "Equity," according to Aristotle, is in no way intended to break down the authority of the Common Law rule or Common Law Justice.⁷⁷ This may be gathered from the fact that "Equity" nowhere abolishes or even diminishes the basic importance of the principle of "*Equality*" which, as has been shown previously, constitutes the essence of the Aristotelean "Justice

⁶⁹ 1137 b 22; 26 f.

⁷⁰ 1137 b 26 f.

⁷¹ 1137 b 29 f.

⁷² 1137 b 32.

⁷³ 1137 a 33 f.

⁷⁴ Compare 1137 b 27 f.: "Things are not all determined by Common Law."

⁷⁵ 1137 b 26 f.

⁷⁶ 1137 b 28 f.

⁷⁷ Compare 1137 b 24 f.

in the narrower sense." ⁷⁸ For since "Equity" is but a form of Justice which elaborates on the Idea of the "Right and Just," ⁷⁹ the principle of "Equality" must be equally valid for the concept of "Equity."

Aristotle also uses the term "Equity" or "Equitable" in another connotation, namely where he speaks of the "*equitable and fair man*," ⁸⁰ that is, of the "one who by choice and habit does what is equitable and fair, and who does not stand on his rights unduly, but is content to receive a smaller share although he has the law on his side." ⁸¹ Undoubtedly this new "type" of the "Equitable" is, in spite of Aristotle's use of the same term, fundamentally different from what so far has been ascertained as the meaning of "Equity." For this new concept is obviously devoid of all those characteristics common to our previously gained notions of the "Equitable," being primarily concerned with whether one stands upon his rights, or whether one by his own choice renounces these rights out of a purely altruistic motive. The refusal to renounce one's rights in itself does not constitute an act of injustice, for the exercise of one's rights is always justified. But whatever is right and just according to an established rule of law may become an even superior and more ideal form of Law and Justice through the discriminating practice of this voluntary renunciation. Any such renunciation, while remaining in fullest harmony with the Idea of the "Just," ⁸² is already the very point where Justice in its traditional meaning reaches beyond itself.

There can be little doubt that at this point Justice approaches another problem which Aristotle mentions in closest connection with his ideas on true Justice, namely that of "unselfish and plain devotion to the well being of another." ⁸³

⁷⁸ 1129 a 34; 1130 b 9; 16; 24; 33; 1131 a 10 f.; 12; 13; 14; 15; 16.

⁷⁹ 1137 b 13 f.; 26 f.

⁸⁰ 1137 b 34; Also 1135 a 35; 1137 a 34 f.

⁸¹ 1137 b 35 — 1138 a 2.

⁸² 1138 a 3.

⁸³ See, in general, 1155 a. f.; The Greek term "PHILIA" commonly is translated as "friendship." However, "friendship" is much too narrow a concept as

The highest perfection of Justice is to be found in the practice of *unselfish devotion*. For "if men are friends, that is, altogether dedicated to the ideal of unselfish mutual devotion, then there is no need of legal Justice among them."⁸⁴ Should no one out of his own free will press his rights to the limit, in other words, should everyone practice the ideal of "unselfish service," then Law and Justice would become a most perfectly working social institution, a truly effective social-ethical philosophy of life. For whoever refuses to stand on his rights unduly, whoever renounces certain rights which might work to the disadvantage of another, does not merely regard his fellow man as his equal in a legal sense, but enters with him into an *ideal social union*, into "a friendship between man and man universally."⁸⁵ Thus humanitarian ideals not only promote, in the last analysis, the perfection of the administration of Justice, but may also, in certain instances, even supersede Law and Justice.⁸⁶ Now we are able to appreciate why Aristotle uses the term "equitable" as the equivalent of "morally good," and the term "equitable man" as the equivalent of "morally good man."⁸⁷

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to cope satisfactorily with the ultimate meaning of the Aristotelean "PHILIA," for, according to Aristotle, a definite "PHILIA" and a definite "social attitude" or "union" always belong together. "PHILIA" may refer to patriotism (1160 a 11), marital love (1162 a 16), hospitality (1156 a 31), comradeship (1159 b 28), or friendship (1159 b 32). It denotes a sympathetic attitude towards another who is treated as the true "alter ego." Thus the best translation of "PHILIA" would be "the sense of social responsibility and sociability," "the unselfish and plain devotion to the well being of another," "the fullest realization of human relations and human or humanitarian values in the spirit of unselfish service." In the latter sense "PHILIA" constitutes what may be called an ethico-social "style" of living.

⁸⁴ 1155 a 28.

⁸⁵ 1155 a 22.

⁸⁶ 1155 a 28.

⁸⁷ 1137 b 1; 1137 a 34 f.