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## ARISTOTLE AND NATURAL LAW

Tony Burns\*

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**Abstract:** The paper presents an interpretation of Aristotle's views on natural justice in the *Nicomachean Ethics*. It focuses, in particular, on Aristotle's understanding of the relationship which exists between natural justice and political justice, or between natural law and positive law. It is suggested that Aristotle's views on this subject are often misunderstood. It is also suggested that, contrary to what some commentators might think, Aristotle's comments on natural justice are actually central for our understanding of his political thought as a whole. It is argued that Aristotle is, therefore, definitely a natural law theorist of some description. However, Aristotle's natural law theory is unconventional in certain respects. In particular, Aristotle does not consider natural law to be a critical standard by means of which positive law might be evaluated. This places Aristotle outside the mainstream of natural law theory as it has been traditionally understood. Aristotle is not, in this sense at least, the forerunner of the Stoic natural law tradition and of the individualistic, liberal natural law theory of the modern era. He is, rather, the founding father of what might best be described as the conservative natural law tradition, the most well known adherents of which in modern times are Montesquieu, Burke and Hegel.

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Aristotle's remarks concerning natural justice or law (*φυσικὸν δίκαιον*, *physikon dikaion*) are of the greatest significance.<sup>1</sup> They are fundamental for our understanding of the history of political thought in general, and for the history of natural law theory in particular. They are also of the greatest importance for our understanding of Aristotle's system of political thought as a whole, and especially for the assessment of the role which the notion of natural law has to play within it. It is for these reasons that, as M.B. Crowe has pointed out, they have 'always attracted commentators'.<sup>2</sup> To elucidate their meaning, however, is by no means an easy task. This is so for three reasons. In the first place, they are highly compressed. As Strauss has emphasized, they take up 'barely

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<sup>1</sup> The Greek term employed by Aristotle should strictly speaking be translated into English as 'natural justice'. Leo Strauss prefers the expression 'natural right'. Cf. L. Strauss, 'Natural Law', *International Encyclopedia of Social Sciences*, 11 (New York, 1968), p. 81. As M. Salomon Shellens has pointed out, however, many commentators employ the phrase 'natural law' in this context. Cf. M. Salomon Shellens, 'Aristotle on Natural Law', *Natural Law Forum*, 72 (1959), p. 74. We shall use the terms 'natural justice' and 'natural law' interchangeably.

<sup>2</sup> M.B. Crowe, *The Changing Profile of Natural Law* (The Hague, 1977), p. 22.

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one page' of the *Nicomachean Ethics*.<sup>3</sup> In the second place, they are decidedly ambiguous. Crowe is quite right to point out that they 'leave more than one tantalising question unanswered'.<sup>4</sup> He is also right to suggest that 'where there is ambiguity commentators sometimes find what they wish to find'.<sup>5</sup> In the third place, Aristotle's words appear at times to be downright inconsistent. It is, indeed, difficult to disagree with P.F. Sigmund when he claims that they are quite simply 'confusing'.<sup>6</sup> The passage in question, therefore, evidently has its dangers for the would-be interpreter. Since what follows is in fact an attempt to at least partially elucidate the meaning of this one passage, it should perhaps be emphasized at the outset that this attempt is an exploratory one (some may well find it tendentious), and that all such interpretations (including this one) should be treated with the greatest caution. The justification for making the attempt lies in the fact that the passage in question is so important and influential, and yet clearly does require interpretation if it is to be understood at all. We shall begin by presenting the passage in question in full. We will then subject it to a detailed analysis. The purpose of this analysis is to clarify some of the passage's ambiguities, to make explicit some of its concealed presuppositions, and in particular to uncover Aristotle's attitude towards the relationship which exists between natural law and positive law:

[1134b, 18] Of political justice part is natural, part legal — natural, that which everywhere has the same force and does not exist [20] by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent, e.g. that a prisoner's ransom shall be a mina, or that a goat and not two sheep be sacrificed, and again all the laws that are passed for particular cases, e.g. that sacrifice shall be made in honour of Brasidas, and the provisions of decrees. Now some think that all justice [25] is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognised as just. This, however, is not true in this

<sup>3</sup> L. Strauss, *Natural Right and History* (Chicago, 1974), p. 156. We shall focus here on the *Nicomachean Ethics* and ignore the *Rhetoric*. The value of the latter as a source for Aristotle's views on natural law is a matter of dispute. See C.J. Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago, 1963), p. 23 n. 16; M. Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (New Haven, 1951), p. 39 n. 1 and p. 65; H. Kelsen, 'The Foundations of the Theory of Natural Law', in H. Kelsen, *Essays in Legal and Moral Philosophy* (Dordrecht, 1973), p. 135; D.G. Ritchie, 'Aristotle's Subdivisions of Particular Justice', *Classical Review*, VIII (1894), pp. 185–92, esp. p. 191 n. 2; D.G. Ritchie, *Natural Law and Natural Rights* (London, 1895), p. 30; P.E. Sigmund, *Natural Law in Political Thought* (Cambridge, MA, 1971), pp. 9–10; J.W. Salmond, 'The Law of Nature', *The Law Quarterly Review*, 42 (1895), p. 127; F.D. Wormuth, 'Aristotle on Law', in *Essays in Political Theory*, ed. M.R. Konvitz and A.E. Murphy (New York, 1948).

<sup>4</sup> Crowe, *The Changing Profile of Natural Law*, p. 25.

<sup>5</sup> *Ibid.*

<sup>6</sup> Sigmund, *Natural Law in Political Thought*, p. 9.

unqualified way, but is true in a sense; with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature. [30] It is evident which sort of thing, among things capable of being otherwise, is by nature, and which is not but is legal and conventional, assuming that both are equally changeable. And in all other things the same distinction will apply; by nature the right hand is stronger, yet it is possible that all men should come to be ambidextrous. The things which are just by virtue of convention [1135a] and expediency are like measures; for wine and corn measures are not everywhere equal, but larger in wholesale and smaller in retail markets. Similarly, the things which are just not by nature but by human enactment are not everywhere the same, since constitutions also are not the same, though there is but one which is everywhere and by nature the best [5].<sup>7</sup>

It should be readily apparent that this passage does undoubtedly contain a number of ambiguities, and perhaps also a number of downright inconsistencies. It is probable that there is no single interpretation of its contents which could succeed in resolving all of these into an account of Aristotle's views on natural law which is entirely coherent. This does not mean, however, that no sense at all can be made of it.

## I

### Aristotle's Terminology: Natural Justice, Legal Justice and Political Justice

One point of central importance to note about this passage is that in it Aristotle appears to refer to *three* different types of justice. These are what he calls 'political justice' (πολιτικόν δικαίον, politikon dikaion), natural justice (φυσικόν δικαίον, physikon dikaion), and legal or conventional justice (νομικόν δικαίον, nomikon dikaion). This is unusual, in that most commentators today who write about these matters adopt the 'bi-partite' approach of the stoic tradition. They make a straightforward distinction between just two types of justice or law, namely 'natural law' on the one hand and 'positive law' on the other.<sup>8</sup> Aristotle's system of classification is more sophisticated than this. It is certainly true that he makes a distinction between natural justice and legal or conventional justice. In addition to this, however, he also suggests that what he calls 'political justice', on the one hand, and legal or conventional justice on the other, are not exactly the same thing. In his view, legal or conventional

<sup>7</sup> Aristotle, *Ethica Nicomachea*, trans. W.D. Ross (Oxford, 1925), Book V, ch. 7, 1134b–1135a.

<sup>8</sup> The account presented here is based on an earlier discussion of Aristotle's views in Tony Burns, *Natural Law and Political Ideology in the Philosophy of Hegel* (Avebury, 1996), pp. 3, 14, 67–8. See also A.P. d'Entrèves, *Natural Law* (London, 2nd edn., 1974), pp. 174–5; H. Rommen, *The Natural Law* (New York, 1979), p. 247.

justice is but a 'part' of political justice.<sup>9</sup> This raises the question of how we should use the term 'positive law' when discussing Aristotle's political thought. Should we use this term to refer to Aristotle's νομικόν δικαίον or rather, should we use it to refer to Aristotle's πολιτικόν δικαίον? A number of commentators have observed that the term 'positive law' is typically used to refer to the former and not the latter. It tends to be employed as a synonym for what Aristotle himself refers to as 'legal or conventional justice'. This is not too surprising, as the features which are usually associated with positive law are much the same as those which Aristotle associates with legal or conventional justice. We shall argue however that, strictly speaking, to translate νομικόν δικαίον as 'positive law' is not accurate. In our view, the term 'positive law' is best employed to refer to Aristotle's πολιτικόν δικαίον, or *political* justice, rather than legal or conventional justice.<sup>10</sup>

J.W. Salmond has noted that Aristotle makes this theoretical distinction between political justice and legal or conventional justice. In Salmond's opinion, however, this distinction is 'of no theoretical importance'.<sup>11</sup> Against this, however, it could be argued that, on the contrary, this distinction is actually of considerable theoretical importance. It is quite impossible for us to understand Aristotle's view of the relationship which exists between natural law and positive law unless we appreciate this fundamental theoretical distinction which lies at the very heart of Aristotle's doctrine of natural law, and hence also at the heart of his political thought as a whole.

## II

### Unchangeability and Moral Necessity

Are the principles of natural justice changeable or unchangeable? Aristotle's remarks about the changeability or unchangeability of the principles of natural justice in the passage under discussion appear to be inconsistent with one another. At the beginning of the passage he clearly implies that natural justice is 'unchangeable' (ἀκίνετον, *akineton*). For he says that it 'has everywhere

<sup>9</sup> See B. Yack, 'Natural Right and Aristotle's Understanding of Justice', *Political Theory*, 18(2) (1990), p. 219; also M. Salomon, 'Le droit naturel chez Aristote', *Archives de philosophie de droit et de sociologie juridique*, 7 (1937), pp. 120–7; Salmond, 'The Law of Nature', p. 127 n. 2.

<sup>10</sup> The term 'positive law' (or its equivalent) actually comes into use for the first time in the medieval period. See D. van den Eynde, 'The Terms *Ius Positivum* and *Signum Positivum* in Twelfth Century Scholasticism', *Franciscan Studies*, 9 (1949), pp. 41–9; S. Kuttner, 'Sur les origines du terme *droit positif*', *Revue historique de droit français et étranger*, 15 (1936), pp. 728 ff.; W. Ullmann, *Law and Politics in the Middle Ages* (London, 1975), p. 62. Most commentators acknowledge that the features which at this time come to be associated with positive law are those which Aristotle associates with legal or conventional justice.

<sup>11</sup> Salmond, 'The Law of Nature', p. 127 n. 2.

the same force'. The example which he uses to illustrate what he means by this is the fact that 'fire burns both here and in Persia'. Moreover he contrasts natural justice with legal justice, which (later on) he says is 'changeable' (κινετον, kinton). Towards the end of the passage, however, Aristotle confuses his readers by asserting that, like legal justice, natural justice is *also* in a sense 'changeable'. He says that both natural justice and legal justice are 'equally changeable'. One of our problems, therefore, is to make sense of what Aristotle is saying here, so as to resolve this apparent contradiction. What we must consider is how it is possible for Aristotle to maintain that we can clearly distinguish between justice which is natural and justice which is legal or conventional, despite the fact that both types of justice might be said to be equally changeable.

Aristotle's remarks about the 'changeability' and 'unchangeability' of natural justice have a very clear association with the notion of *moral validity*. That this is so is evident from the fact that, after contrasting natural justice with legal or conventional justice, Aristotle goes on to assert that legal or conventional justice, which is most definitely 'changeable', has to do with actions which are 'originally indifferent'. In other words, it has to do with the enjoining, forbidding, or permitting, of actions which are in themselves indifferent when considered from the moral point of view.<sup>12</sup> In these cases there is, as it were, no moral necessity which dictates either that the actions in question ought to be performed, or that they ought not to be performed. The clear implication which lies behind these remarks is that those principles of justice which are 'unchangeable' and which 'everywhere have the same force', namely the principles of natural justice, have to do with the enjoining or forbidding of actions which are evidently not morally 'indifferent'. Insofar as actions of this sort are concerned, there is a moral necessity which dictates either their performance or their non-performance.

Aristotle does not appear to give any examples, in the passage quoted, of those actions which are not morally indifferent. However he does provide us with such examples in Book II of the *Nicomachean Ethics*:

not every action . . . admits of a mean; for some have names that already imply badness, e.g. . . . adultery, theft, murder; for all these and suchlike things imply by their names that they are themselves bad, and not the excess or deficiencies of them. It is not possible, then, ever to be right with them; one must always be wrong . . . simply to do any of them is to go wrong.<sup>13</sup>

It is clear from this that Aristotle believes that there are some actions which are by their very nature morally wrong. They are essentially or necessarily wrong,

<sup>12</sup> As Ernest Barker points out, Aristotle employs the terms 'justice' and 'injustice' in a sense which is as much 'moral' or 'ethical' as it is 'legal'. See Aristotle, *The Politics of Aristotle*, ed. Sir Ernest Barker (Oxford, 1946), Appendix II, p. 362.

<sup>13</sup> Aristotle, *Ethica Nicomachea*, II, 6, 1107a, 10–20.

and the type of 'necessity' that we are talking about in this context is strict logical necessity. The 'wrongness' of murder, theft and adultery is logically implied by the meaning of the terms which we use to describe such actions. Like certain 'descriptivist' moral philosophers today, Aristotle takes the view that if we understand the meaning of these terms then, at the same time, we must necessarily also understand that we are under a moral obligation not to perform the actions which they describe.<sup>14</sup> On this interpretation, Aristotle would agree with Kant that there can be no moral justification for the performance of such actions. To agree that a particular action was an example of an act of murder, theft or adultery and then go on to maintain that nevertheless its performance was morally permissible, would from Aristotle's point of view be to contradict oneself.

An important consequence of this is that Aristotle is evidently of the opinion that actions such as murder, theft and adultery must necessarily be morally wrong always and everywhere, in all societies, at all times and in all places. All societies *ought* to have legal systems containing principles of political justice which forbid the performance of such actions. The principles of justice associated with these actions possess a moral validity which is universal, and not simply parochial or historically specific. This is part at least of what Aristotle appears to have in mind when he refers to the principles of natural justice as being 'unchangeable'.

### III

#### The Relationship Between Natural Law and Positive Law

A further point to note about Aristotle's discussion of natural justice in the *Nicomachean Ethics* is that the opening sentence of the long passage presented above is actually quite ambiguous. Aristotle says here that 'of political justice part is natural, part legal'. Hans Kelsen is therefore quite right to suggest that for Aristotle 'natural law is simply a constituent part' of 'the positive law of the state'.<sup>15</sup> The crucial question, however, is what exactly should this be taken to mean? For Aristotle's remarks might be interpreted in two quite different ways, one of which (the second) is preferred here.

According to the first interpretation, what Aristotle has in mind when he makes these remarks is what we may refer to as a 'vertical' division of a system of political justice into those positive laws which are *entirely* 'natural' insofar as their substantive content is concerned, on the one hand, and those positive laws whose content is *entirely* legal or conventional on the other. This approach,

<sup>14</sup> See for example J.M. Brennan, *The Open Texture of Moral Concepts* (London, 1977), pp. 36, 41, 44–57, 64–5, 119; J. Kovesi, *Moral Notions* (London, 1967), pp. 26, 32, 109; and L.A. Jost, 'A Descriptivist Reading of Aristotle's Treatment of Virtue Terms', *Apeiron*, 13 (1979), pp. 41–8.

<sup>15</sup> Kelsen, 'The Foundation of the Theory of Natural Law', p. 131.

fundamentally, is that of the stoic conception of natural law.<sup>16</sup> From this point of view, a positive law with a content which is entirely natural is simply a principle of natural law which has been incorporated into the legal system of a particular society and which has, thereby, been provided with a coercive sanction. In the light of Aristotle's statement that what characterizes natural justice, as distinct from legal justice, is that it 'everywhere has the same force', this implies that what we have in mind here is a division of a body of positive laws into just two categories. In the first category we may place those positive laws which have a substantive content which is *entirely* 'unchangeable' from the standpoint of their moral validity. These laws deal with matters of moral necessity, and are valid in all societies everywhere. In the other category we may place those positive laws which have a substantive content which is *entirely* 'changeable', concerning which there is no moral necessity and which, therefore, may legitimately vary from society to society, from time to time, and from place to place.

According to the second interpretation, however, when Aristotle makes these remarks he is thinking of something quite different altogether. On this interpretation he has in mind, rather, what we may refer to as a 'horizontal' division of a system of political justice into two 'parts'. Considered from this second point of view, each and every individual principle of political justice, or positive law, within a system of political justice is thought of as having, at one and the same time, *both* a part which is natural *and* a part which is legal or conventional. From this standpoint, there is *no* principle of political justice which is either entirely natural, or entirely legal or conventional, insofar as its substantive content is concerned. Any particular principle of political justice is thought of as having a part which relates to some matter of moral necessity, whilst at the same time also having another part which relates to something which is a matter of indifference from the moral point of view.

A great deal of the confusion surrounding what Aristotle has to say in the long passage we are analysing arises because he does not himself distinguish clearly between these two different ways in which we can conceive of a body of positive law being divided into 'parts'. This confusion is compounded by the fact that Aristotle actually adopts *both* approaches, quite unsystematically, in the ensuing discussion of natural justice. Moreover, this confusion is further compounded by the ambiguity which is clearly evident in the original Greek text of the *Ethics*: Του δε πολιτικον δικαιον το δε μεν φυσικον εστι το νομικον (Tou de politikon dikaion to men physikon esti to de nomikon).<sup>17</sup> Some English translations of this sentence do not pick up on this ambiguity. As examples we may cite the translations of H. Jackson, D.P. Chase and J.A.K.

<sup>16</sup> For a discussion of the stoic conception of natural law see Burns, *Natural Law and Political Ideology*, Ch. 1.

<sup>17</sup> Aristotle, *ἈΡΙΣΤΟΤΕΛΟΥΣ ΗΘΙΚΑ ΝΙΚΟΜΑΧΕΙΑ: The Ethics of Aristotle*, ed. J. Burnet (London, 1900), V, 7, 1134b, 18–19.



Thompson. For example, in his commentary on the *Ethics*, Jackson suggests that this Greek sentence should be translated as follows: 'Of the πολιτικον δικαιοον there are two *kinds*, natural and conventional'.<sup>18</sup> This particular translation clearly suggests that Aristotle has in mind what we have termed a 'vertical' division of a system of political justice into its component parts. It therefore lends itself to just one particular interpretation of the meaning of the Greek text, and hence also to just one particular interpretation of Aristotle's views on natural law and its relation to positive law, an interpretation which sees Aristotle as a forerunner of stoic natural law theory. The translation of W.D. Ross, above, is superior because it leaves open the possibility that what Aristotle may actually be thinking of is a 'horizontal' division. This leads to a quite different interpretation of Aristotle's views on natural law and of his political thought as a whole.<sup>19</sup>

Aristotle appears to be thinking of what we have termed a 'vertical' division of a system of political justice into its component parts when he acknowledges, later on in the passage under discussion, that it is in fact possible for some principles of political justice to be entirely legal or conventional insofar as their substantive content is concerned. These principles are those which are 'passed for particular cases', or which have to do with the 'provisions of decrees'. In both of these cases it would seem that Aristotle is prepared to allow that the specific content of positive law does not in any way relate to a matter of moral necessity. If, however, we set aside what Aristotle says about the provisions of decrees and the laws passed for particular cases, it would appear that, in the rest of the passage, when he talks about a system of political justice being divisible into its component parts what he has in mind is what we have termed a 'horizontal' division rather than a 'vertical' one. In other words, he suggests that *none* of the remaining positive laws of the society in question should be thought of as having a substantive content which is *entirely* natural with respect to its substantive content. He suggests that there is no positive law which has a substantive content which relates entirely to matters of strict moral necessity. There is no positive law which has a moral validity which is strictly universal in scope. In short, ignoring the provisions of decrees and laws passed for

<sup>18</sup> Aristotle, ΠΕΡΙ ΔΙΚΑΙΟΣΥΝΗΣ: *The Fifth Book of the Nicomachean Ethics of Aristotle*, ed. H. Jackson (Cambridge, 1879), p. 39. Similar translations are offered by Chase, in Aristotle, *The Nicomachean Ethics of Aristotle*, ed. D.P. Chase (London, n.d.), p. 145, and by Thompson in Aristotle, *The Ethics of Aristotle*, ed. J.A.K. Thompson (Harmondsworth, 1965), p. 157, although Thompson refers to two '*forms*' of political justice rather than two '*kinds*'. See also Yack, 'Natural Right and Aristotle's Understanding of Justice', p. 220.

<sup>19</sup> A similar translation to that of Ross is provided by both Grant, in Aristotle, *The Ethics of Aristotle: Illustrated with Essays and Notes*, ed. Sir Alexander Grant (2 vols., London, 4th edn., 1885), Vol. II, p. 126, and by Stewart, in J.A. Stewart, *Notes on the Nicomachean Ethics of Aristotle* (2 vols., Oxford, 1892), p. 492, although Grant and Stewart employ the word 'element' rather than the word 'part'.

particular cases, there is for Aristotle *no* positive law which has a substantive content which is *entirely* 'unchangeable', in the moral sense of that term. According to this interpretation, then, the best way to characterize Aristotle's attitude towards those principles of political justice which are not entirely legal or conventional would be to say that in his view such principles must be thought of as being divisible 'horizontally' into two component principles of justice, one of these principles being a principle of natural justice and the other being a principle of legal or conventional justice.

#### IV

#### What are the Principles of Natural Justice?

In the passage we are analysing Aristotle appears unwilling to provide specific examples of principles which he considers to be principles of natural justice. The only examples to which he refers are those relating to the practice of ransoming of prisoners and to the practice of offering sacrifices. At first sight, however, these appear to be examples of principles of legal or conventional justice, rather than examples of precepts of natural justice. This has led at least one eminent commentator, Leo Strauss, to maintain that one of the reasons why Aristotle's discussion of natural justice is ambiguous, or so 'singularly elusive', is that 'it is not illumined by a single example of what is by nature right'.<sup>20</sup>

If our interpretation of Aristotle is correct, however, then Strauss's claim is not justified. This is so because, from our point of view, the principles of justice to which these examples refer are *not* what Aristotle would consider to be principles of legal or conventional justice. They are, rather, principles of *political* justice. It follows from this, given that these principles have a 'part' which is natural as well as a part which is legal or conventional, that these two principles must necessarily also provide us with examples of what Aristotle would consider to be principles of *natural* justice.

We may illustrate this point by considering as an example the principle that 'a prisoner's ransom shall be a mina'. Aristotle suggests that it is a matter of convention that a prisoner's ransom shall be a mina. According to the interpretation we are developing, what this means is that it is a matter of indifference, morally speaking, that a prisoner's ransom shall be a mina, as opposed to something else. Here the principle that 'a prisoner's ransom shall be a mina' is considered to be an example, not of a principle of *legal* or conventional justice, but of a principle of *political* justice. As such, this principle may be thought of as having two constituent 'parts'. On the one hand there is the principle of justice which states that 'all prisoners shall be ransomed'. On the other hand there is the principle of justice which states that a prisoner's ransom 'shall be a mina'. The first of these principles is a principle of natural justice. In Aristotle's view, it is not a matter of moral indifference whether prisoners

<sup>20</sup> Strauss, *Natural Right and History*, p. 156.

should be ransomed. On the contrary, this is a matter of strict moral necessity. Prisoners ought to be ransomed. All *poleis* ought to include such a principle within their respective systems of political justice. The second principle, however, does not relate to a matter of moral necessity. The question as to what, exactly, a prisoner's ransom ought to be is a matter of indifference from the moral point of view. This question therefore, in Aristotle's opinion, is a matter of 'convention'. It is to be decided in a morally arbitrary manner by the positive law of a particular *polis* at a particular time.<sup>21</sup> This particular interpretation of Aristotle is the one presented by Aquinas in his commentary on the *Nicomachean Ethics*. According to Aquinas, Aristotle's attitude towards the principle that 'a prisoner's ransom should be a mina' is that:

It is *natural* justice that a citizen who is oppressed without fault on his part should be aided, and consequently that a prisoner should be ransomed, but the fixing of the price pertains to *legal* justice, which proceeds from natural justice without error.<sup>22</sup>

Aristotle, then, would acknowledge that in some *poleis* the ransom demanded for a prisoner will be a mina, whereas in others it will not, and that this variation is one which is entirely legitimate from the moral point of view.

From the standpoint of the interpretation being presented here, it is evident that those principles of justice which forbid the performance of actions which are necessarily wrong, such as murder, theft and adultery, would also be considered by Aristotle to be principles of natural justice or natural law. It is true that Aristotle does not state explicitly that this is so. All he says in the long passage under examination is that it is 'evident' which principles of justice are natural and which are legal or conventional. This conclusion is, however, clearly implicit in the remarks which Aristotle makes about the notion of 'unchangeability', on the one hand, and about actions such as murder, theft and adultery on the other. For Aristotle says that the principles of justice forbidding murder, theft and adultery 'must always be wrong', and this implies that, 'morally speaking, these principles are 'unchangeable'. He also suggests, however, that the principles of justice which are *natural* are precisely those precepts

<sup>21</sup> Aristotle does not make any explicit distinction between legal or conventional justice which is *customary* and legal or conventional justice which is *enacted*. It would, however, be a mistake to assume automatically, as W.A. Robson appears to do, that he must have had customary law in mind here. Cf. W.A. Robson, *Civilisation and the Growth of Law* (London, 1935), pp. 243–5. As G.R. Morrow has pointed out, the idea of 'legislation' is evidently by no means alien either to Greek political experience or to Greek political thought at this time. Cf. G.R. Morrow, 'Plato and the Law of Nature', in *Essays in Political Theory*, ed. Konvitz and Murphy, pp. 38 ff. This is, indeed, evident from what Aristotle himself has to say about such matters in Chapter 9 of Book 10 of the *Ethics*.

<sup>22</sup> Aquinas, *Commentary on the Ethics of Aristotle*, ed. C.I. Litzinger (Chicago, 1964), p. 443.

which are ‘unchangeable’ and which have ‘everywhere the same force’. It is principles of this sort that, in the later scholastic natural law theory developed by Aquinas and others, are referred to as the ‘secondary’ precepts of natural law.<sup>23</sup>

It is a further consequence of the interpretation presented here that if Aristotle accepts that the principles of justice which forbid murder, theft and adultery are principles of natural justice, then he is logically committed to accepting that there is yet another, more general principle which is also a principle of natural justice. This principle, indeed, is what might be termed the supreme principle of natural justice, or the ‘primary’ precept of natural law. It is the principle from which actions like murder, theft and adultery derive their status as actions which are necessarily wrong or unjust. This principle encapsulates Aristotle’s belief that the very idea of justice is necessarily related to that of equality (το ἰσον, to ison).<sup>24</sup> It states that those who are equal in some relevant respect ought to be treated equally in (relevantly) similar circumstances.<sup>25</sup> Aristotle does not himself give this principle a name. We shall, however, follow a tradition which has developed since the time of Aristotle and refer to this principle as the principle of equity.<sup>26</sup>

<sup>23</sup> For this see, *inter alia*, R.A. Armstrong, *Primary and Secondary Precepts in Thomistic Natural Law Teaching* (The Hague, 1966).

<sup>24</sup> Aristotle, *Ethics*, V, 1, 1129a, 34–43.

<sup>25</sup> Modern discussion of the concept of justice has been greatly influenced by what Aristotle has to say about the subject. See, for example, I. Berlin, ‘Equality’, *Proceedings of the Aristotelian Society*, 56 (1955–6); W.T. Blackstone, ‘On the Meaning and Justification of the Equality Principle’, *Ethics* (1967); M. Ginsberg, ‘The Concept of Justice’, in *On Justice in Society* (Harmondsworth, 1971); H. Kelsen, *What is Justice? Justice, Law and Politics in the Mirror of Science: Collected Essays by Hans Kelsen* (Berkeley and Los Angeles, 1957); H. Kelsen, *A General Theory of Law and the State* (New York, 1961); D. Lloyd, *The Idea of Law* (Harmondsworth, 1972); Ch. Perelman, *The Idea of Justice and the Problem of Argument* (London, 1963); Ch. Perelman, *Justice, Law and Argument: Essays on Legal and Moral Reasoning* (Dordrecht, 1980); D.D. Raphael, *Problems of Political Philosophy* (London, 1970); A. Ross, ‘The Idea of Justice’, in *On Law and Justice* (London, 1958); B. Williams, ‘The Idea of Equality’, in *Philosophy, Politics and Society*, ed. P. Laslett and W.G. Runciman, second series (1967).

<sup>26</sup> That the English term ‘equity’ is derived ultimately (via the Latin *aequitas*) from the Greek το ἰσον has been maintained by a number of commentators. See for example, J. Riley, ‘A Conspectus of the Meaning of ‘Epieikeia’ and ‘Aequitas’ in History’, in *The History, Nature and Uses of Epieikeia in Moral Theology* (Washington, 1948), pp. 10–18. For a different view see H. Maine, *Ancient Law*, ed. J.H. Morgan (London, 1965), p. 34. It is important to note that the English word ‘equity’ used in this more general sense must be distinguished from the same term when it is used to translate the Greek word ἐπιεικεία (epieikeia). Aristotle discusses ἐπιεικεία in Book V, Chapter 10 of the *Ethics*. Equity in this more technical sense is a legal principle which is supposed to deal with ‘problem cases’ which call for ‘a correction of the law where it is defective owing to its universality’ (Aristotle, *Ethics*, V, 10, 1137b, 25–30).

In certain situations, namely within what Aristotle refers to as the sphere of 'rectificatory justice', where it is assumed that all *are* in fact equal in all relevant respects, the principle of equity may be said to reduce itself to, and is indeed an alternative formulation of, the precept of morality known as the Golden Rule: 'Do not to another what you would not have done to yourself.' That this is so is something which has been noted on a number of occasions. Georgio del Vecchio, for example, has provided an excellent account of Aristotle's views on justice, an account which strongly emphasizes the importance which Aristotle attaches to the Golden Rule.<sup>27</sup> It has also been noted that, quite apart from any (implicit or explicit) reference to it in the writings of Aristotle, there is evidently a very strong connecting link between the idea of equity and the Golden Rule. According to R. Newman, for example, the Golden Rule is 'the central concept of pure equity'.<sup>28</sup> This view is also shared by R. Snyder, who insists that equity 'denotes the spirit and habit of fairness, justness and right dealing which should regulate the intercourse of men'. The basic principle of equity, therefore, is the rule 'of doing to all others as we would have them do to us'.<sup>29</sup> E.H. Snell has also pointed out that in the English language, 'the term equity is used in various senses'. However, in its most popular sense 'it is practically equated to natural justice'.<sup>30</sup> This belief that equity and natural justice are much the same thing has a long history, a history which dates back to Aristotle himself.<sup>31</sup> Certainly the sentiment which Snell expresses here is one with which, in spirit, Aristotle would entirely agree.

In the light of the above, it is extremely difficult to accept S.B. Smith's claim that there is 'no Aristotelian equivalent' either of 'the Kantian Categorical Imperative' or of 'the commandments of the Decalogue'.<sup>32</sup>

<sup>27</sup> G. del Vecchio, *Justice*, ed. A.H. Campbell (Edinburgh, 1952), pp. 84, 187–8. For additional references to Aristotle and the Golden Rule see: Hamburger, *Morals and Law*, p. 52; W.A. Spooner, 'Golden Rule', in *The Encyclopaedia of Religion and Ethics*, ed. G. Hastings (New York, 1914), Vol. 6, p. 311; J.O. Hertzler, 'On Golden Rules', *International Journal of Ethics*, 44 (1934), p. 423.

<sup>28</sup> R. Newman, 'Introduction' to *Equity in the World's Legal System*, ed. R. Newman (Brussels, 1973), p. 28.

<sup>29</sup> R.N. Snyder, 'Natural Law and Equity', in *Equity in the World's Legal System*, ed. Newman, p. 38.

<sup>30</sup> E.H.T. Snell, *The Principles of Equity* (London, 17th edn., 1915), p. 1.

<sup>31</sup> See also Snyder, 'Natural Law and Equity', pp. 33–43; Ch. Perelman, 'Equity and the Rule of Justice', in *Justice, Law and Argument*, pp. 34–43; D.D. Raphael, 'Equality and Equity', *Philosophy*, 21 (1946); F.W. Maitland, *Equity: A Course of Lectures* (New York, 1936); H. Maine, 'Law of Nature and Equity', in *Ancient Law*; C.K. Allen, 'Equity', in *Law in the Making* (Oxford, 1951); P. Vinogradoff, *Historical Jurisprudence* (Oxford, 1923), Vol. 2, ch. III, s. 5; P. Vinogradoff, *Common Sense in Law* (London, 1943), Chs. VIII and IX.

<sup>32</sup> S.B. Smith, *Hegel's Critique of Liberalism: Rights in Context* (Chicago, 1991), pp. 138–9.

## V

**The Nature of Political Justice**

For Aristotle, the principles of natural law are what we propose to refer to as 'formal' principles of morality or justice.<sup>33</sup> The 'primary' principle of natural law, the principle of equity, is a formal principle because, although it states that equals ought to be treated equally in relevantly similar circumstances, it does not state which persons are to be considered as equals, how they are to be actually treated, or which circumstances are to be considered as relevantly similar. The 'secondary' principles of natural law, such as those forbidding murder and theft, are formal principles because, although they state that we ought not to perform such actions, they do not state which particular actions are to be considered as falling into these 'forbidden' categories. If these principles are to be of any practical value they need to be provided with a definite substantive 'content'. They must be *combined* with certain principles of legal or conventional justice, the purpose of which is to interpret or define more precisely the concepts of murder, theft and so on. For Aristotle, this is the principal task of legal or conventional justice. In the terminology of the later scholastic natural law theory, the principles of legal or conventional justice provide the formal principles of natural justice with a more detailed specification or 'determination'.

As this task is carried out by principles of justice which are not natural, but legal or conventional, then it follows that in Aristotle's view it does not actually matter precisely how this task of further determination or definition is actually carried out. The precise definitions of the relevant concepts is something which is essentially arbitrary when considered from the moral point of view. There is no reason, morally speaking, why these concepts ought to be defined in one way rather than another. As they are precepts of legal justice, and not natural justice, the principles of justice which carry out the task of definition are 'changeable' in the moral sense of this term. Morally speaking, they can and do vary from society to society. At this level it is not the principle of moral universalism, but that of historical or cultural relativism, which reigns.

According to Aristotle, then, practical moral problems cannot be solved by an appeal to the principles of natural justice alone. Nor, in Aristotle's opinion, can they be resolved solely by an appeal to a law which is purely legal or conventional. Such problems can only be solved by the joint application of a principle of natural justice and a principle of legal or conventional justice, in combination with one another. It is Aristotle's view that, apart from one or two exceptions already noted, principles of these two types never actually exist apart from one another. They always exist in combination with one another, and they are always associated with a specific principle of political justice, of which they

<sup>33</sup> See Burns, *Natural Law and Political Ideology*, pp. 36–41.

constitute the integral, component 'parts'. The *concrete* existence of the principles of natural justice depends on their being given a specific determination in positive law. It is only insofar as they have been specifically interpreted in positive law that they might be said to exist at all. They exist *immanently* within the principles of political justice of a particular polis. From this point of view, most of the principles of political justice of a polis are principles of natural justice which have been given a more specific interpretation or 'determination' by certain principles of legal or conventional justice. These principles of political justice may, therefore, be considered to be particular concrete manifestations or 'realizations' of the formal principles of natural justice. The principles of political justice *are* the principles of natural justice, when considered from the standpoint of the specific, historically given character of their many, and various, possible modes of existence. It is only after they have been so interpreted that it is possible for individuals to follow the principles of natural justice in practice.<sup>34</sup>

It is for this reason that Salmond's claim that the distinction between 'political justice' and 'legal justice' is of no theoretical importance for our understanding of Aristotle's political thought is not at all well founded. To fail to appreciate the significance of this distinction is to misunderstand completely Aristotle's view of the relationship which exists between natural law and positive law. It is to misunderstand completely what Aristotle means when he says that natural justice is a 'part' of political justice. Ernest Barker is one of the very few commentators who appear to have understood Aristotle's views on the relationship between natural law and positive law. As he quite rightly puts it:

That the law is natural does not . . . preclude the agency of man in creating law. Aristotle refuses to make an antithesis between nature and art . . . We must distinguish between the naturally and the legally just, not however as antithetical, but as supplementary to one another.<sup>35</sup>

An important implication of our interpretation of Aristotle's claim that of political justice 'part is natural, part legal' is that, for Aristotle, when a principle of natural justice, like that forbidding murder or theft, is incorporated into the system of political justice of a particular society it is not simply ratified, or provided with a coercive sanction. The principles of political justice of a

<sup>34</sup> In the terminology of the Hegelian philosophy, a precept of natural justice is an 'essence'. This principle manifests itself, or 'appears', in a particular society at a particular time, as a principle of positive law or 'political justice'. To see a principle of positive law as a 'synthesis' of an 'essence' with an 'appearance' is to see it in its 'actuality'. See Burns, *Natural Law and Political Ideology*, pp. 66–74.

<sup>35</sup> E. Barker, *The Political Thought of Plato and Aristotle* (New York, 1959), p. 327. This Aristotelian insight is preserved in the philosophy of Hegel, who states that although natural law 'is distinct from positive law', nevertheless to 'pervert their difference into an opposition and a contradiction would be a gross misunderstanding'. Cf. G.W.F. Hegel, *Philosophy of Right*, ed. T.M. Knox (Oxford, 1979), Para. 3, p. 16.

particular society are not simply principles of natural justice to which nothing, apart from a coercive sanction, has been 'added'. Hence, also, these principles of political justice are not exact copies or reproductions of the principles of natural justice, down to the smallest details, insofar as their substantive content is concerned. On the contrary, when the precepts of natural justice are incorporated into the legal system of a given society they are not only given such a coercive sanction, but they are also at the same time modified in some way. They are modified by being combined or amalgamated with principles of legal or conventional justice. A principle of political justice is the *synthetic* or compound principle which results from such a process of combination. It is this principle of political justice which is enforced by coercive sanctions.<sup>36</sup>

## VI

### The Changeability of Natural Justice

As we noted earlier, at the beginning of the passage under discussion, Aristotle says that what characterizes natural justice is the fact that it is 'unchangeable'. We have already considered one interpretation of what he might possibly have meant by this. Later on in the passage, however, he goes on to acknowledge that *all* principles of justice, those of natural justice included, are actually 'changeable'. These two statements appear to flatly contradict one another. Our present problem, therefore, is to consider how these apparently contradictory statements might be reconciled. Aristotle provides us with a hint as to how this problem might be solved when he says that natural justice is indeed 'changeable', but only 'in a sense', and not in an 'unqualified way'. This suggests that he takes the view that natural justice might also be said to be 'unchangeable', although again only 'in a sense', and not in any unqualified way. In short, these remarks indicate that Aristotle is of the opinion that the principles of natural justice are in one sense changeable and in another sense not so, depending on the point of view from which we consider them.

Earlier we related the notion of 'changeability' to that of moral necessity. With respect to the question of the moral validity of the precepts of natural justice, a clear implication of Aristotle's later admission that these principles are in fact 'changeable' after all is that these principles are not in fact associated with matters of strict moral necessity and do not possess any universal moral validity. This amounts to saying, if we take as a specific example the principle of natural justice forbidding murder, that for Aristotle the act of murder *might*, in certain circumstances, be morally permissible.<sup>37</sup> Hence it is acceptable,

<sup>36</sup> See Burns, *Natural Law and Political Ideology*, pp. 18–19; also J. Finnis, *Natural Law and Natural Rights* (Oxford, 1980), pp. 28, 281; Kelsen, *General Theory of Law and the State*, p. 416.

<sup>37</sup> Bentham would insist that it is logically impossible for a positive law to permit the act of murder. See J. Bentham, *A Comment on the Commentaries*, ed. J.H. Burns and



morally speaking, that the legal systems of some societies should actually permit the performance of the act of murder. Interpreted in this way, Aristotle's remarks might be said to lend support to the view that he is sympathetic to some form of moral relativism.

However, it seems most unlikely that this is what Aristotle is thinking of when he acknowledges that natural justice is, after all, at least in one sense 'changeable'. There are three reasons for doubting the validity of this particular interpretation of Aristotle's meaning. The first is that, as we have seen, Aristotle is perfectly clear elsewhere in the *Ethics* that the precepts of justice forbidding acts like murder, theft and adultery *are* strictly universal when considered from the standpoint of their moral validity. In Aristotle's view questions of moral validity are matters of logical necessity. Hence they are associated with principles which possess a strict universality. The second is the fact that, towards the end of the passage, Aristotle suggests that, where political constitutions are concerned, there is but one 'which is everywhere and by nature the best'. This clearly implies that, with respect to questions of moral validity, Aristotle associates something being natural with its being *strictly* universal. The third is that if this is what Aristotle means when he says that the principles of natural justice are at least in one sense 'changeable', then it becomes difficult to explain the particular sense in which he considers that these principles remain 'unchangeable'. It follows from this that either our earlier account of what Aristotle means by the 'unchangeability' of natural justice is incorrect (which in our view it is not), or that Aristotle contradicts himself (which in our view he does not), or, finally, that Aristotle means something else when he says that the principles of natural justice are, at least in a sense, 'changeable'. The problem, here, is that of establishing what else he might possibly mean.

Now there is in fact an alternative account of Aristotle's claim that the principles of natural justice are either 'unchangeable' or 'changeable'. According to this alternative account, when Aristotle speaks of a principle of justice being unchangeable what he has in mind is the notion that the principles in question are *empirically universal*. That is to say, they are as a matter of fact to be found encapsulated in the positive legal systems of all societies, at all times and in all places. This analysis of Aristotle's remarks fits in very well with what he has to say elsewhere, both in the *Ethics* and in his other writings, about what is involved when we say of something that it is 'natural'. There is a general tendency for Aristotle to associate something's being natural with its being 'universal', that is to say, with its being 'necessary' in the specific sense that it applies in all possible cases.<sup>38</sup> As Aristotle says elsewhere, 'some occurrences

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H.L.A. Hart (London, 1977), pp. 42–3. See also Burns, *Natural Law and Political Ideology*, pp. 36–7.

<sup>38</sup> Aristotle, *Ethics*, X, 9, 1180b, 10–25; Aristotle, *Analytica Posteriora*, ed. G.R.G. Mure (Oxford, 1926), I, 4, 73b, 25–30; *ibid.*, I, 33, 88b, 30–35.

are universal',<sup>39</sup> for they are what they are 'always and in every case', and 'to hold in every instance and always is of the nature of the universal'. From the standpoint of this alternative interpretation, when Aristotle admits later on in the passage under discussion that the principles of natural justice are in fact 'changeable' after all, at least in one sense, what he is doing is acknowledging that although these principles are morally universal, nevertheless they are *not* empirically universal.

Even when considered from this alternative point of view, however, that which relates to their empirical universality rather than to their moral necessity, Aristotle's remarks concerning the 'changeability' of the principles of natural justice remain ambiguous. For even now they can be interpreted in two quite different ways, only the second of which, in our view, is correct. According to the first of these interpretations, the principles of natural justice would be 'unchangeable' if they were to be found universally, incorporated within the systems of political justice of all societies at all times. Similarly, they would be 'changeable' if their occurrence was *not* strictly universal in this sense. Thus, when Aristotle says that the principles of natural justice are actually in a sense 'changeable' it follows, on this first interpretation, that what he is suggesting is that there are some societies in which the principles of natural justice, or particular concrete manifestations of them, are not to be found at all. Despite the fact that these principles possess a moral validity which is universal, there are nevertheless some societies which 'fail' to incorporate these principles into their own systems of political justice. There are societies which enjoin or permit the performance of certain actions which are actually forbidden by natural justice.<sup>40</sup>

We may illustrate this by considering an example. Let us take the principle of natural justice which states that murder is wrong, and let us assume that, for Aristotle, from the standpoint of its moral validity this principle *is* strictly universal. In other words, the act of murder, according to Aristotle, is necessarily wrong, always and everywhere. No individual could ever be justified, morally speaking, in committing an act of murder; and no society could ever be justified in permitting the performance of the act of murder in and through its system of positive law. In this sense, at least, the precept of natural justice forbidding murder certainly is 'unchangeable'. However, in certain societies this might not be *recognized*. The principle may 'fail' for some reason. For, as Aristotle puts it, 'things are objects of knowledge in two senses'. Some things are known 'without qualification', and some things are known only 'to us'.<sup>41</sup>

<sup>39</sup> Aristotle, *Analytica Posteriora*, ed. Mure, II, 12, 96a, 5–15.

<sup>40</sup> For this interpretation of the notion of 'changeability' in relation to natural law see R.F. Begin, *Natural Law and Positive Law* (Washington, 1959), p. 88; J. Maritain, *Man and the State* (Chicago, 1958), pp. 84–94; Strauss, *Natural Right and History*, pp. 9, 97–8.

<sup>41</sup> Aristotle, *Ethics*, I, 4, 1095b, 1–5.

Though morally universal, the principle of justice forbidding murder might not be empirically universal, precisely because the systems of political justice of at least some societies wrongfully permit the act of murder.

On the other hand, however, Aristotle's claim that the principles of natural justice are at least in one sense 'changeable' might be interpreted in a quite different way, although still in a way which relates to the question of their empirical universality, as opposed to that of their moral validity. According to this second interpretation (which is the one favoured here) it is Aristotle's view that the principles of natural justice are strictly and entirely 'unchangeable' when considered from the standpoint of their moral validity. Further, it is Aristotle's view that these principles are also strictly 'unchangeable' when considered from the standpoint of their empirical application, at least in one sense. In other words, these principles are indeed to be found incorporated within the systems of political justice of all societies, in all times and in all places. The problem that we have when interpreting Aristotle's remarks regarding the '*changeability*' of natural justice, then, is that of explaining how it is possible for Aristotle to consistently maintain that the principles of natural justice are in this one sense empirically universal, and yet in another sense not so. The solution to this problem, in our view, lies in the fact that the principles of natural justice may be considered from two quite different standpoints here. They may be considered either as purely *formal* or *abstract* principles of justice, or they may be considered as *concrete* principles of justice.

If we consider the principles of natural justice as formal principles then these principles are, empirically speaking, entirely 'unchangeable'. According to our preferred interpretation, it is Aristotle's view that, in addition to possessing a moral validity which is universal, these principles of natural justice are also empirically universal. They are to be found in the systems of political justice of all societies at all times, without exception. On the other hand, however, it must not be forgotten that these formal principles of natural justice can only exist at all insofar as they are combined with certain principles of legal or conventional justice, as integral component elements of corresponding principles of political justice, which are to be found in the legal systems of particular societies at particular times. It is Aristotle's view that these principles of political justice are particular concrete manifestations of the formal principles of natural justice. They *are* the principles of natural justice insofar as the latter are considered from the point of view of their empirical existence. It seems clear enough, however, that these principles of political justice do in fact differ from one another in certain respects. For the formal principles of natural justice do not manifest themselves always in precisely the same way. Thus, considered as *concrete* principles of justice, the principles of natural justice are not 'unchangeable', but 'changeable'. Both morally and empirically, the specific manner in which they manifest themselves can and does *vary* from society to society, from time to time and from place to place.

It is in this way, then, by emphasizing that the principles of natural justice may be thought of either as formal or *abstract* entities on the one hand, or as *concrete* entities on the other, that we are able to explain how it is possible for Aristotle to maintain without contradiction that these principles can be both ‘changeable’ and ‘unchangeable’ at one and the same time, when considered from the standpoint of their empirical universality.

## VII The Possibility of Scientific Knowledge in the Sphere of Morality and Politics

Usually, when Aristotle talks about true knowledge, or genuinely ‘scientific’ knowledge, he associates the term with those things which occur as a matter of necessity. As he puts it, ‘the object of scientific knowledge is of necessity’.<sup>42</sup> The notion of ‘necessity’, in turn, he associates with ‘universality’ in the empirical sense, that is, strict universality of occurrence. In his view, ‘scientific knowledge and its object differ from opinion’ in that scientific knowledge is ‘commensurately universal’.<sup>43</sup> This means that it is knowledge of something which applies in every case, or which ‘belongs to every instance of its subject’.<sup>44</sup> As we have seen, Aristotle says elsewhere that ‘some occurrences are universal’,<sup>45</sup> for they are what they are ‘always and in every case’, and ‘to hold in every instance and always is of the nature of the universal’. A clear implication of these remarks is that anything which did not occur always and in every case could not, strictly speaking, be said to be ‘universal’. Nor, therefore, could it be said to be ‘necessary’. Hence neither could it be said to be a possible object of genuinely ‘scientific’ knowledge.

When Aristotle says that those things which are ‘natural’ are ‘unchangeable’, in the passage under discussion, his remarks are entirely consistent with what he has to say about scientific knowledge, and its relationship to the notions of necessity and universality, elsewhere in his writings. A clear implication of Aristotle’s remarks on this subject is that we *can* have genuinely scientific knowledge within the spheres of morality and politics. Such knowledge relates precisely to the principles of natural justice, insofar as these principles may be said to be necessary and universal principles which have ‘everywhere the same force’.

On the other hand, however, there are also problems with this interpretation of Aristotle. For elsewhere Aristotle explicitly rejects the view that in the sphere of politics genuinely scientific knowledge is possible at all. Aristotle’s reason

<sup>42</sup> Aristotle, *Ethics*, VI, 3, 1139b, 15–25; also VI, 5, 1140a, 30–5; VI, 6, 1140b, 30–5.

<sup>43</sup> Aristotle, *Ethics*, X, 9, 1180b, 10–25; Aristotle, *Analytica Posteriora*, ed. Mure, I, 33, 88b, 30–5.

<sup>44</sup> Aristotle, *Analytica Posteriora*, ed. Mure, I, 4, 73b, 25–30.

<sup>45</sup> *Ibid.*, II, 12, 96a, 5–15.

for adopting this position appears to be the fact that all principles of justice are, in his view, not unchangeable, but changeable. There is *no* principle of justice which possesses the quality of strict universality of occurrence which Aristotle associates with genuinely scientific knowledge.<sup>46</sup> The problem with this is that if we were to take Aristotle's remarks here quite literally then their logical implication is a denial of the very existence of any such thing as *natural* justice. Aristotle, however, evidently does not wish to commit himself to such a view. It must, therefore, be possible for us to reconcile the apparently conflicting remarks which he makes with respect to this question. The solution to this problem is to recognize that, in Aristotle's view, it is possible for us to discuss questions of morals and politics at different 'levels'. If we are content to be satisfied with general principles, then it is certainly possible for us to make statements in this sphere which have a universal applicability, and which, therefore, do possess the status of 'scientific knowledge'. If, however, we wish to focus not on general principles but on specific details regarding such questions, then such knowledge is not possible. At this level there are no principles which have a universal applicability. Aristotle insists, therefore, that 'precision is not to be sought for alike in all discussions', and that in matters of ethics and politics we 'must be content' to 'indicate the truth roughly and in outline'.<sup>47</sup>

It is for this reason that Aristotle suggests that laws are a product of the 'art' of politics.<sup>48</sup> It is for this reason, also, that he suggests that, in matters of legislation, guidance is to be found by the application of 'phronesis', 'prudence' or 'practical wisdom' (φρονησις), rather than by scientific knowledge in the strict sense.<sup>49</sup> He points out that prudence is concerned not with 'universals' but with 'particulars', and as a result is in some situations actually more *useful* than genuine or scientific knowledge, which is concerned with universals.

The example which Aristotle gives to illustrate this point is an extremely interesting one. He refers to the routine principle of everyday conduct which stipulates that 'light meats are good for you'. For Aristotle, this is a 'universal' principle and hence a matter of genuine 'scientific knowledge'. This principle is, however (to employ the terminology adopted earlier) a *formal* principle. For, as Aristotle himself points out, it is possible for a man to know 'that light meats are digestible and wholesome', and yet for him *not* to know 'what sorts of meats are light'. In these circumstances, Aristotle suggests, a person who relied on scientific knowledge alone would not succeed in producing 'health'. The man of 'prudence', on the other hand, may well be unfamiliar with the general principle that light meats are good for you. He may lack genuinely scientific knowledge in this particular area. Yet at the same time he could be familiar with the particular principle that, for example, 'chicken is wholesome'. According

<sup>46</sup> Aristotle, *Ethics*, I, 3, 1094b, 10–30; II, 2, 1103b, 25–1104a, 10.

<sup>47</sup> *Ibid.*, I, 3, 1094b, 10–20; II, 2, 1103b, 25–1104a, 5.

<sup>48</sup> *Ibid.*, X, 9, 1181a, 25–1181b, 1.

<sup>49</sup> *Ibid.*, VI, 5, 1140a, 25–1140b, 30.

to Aristotle, such a person is in practice more likely to produce health than someone who relies totally on general principles. Aristotle goes on to say that an adequate understanding of politics (and practical affairs generally) actually requires an appreciation of *both* types of principle, the general and the particular, and the relationship which exists between the two. It requires both 'scientific knowledge' of general principles *and* 'prudence' or 'practical wisdom' regarding the way in which these general principles manifest themselves in particular circumstances.<sup>50</sup> The analogy between what Aristotle says here about this principle that 'light meats are digestible and wholesome' and what he says in the passage under discussion about the principle that 'a prisoner's ransom shall be a mina' is readily apparent. Indeed, it is quite striking. This particular example clearly supports the interpretation that we have presented above of Aristotle's understanding of the relationship which exists between natural law and positive law.

### VIII

#### Natural Law Theorist or Legal Positivist?

We may finish our discussion of Aristotle's views on natural justice by considering the question of whether Aristotle is a natural law theorist or a legal positivist? This question has been answered in different ways by commentators on Aristotle's political thought. Some, perhaps most, claim that Aristotle is a natural law theorist, indeed the first natural law theorist in the history of political thought. He is the founder of the natural law tradition. As M. Salomon Shellens has pointed out, 'philosophers and historians almost invariably claim that Aristotle is the father of natural law'.<sup>51</sup> Others, however, have denied this. Some, like Hans Kelsen, have maintained (or at least strongly implied) that Aristotle rejects the notion of natural law altogether.<sup>52</sup> Others, like R.G. Mulgan, have maintained that although the notion of natural law is indeed to be found in Aristotle's writings, and specifically in the passage from the *Nicomachean Ethics* which we have been discussing, nevertheless this notion 'does not play an important role in his political theory' as a whole.<sup>53</sup>

We may begin by asking whether or not Aristotle would allow that the principles of natural justice could possibly serve as a yardstick for measuring the justice or injustice of political justice, or positive law, for this is usually

<sup>50</sup> *Ibid.*, VI, 7, 1141b, 15–20.

<sup>51</sup> Salomon Shellens, 'Aristotle on Natural Law', p. 72. See also Crowe, *The Changing Profile of Natural Law*, p. 19; W. Friedmann, *Legal Theory* (London, 5th edn., 1967), p. 10; Friedrich, *Philosophy of Law in Historical Perspective*, pp. 22–3.

<sup>52</sup> Kelsen, 'The Foundation of the Theory of Natural Law', pp. 122–36; H. Kelsen, 'Aristotle's Doctrine of Justice', in *What is Justice?*, pp. 125–36; Yack, 'Natural Right and Aristotle's Understanding of Justice', p. 216.

<sup>53</sup> R.G. Mulgan, *Aristotle's Political Theory: An Introduction for Students of Political Thought* (Oxford, 1977), p. 141.

considered to be a defining characteristic both of natural law and natural law theory. Insofar as the principle of equity is concerned, it seems evident that in Aristotle's opinion no positive law could possibly come into conflict with the demands which are placed upon us by this fundamental principle of natural justice. For this principle is a purely formal principle. It states that equals ought to be treated equally in similar circumstances, and Aristotle gives to positive law the task of deciding who are equals and precisely how these equals are to be treated. From Aristotle's point of view, therefore, any positive law at all, insofar as its specific content is concerned, is consistent with the principle of equity. A positive law could be unjust or unfair, from this point of view, only if it were actually administered unfairly. From the standpoint of concrete or substantive justice, the principle of equity is clearly incapable of providing a means of differentiating between those positive laws which are just and those which are unjust. This is a point which has been well made by Alf Ross, who has noted that 'it is indeed impossible' to derive 'from the formal idea of equality' any sort of demand 'with regard to the content of' a legal order. It is also a point which has been acknowledged by Hans Kelsen, specifically in connection with the thinking of Aristotle. According to Kelsen, it is Aristotle's view that, as 'a rationalistic moral philosophy is not capable of determining the content of a just order', that is to say, is not capable of answering the questions 'which differences between individuals are relevant and which irrelevant', then it follows that such matters must be left 'to the state', that is, 'to the positive legislator'.<sup>54</sup> But this implies, as again Ross has noted, that justice in the formal sense 'cannot be a legal-political yardstick or an ultimate criterion by which a law can be judged'.<sup>55</sup>

Similar remarks might be made about the more specific principles of natural justice forbidding actions such as murder and theft. These principles also possess a formal character. They need to be given a specific interpretation or a definite content if they are to be applied in practice. It is Aristotle's view that this task be carried out by positive law. Under these circumstances it is evidently a logical impossibility for positive law to conflict with the requirements of natural law. Thus, here also, it is quite impossible for natural law to serve as a standard of measurement by means of which the justice or injustice of positive law might be evaluated.<sup>56</sup>

The peculiarity of Aristotle's doctrine of natural law, and of his understanding of the relationship which holds between natural law and positive law, appears not to have been noticed by most of the commentators who associate Aristotle's political thought with the natural law tradition. It *has*, however, been

<sup>54</sup> Kelsen, 'Aristotle's Doctrine of Justice', p. 133. See also, H. Kelsen, 'Natural Law Doctrine and Legal Positivism', in *A General Theory of Law and the State*, pp. 439–40.

<sup>55</sup> Ross, *On Law and Justice*, pp. 274, 280.

<sup>56</sup> See the discussion of 'formal conceptions of natural law' in Burns, *Natural Law and Political Ideology*, pp. 34–41.

noted by Kelsen, who maintains that Aristotle should not be considered to be a 'genuine' natural law theorist at all, precisely because he does not consider natural law to be a yardstick for the evaluation of positive law, and because, in Kelsen's view, such a belief is a necessary precondition for any genuine natural law theory. Kelsen points out, quite rightly, that for Aristotle 'natural law is simply a constituent part of the positive law of the state'. He also suggests, again correctly, that in Aristotle's view the principles of natural justice 'consist of those norms which are much the same in all legal orders'. However, Kelsen also goes on to point out that, under these circumstances, 'this so-called natural law cannot exercise the function essential to all natural law proper, of operating as a standard of evaluation for positive law'. Within Aristotle's system, Kelsen quite rightly insists, one *cannot* 'distinguish, by appeal to natural law, between a just and an unjust system of law'. Thus, Kelsen finally concludes, despite his employment of the term 'natural justice' Aristotle cannot be regarded as a 'genuine' natural law theorist in the strict sense. For he gives to the notion of natural law 'a meaning which is entirely otiose from the standpoint of a genuine natural law theory'. Aristotle employs the concept of natural law, or natural justice, 'only to vindicate positive law'.<sup>57</sup>

What is interesting about Kelsen's interpretation of Aristotle's views on natural law is that, throughout, Kelsen simply assumes quite unquestioningly that a system of political thought cannot be a genuine natural law theory if it denies that natural law is a standard for evaluating positive law. This assumption, which is certainly to be found in some natural law traditions but is entirely absent in others, is for Kelsen *definitive* of the very notions of 'natural law' and 'natural law theory' *per se*. It is precisely because he makes this unfounded assumption that Kelsen comes very close to making the contrary claim that, far from being a natural law theorist, Aristotle is in fact an early forerunner of the modern doctrine known as legal positivism, a doctrine to which Kelsen himself subscribes. Thus, according to Kelsen, it is Aristotle's view that 'positive law' and 'positive law alone' is 'just'. Hence 'positive law and justice coincide'. This amounts, in Kelsen's view, as it might be said to do in the case of all legal positivists, 'to an unconditional glorification of positive law'.<sup>58</sup>

Our own position with respect to this question is that Aristotle is neither a legal positivist nor a natural law theorist in the sense in which these notions are usually understood. Aristotle *is*, however, most definitely a natural law theorist in some sense, although the natural law theory to which he subscribes is one which most commentators today would consider to be of an unconventional type. For Aristotle does not subscribe to what, elsewhere, we have referred to as the stoic conception of natural law, which dominates the understanding most commentators today have of natural law and natural law theory.<sup>59</sup> As Kelsen

<sup>57</sup> Kelsen, 'The Foundations of the Theory of Natural Law', p. 132.

<sup>58</sup> *Ibid.*, p. 131; see also p. 127; and Kelsen, 'Aristotle's Doctrine of Justice', p. 126.

<sup>59</sup> Burns, *Natural Law and Political Ideology*, Ch. 1.



points out, Aristotle does not regard the principles of natural law as constituting some ideal standard of justice which individuals might use to critically evaluate positive law. We are, therefore, in complete agreement with F.D. Wormuth when he says that Aristotle ‘had no conception of a natural law which *annuls* positive law’.<sup>60</sup> This does not mean, however, as Kelsen wrongly suggests, that Aristotle is not a natural law theorist at all. All that it means is that there are important differences between Aristotelian natural law theory and stoic natural law theory. For Aristotle adheres to what may be termed a ‘formal’ conception of natural law. To employ the terminology associated with the different political ideologies, whereas Cicero and the stoic conception of natural law are the forerunners of the liberal natural law theory of modern times, Aristotle is the founding father of the *conservative* conception of natural law which is to be found in the writings of figures such as Montesquieu, Burke and Hegel.<sup>61</sup>

Given the central role which Aristotle’s discussion of the principle of equity has to play in Book V of the *Nicomachean Ethics*,<sup>62</sup> and given that Aristotle’s discussion of justice in the *Ethics* is a preliminary to his treatment of the same subject in the *Politics*,<sup>63</sup> the claim which we made earlier that for Aristotle the principle of equity is the fundamental principle of natural justice is actually of some considerable importance. In particular, this claim implies that Aristotle’s

<sup>60</sup> Wormuth, ‘Aristotle on Law’, p. 59; also pp. 46, 54–8. The view of Kelsen and Wormuth is shared by Yack, ‘Natural Right and Aristotle’s Understanding of Justice’, pp. 220, 234.

<sup>61</sup> I have discussed the role that the Aristotelian conception of natural law has to play in Hegel’s political thought, briefly, in Tony Burns, ‘Hegel and Natural Law Theory’, *Politics*, 15(1) (1995), pp. 27–32, and at greater length in Burns, *Natural Law and Political Ideology*, Chs. 2 and 4.

<sup>62</sup> In our view, Aristotle’s principal task throughout Book V of the *Nicomachean Ethics* is to *define* the concept of justice — which he does by relating this concept to that of equity. Book V, therefore, as del Vecchio has put it, contains Aristotle’s understanding of the concept of justice, as it is ‘generically understood’. That is to say, it contains an account of the concept of justice understood in its strictest sense, or ‘without qualification’ (*απλως δικαιον*, *haplos dikaion*). For this reading of Aristotle’s intentions see del Vecchio, *Justice*, p. 23; Gauthier and Jolif, in Aristotle, *L’Éthique à Nicomaque*, ed. R.A. Gauthier and J.Y. Jolif (4 vols., Louvain–Paris, 2nd edn., 1970), Vol. III, p. 385; Jackson, *The Fifth Book of the Nicomachean Ethics*, pp. xx, 100–4; W.L. Newman in *Aristotle: The Politics*, ed. W.L. Newman (4 vols., Oxford, 1881–1902), Vol. III, p. 192; Salomon Shellens, ‘Aristotle on Natural Law’, p. 89. Such a reading of Aristotle’s intentions implies that, although it may not appear so on the surface, Book V *does* actually possess, at least implicitly, some sort of underlying, coherent structure. For this hotly debated issue see Burnet, *The Ethics of Aristotle*, pp. 213, 217–24; del Vecchio, *Justice*, pp. 53, 68; Grant, *The Ethics of Aristotle*, Vol. II, pp. 108–12; Jackson, *The Fifth Book of the Nicomachean Ethics*, pp. xx, 76, 82–3 and 100–4; Gauthier and Jolif, *L’Éthique à Nicomaque*, Vol. III, pp. 369–73, 385; Ritchie, ‘Aristotle’s Sub-Divisions of Particular Justice’, p. 185; W.D. Ross, *Aristotle* (London, 1964), p. 212; Stewart, *Notes on the Nicomachean Ethics*, I, pp. 431–2.

<sup>63</sup> cf. Aristotle, *Politics*, ed. Barker, III, IX, 3, 1280a, p. 136; III, XII, 1, 1282b, p. 151.

brief discussion of natural justice in Chapter Seven of Book Five of the *Ethics* is of much greater significance for our understanding of his political thought as a whole than is usually supposed. It is therefore quite impossible for us to agree with R.G. Mulgan when he alleges that ‘the idea of natural law as such does not play an important role’ in Aristotle’s system of political thought.<sup>64</sup> Nor can we agree with D. Lloyd when he asserts that ‘the doctrine of natural justice’ played ‘little part in Aristotle’s *Ethics*’.<sup>65</sup> Nor, finally, can we agree with P.E. Sigmund when he insists that although ‘a conception of fundamental natural law or natural justice was present’ in Aristotle’s writings ‘it was not developed or integrated with the rest of his thought’.<sup>66</sup> All of these commentators have, in our opinion, misunderstood Aristotle’s views on natural law, and especially his view of the relationship which exists between natural law and positive law. Had they properly understood what Aristotle has to say about natural justice, legal justice and political justice in the *Ethics* they would not have been so quick to relegate the notion of natural law to the status of a footnote to Aristotle’s system of political thought as a whole — and an embarrassing footnote at that. When Aristotle’s position is properly understood, then the notion of natural justice or law is placed where it truly belongs, and where later scholastic natural law theory quite rightly places it, at the very heart of Aristotle’s political thought.

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<sup>64</sup> Mulgan, *Aristotle’s Political Theory*, p. 141.

<sup>65</sup> D. Lloyd, *Introduction to Jurisprudence* (London, 1959), p. 65, n. 54.

<sup>66</sup> Sigmund, *Natural Law in Political Thought*, p. 12.