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ARISTOTLE AND THE CONCEPT OF LAW¹

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'OCKHAM'S RAZOR', or what may be called the principle of homogeneity, is a widely used and recommended methodological device. It demands that the number of principles of explanation must not be unnecessarily increased, 'entia praeter necessitatem non sunt multiplicanda'. This 'principle of parsimony', as it has also appropriately been called, has contributed much towards unifying and simplifying explanations.

'Ockham's Razor' has an opposite which one might call the principle of specification. This was applied by Plato, Aristotle, Kant, and Schopenhauer; it is also prominently displayed in the works of contemporary philosophers such as Gilbert Ryle and Wittgenstein. The principle of specification requires that the number of different principles of explanation should not be unnecessarily limited. Kant's formulation of the principle is sufficiently relevant to be quoted here: 'It is of the utmost importance to *keep apart* forms of knowledge or truths which are distinguishable from others in kind and origin and carefully guard against confusing them with others with which in ordinary usage they are frequently combined'.² It is probably true to say that 'Ockham's Razor' is mentioned and applied more often than the principle of specification. One explanation is that, on the whole, we notice comprehensive syntheses or connections between things more readily than subtle differences or distinctions between them. None the less, throughout the changing history of thought, it has always been one of the main concerns of philosophers to draw lines between different categories of thought or different types of discourse. Schopenhauer hoped that the application of the principle of specification would lead to the greatest advance in philosophy.

¹Paper read to the Senior Political Theory Seminar, Manchester University.

²*Critique of Pure Reason*, in *Werke* (Akademie edition, Berlin, 1902, etc., second ed. 1940, etc.), vol. III, p. 544.

He employed it himself in connection with his explanation of what is known as the principle of sufficient reason, bringing into the open the four fundamental forms, the 'Fourfold Root', of this principle. In particular, he achieved a very clear distinction between logical reasons on the one hand and factual causes on the other.

As regards the concept of law there are, similarly, a variety of answers that can be given to the question 'What is the nature of law, and what does its binding force consist in?'. The question is capable of being answered in a variety of ways because it admits of a number of different senses. One might ask 'What is the necessary condition for the existence of a law?' or alternatively, 'What grounds are there for speaking of something as a law?'. Neither of these two questions should be confused with an endeavour to find the meaning of the word 'law', nor again with either part of the question 'On what grounds *do* people, or *ought* people to, obey a law?'. The questions Aristotle raised concerning law and the answers he offered are equally varied. Indeed, it is important to point out from the beginning that Aristotle's achievement, in this as in several other contexts of philosophical importance, was to have recognised the complexity of the problem involved. His answer to the questions under consideration was accordingly neither single¹ nor simple. As he was among the first, if not the first, to offer a many-sided analysis of the concept of law, we might profitably examine it here in detail. On the other hand, should his answer in part appear obscure or the result of a confusion, we can also benefit by avoiding these pitfalls.

My purpose then is to try and elucidate the concept of law by considering the pros and cons of Aristotle's views and particularly how in his eyes a law can be said to be valid and binding. As will be seen, Aristotle provides *different types* of answer to this question. These can be treated either separately from, and independently of, one another, or alternatively in conjunction and then be regarded as complementary to one another. I propose to select the second alternative and treat Aristotle's different answers to this basic question as though they were meant to buttress one another. There is an obvious difficulty if this approach is adopted. One might be tempted to treat the different answers as 'homogeneous', i.e. as though they entitled one to pass from one to the other for purposes of corroboration or inference. Any such passage would have to be examined critically and, if found to contain different *kinds* of concepts, principles, or questions, considered illegitimate. If the answers given correspond to different senses of the word 'law' or to different contexts in which the word may be or has been used, the

¹C. J. Friedrich, *The Philosophy of Law in Historical Perspective*, Chicago, 1958, p. 24.

answers must be on different logical levels, and they must have different logical forces and implications. A transition from one to the other would then become tantamount to a category-mistake or type-fallacy and it might accordingly engender paradoxes, inconsistencies, and all kinds of spurious problems.

No explicit or systematic exposition of the concept of law is to be found in any of Aristotle's works, and for my purpose I intend to collect the relevant passages from his various writings. If I am correct, there are altogether four headings under which his answers to the question 'what is the nature of law and the reason for its binding force?' can be conveniently grouped:

- (i) its General Nature;
- (ii) its Rationality;
- (iii) its Moral Nature;
- (iv) its Antiquity; Habits of Obedience.

In ancient Greece a number of additional answers were given to the question under consideration. The purpose of validation was served either by invoking an alleged decree on the part of a divine being or a legislator, or alternatively by reference to the fact that a law is there to prevent or correct wrong-doings or to represent the best of public opinion. For reasons of justification it was sometimes urged also that a law represents a general covenant among members of a political community, or alternatively what would amount to the general will. According to Aristotle none of these views is acceptable; in his eyes they are either irrelevant or involve the notion of liberty to a degree which would have appeared to him unjustifiable.

I. THE GENERAL NATURE OF LAW

What Aristotle would seem to have had in mind above all else here was something like the concept of an unwritten natural law.¹ He thought that there might be a law which applies to all men, in all places, and at all times, though perhaps not in all particular circumstances. In one passage² he speaks of 'absolute justice', and Ernest Barker³ comments that we may conjecture that this form of justice is absolute in the sense that it is not relative to any particular community. Absolute justice, therefore, is justice as between man and man *sub specie humanitatis*; as such, it is distinguishable from justice as between citizen and citizen, i.e. political justice.

Of course to speak of the general nature of law is to speak am-

¹*Rhetoric*, Bk. I, ch. x, para. 3; ch. xiii, para. 2; ch. xv, para. 6; *Nicomachean Ethics*, Bk. V, ch. vii.

²*Nicomachean Ethics*, Bk. V, ch. vi, 1134 a 26.

³*The Politics of Aristotle*, Oxford, 1946, p. 364.

biguously. I am not thinking here of the ambiguity that lies in the word 'law', i.e. the possible confusion between laws describing (not really 'governing') the uniformities or regularities of nature on the one hand (e.g. to use Aristotle's own example, fire burning alike in Greece and Persia, in the past and in the present)¹ and laws prescribing that men should conduct themselves in certain ways on the other. It is worth emphasising, however, that the latter confusion is largely due to the fact that believers in natural law in the moral sense have thought that what is *normative* of the proper conduct of men is as readily discoverable by observation and reasoning as what is *invariably* the case in the course of nature as formulated by scientific laws. The ambiguity I have in mind in the present context is that 'general' may mean, among other things, common, or universally applicable; it may mean unspecified, vague, or indistinct. Aristotle does not define his meaning clearly, though for the purpose of my analysis I think one can never stress the differences of meaning sufficiently.

The points which deserve attention are the following. Regardless of whether Aristotle failed to differentiate between the two meanings, or whether he had purposely in mind both or only one of them, either meaning is such that important corollaries may be derived from it. If by 'general' is meant applicable to all, a principle of universality is invoked which may serve as a basis of the claim for the universalisability of moral judgments. By the same token, the word 'general' may refer to the timeless present of certain immutable principles or the entities discussed in mathematics, or again anything for which validity without reference to date is claimed. 'General' might then mean universally or eternally true. For my present purpose I shall not distinguish further between these first slightly different meanings of 'general'. On the other hand, 'general' may mean that, as Aristotle puts it, 'the judgment of the legislator does not apply to a particular case, but is universal'.² If, as in this quotation, the word 'general' means indeterminate or vague, the significance of the notion of the generality of a rule of law lies in the presence of gaps in the area to which the rule applies or, put differently, the absence of details and qualifications in the formulation of the rule.

It should be noted that it is precisely for this reason that the definition of law as a *general* rule has often, if not always, recommended itself. The more general, in the second of my two senses, the formulation of a law, the vaguer it will be, and the more room there will also be for freedom in subjects. Even Hobbes could exclaim: 'where the law is silent, natural liberty reigns'. And Hegel, too,

¹*Nicomachean Ethics*, Bk. V, ch. vii, 1134 b 24-27.

²*Rhetoric*, Bk. I, ch. i, para. 7.

thought that in a modern state the determination of law should stop short at the general and leave scope for the choice of subjects in the particular means of its fulfilment. Thus if there is a law for the payment of debts or taxes and the schooling of each child, the specific form in which debts or taxes are paid or schooling takes place may be left to individual discretion. Again, suppose there were a rule of law enjoining that one should assist one's neighbours. Would it not depend on each individual's choice to determine what sort of assistance is implied in the command, whom one is to consider one's neighbours, or how often and in what form the precept is to be carried out? We might recall that on somewhat similar grounds,¹ i.e. as a result of his acceptance of law as a general rule, Locke introduced the notion of a prerogative, i.e. the right of the sovereign to issue special decrees. Laws formulated in general terms might indeed leave the way in which to deal with special occurrences or emergencies undetermined and hence call for initiative and *ad hoc* decisions on the part of a ruler. What is common to the three political thinkers I have mentioned is that, in their view, the condition of generality in the law is a pre-requisite for the exercise of liberty, either on the part of ruler or subject. Certainly in the case of traditional liberalism, one might appropriately define one of its aims as the attempt to limit the law by keeping it as generic or vaguely formulated as possible. As I have intimated, Aristotle was no liberal in the modern sense of the word; nevertheless, one of the seeds of the liberal tradition may be traced back to the implication of defining law as generic in the sense I have described.

It is possible to express Aristotle's more detailed views on the general nature of law in the form of three arguments, of which the first two are based very largely on my first meaning of the word 'general', while the third, the more interesting and important one, is based mainly on my second meaning of 'general'. All three arguments may be regarded as answers to doubts or objections advanced by an imaginary critic. The conclusion in the case of each is that, in spite of any possible exception, the general nature of law prevails as its most fundamental aspect or condition.

The first objection to Aristotle's doctrine might be to assert that a general law is sovereign only to the extent that it is 'rightly constituted', and that the latter qualification is the validating ground for certain patterns of behaviour required by the law to be in fact obligatory. I think Aristotle would have two answers to this objection. In the first place he would urge that the phrase 'rightly constituted' remains undefined except by reference to a common interest or the

¹Which ultimately can be traced back to Aristotle's *Nicomachean Ethics*, Bk. V, ch. x, 1137 b 27-29. Locke, *Second Treatise of Government*, paras. 156, 158, 159 ff.

legitimacy of certain claims—each being a criterion involving conditions of generality in some sense or other. Secondly, on his view, even though a law may depend on a constitution and would be binding not because of its general application but because of its constitutional basis, he would still wish to maintain that it is impossible to have a constitution consisting of special decrees. A real constitution, for him, consists of general rules. Hence again, generality appears as the basic element in the nature of law.

Secondly, a critic might urge against Aristotle that in certain particular cases, where there are no special pronouncements of law precisely on account of the fact that laws are formulated in general terms, personal rule (single or collective) should take its place and have a title to sovereignty. This argument was the special stock-in-trade of monarchists and, generally speaking, all those favouring personal initiative and discretionary powers of decision over and against the rule of law. Aristotle's reply to this objection was to emphasise that a general principle of one sort or another must be present even in the mind of a personal ruler. The concept of law as a general maxim thus remains basic and a pre-requisite of obligation.

Finally, and most importantly, as I shall show more fully later, Aristotle himself was the first to concede that, because of their generic form or vagueness, laws should be changed from time to time; that, especially in their unwritten form (which is bound to be inexact), they should be modified in the light of further experience of men's actions in particular circumstances, or by what Aristotle calls the principles of equity. By equity he means arbitration¹ or that kind of justice which corrects or alternatively supplements the generality of legal formulae and their disregard for the individual case or possible exception. The admission represents no inconsistency in Aristotle's thought. On the contrary, it presupposes a point of both subtlety and great importance. In the first place, principles of equity are valueless if introduced without a moral purpose or 'rhyme and reason', i.e. some general rule. Secondly—and here I perceive real insight on the part of Aristotle—the generality grounded in the very nature of law is as such not superseded or cancelled by the fact that there may be cases containing unforeseen circumstances in connection with which the law is silent. His point is that a general rule of law remains valid to the extent that the conditions to which it applies are general. Put differently, one might say that, though in exceptional cases a given rule of law may not necessarily apply, it does not follow that it thereby forfeits its basic claim to be observed in all other cases which obviously fall under it. There is a parallel here with the principle of equality—another very general and vague

¹*Rhetoric*, Bk. I, ch. xiii, para. 19.

rule. If a believer in equality concedes that there may be cases where an unequal treatment of men is reasonable, justifiable, or equitable, and therefore called for, for instance when old people are given benefits or a deserving person receives a reward, nobody would expect that such an admission must involve a rejection of the primary claim to equality.¹ Indeed, the issue under consideration may be formulated in an even more radical way. One might say that an exception to a general law *confirms* the law as an exception to a rule proves the rule.

The parallel I have in mind here is connected with an avoidance of the fallacy of accident or *secundum quid*.² This fallacy consists of the error of arguing from a general rule or statement taken without qualification to a special case or statement taken under certain qualifications. Examples of the fallacy are: 'He who thrusts a knife into another person should be punished; a surgeon in operating does so; therefore he should be punished'. Or, 'The deliberate taking of life is murder; soldiers in war deliberately take life; therefore they are murderers'. The fallacy is avoided if attention is paid to some obvious, though not explicitly stated, condition that renders the general rule or the statement taken without qualification inapplicable in certain exceptional cases. In the two examples cited, the exceptional cases are those of the surgeon and soldier, respectively. As Eaton explains, 'there are conditions understood, but not expressed, behind every rule; the exceptions make these conditions explicit'. The sense then in which the exception to a rule confirms the rule is that the exception exemplifies an implicitly understood limitation upon the applicability of an *otherwise* general rule. Similarly, a case of equitable inequality of treatment might be said to exemplify an implicitly understood limitation upon the applicability of the otherwise valid claim for equality and, in so doing, indirectly confirm the egalitarian claim.

Likewise, when in Aristotle's terms equity takes the place of the principle of justice which is embodied in a general law, the general law as such remains valid. 'Equity', as he puts it, 'covers a gap left uncovered by law proper'.³ Sometimes the gap in question is intentional, sometimes not. It is intentional when a legislator finds himself unable to make a rule (which fits all cases) exactly, but is nonetheless compelled to state a universal rule, applicable in a

¹See my paper 'On Justifying Inequality', *Political Studies*, vol. XI, February 1963.

²R. M. Eaton, *General Logic*, New York, 1931, pp. 343-4.

³*Rhetoric*, Bk. I, ch. xiii, paras. 12-13. For *prima facie* gaps in the law and its necessary universality of scope see J. Cohen and H. L. A. Hart, 'Theory and Definition in Jurisprudence', *Aristotelian Society*, Supp. Vol. XXIX, 1955, pp. 227, 253-4, 258 ff.

majority of cases. It is also intentional when the infinite number of possible cases makes it difficult for a legislator to lay down a definite and correct rule. For either of these alternatives the difficulty would be very largely that of exhaustively specifying possible exceptions in advance. Aristotle's own example here is that of the difficulty in making a definite rule for each size and shape of weapon that may possibly be used for wounding another person (note the resemblance between this and the example cited in illustration of the fallacy *secundum quid*). Hence, if a legislative rule to this effect is needed, a legislator, Aristotle considers, will have to express himself in 'unqualified' terms, i.e. he will speak of 'any instrument'. As a result, a man who is wearing a ring when he lifts his hand against another man, or actually strikes him, will present the judge with a dilemma. According to the letter of the law, Aristotle explains, the man is a wrongdoer liable to punishment; but in fact he has done no wrong. Equity, Aristotle concludes, is the way of dealing with this dilemma. It is a correction of the law where the law errs because of its generality. It affirms and brings into the open what the legislator himself *would* have ruled, 'had he foreseen that the case might arise'.¹ The implication again is that equity, by making explicit a qualification intended or understood, but not expressed, in the formulation of a general rule of law, rather than abolishing confirms this rule. While equity represents the 'better sort of justice', or the principle of justice in special and exceptional cases, where it is chiefly the emergence of new features or details which require justification, the universal rule of law remains 'by its very nature' the standard of *legal* justice, or at least another 'sort' of the just, whose merit precisely is to be unable to 'condescend upon particulars'. Thus it is perfectly consistent to define the equitable, as Aristotle does, as 'a correction of law where law is defective owing to its universality', and at the same time to urge, as he likewise does, that, although 'the law is aware that there is a possibility of error (i.e. in the exceptional case), the fault is not in the law nor in the framer of the law, but in its application, i.e. the law itself (as a general rule) remains correct'.

Aristotle makes some further observations concerning the law *qua* general which, though they have no special philosophical importance, explain how he can pass, to his own satisfaction, from speaking of the law as general to speaking of it as rational. He holds that part at least of what is meant by saying that a rule of law is general is that it is unaffected by the passions and personal animosities which sway people's minds and even those of a political ruler, a legislator, or a founder of cities. Hence, by being impersonal,

¹*Nicomachean Ethics*, Bk. V, ch. x, 1137 b 23-24.

a law could claim to be something objective and incorruptible, a neutral authority like Adam Smith's 'impartial spectator' or a Kantian regulative idea. In this capacity it might come to be regarded as a *rational* standard or a principle of reason.

II. THE RATIONAL NATURE OF LAW

This aspect, though clearly covered in Aristotle's scheme, is left disappointingly unsubstantiated. The conclusions that he (or followers of his position) would probably have wished to draw here are problematic precisely because of the underlying lack of detailed analysis. One such conclusion, for instance, would have been to say that reason can make discoveries, and if properly employed may lead to the discovery of principles of absolute or natural justice, and indeed one and the same set of such principles. Alternatively, an inference might have been drawn on the basis of the assumption that the conception of law as a law of reason implies that it is possible to justify the law rationally, and in fact that the validity of the law can be proved or shown to be necessary and universal in the same way as the validity of a geometrical demonstration or a logical deduction.

Altogether we find two kinds of argument in connection with Aristotle's view of law as rational.

In the first place he remarks that a rule of law, presumably both in its making and in its content, proceeds from impersonal moral prudence and understanding.¹ This may mean no more than that law involves a rational principle, or is reasonable and unaffected by desire. Aristotle would obviously have wished to be associated with the Platonic approach to ethics or the 'intellectualist' theory and definition of law, which is derived from the assumption that, in Bishop Butler's words, 'there is, in the nature of things, an original standard of right and wrong in actions, independent of all will, but which unalterably determines the will (even) of God'.² On the other hand, Aristotle refers to law as the rule of God and reason,³ thereby seeming to strike a compromise between the 'intellectualist' and 'voluntarist' conceptions of law. Throughout, however, he stresses that a rule of law is binding because of its rational nature and impersonal origin, which make its acceptance comparatively easy: unlike personal rule, it would not be regarded as 'burdensome' or a possible 'object of hatred'.

Secondly, in the *Politics*, Bk. VII, ch. iv, paras. 7 ff., Aristotle

¹*Nicomachean Ethics*, Bk. X, ch. ix, para. 12.

²*The Analogy of Religion*, Pt. II, ch. viii, sect. 25 (Gladstone's ed. of Butler's *Works*, 1896, vol. I, p. 368).

³*Politics*, Bk. III, ch. xvi, para. 5.

raises a point which he holds is confirmed by observation and which can also be established on the strength of philosophical grounds. 'Law', he says, 'is a system of order.' By 'order' he means some purposeful rational behaviour and in particular what some sociologists have referred to as functional organisation, or functional rationality.¹ He considers it essential that, in order to enforce a law as a system of order and to form a habit of obedience to it, there must be a general system of 'orderliness' in the *polis*. He maintains that a system of orderliness in the sense which his theory requires can be secured only if certain necessary conditions in the social and economic make-up of a city-state are satisfied. One of these conditions is a limited population, i.e. of less than, say, 100,000 citizens. By the same token, the population of citizens must not fall below, say, 10. Similarly, the territorial size of a *polis* must not be too large, nor too small. If it is too small, the principle of self-sufficiency, on which Aristotle places so much emphasis, cannot be secured. That is to say, only on the basis of a certain quantitative minimum and a certain functional relationship between ends and means can a political association become self-sufficient, i.e. live healthily, without privation, and with ends that are desirable. What Aristotle has in mind here is that a city-state should possess its own material resources and not depend on outside help; it should secure full employment and fulfil the needs of human development, moral and spiritual as well as material.

There is a parallel here between Aristotle's requirements for preventing an object from forfeiting its nature or otherwise becoming functionally defective and the principles of Minimum Space and Minimum Time laid down by Collingwood² as requirements for a 'functional' understanding of both history and natural science. Collingwood's point is that every event or fact requires a minimum, i.e. appropriate, amount of time in order to occur or exist. Just as only one person is needed for a game of patience, two people to make up a game of tennis or a quarrel, and three to play knaves or to give rise to a case of jealousy, so one might say that only one second is needed in order to see something or to feel pleasure, at least several seconds for a process of walking to materialise, a day or so to paint a picture, two months for learning to type, and a whole lifetime, at least on Aristotle's view, for achieving happiness.

Aristotle's other requirement for establishing a system of orderliness is that the *polis* must not be too large. If it is, it will become in some sense 'unwieldy', ceasing to be 'surveyable' or within the easy command of a general, as though the giving of orders presupposed

¹E.g. K. Mannheim, *Man and Society*, London, 1940, Part I, ch. v.

²*The Idea of Nature*, Oxford, 1945, pp. 17 ff.

being within earshot or having a stentorian voice.¹ Certainly, in a large community, spies and wrongdoers may readily escape detection and, most important of all, it will be difficult, if not impossible, to maintain a 'way of life', a true constitution, a genuine system of order. The upshot is that, in the absence of either form of order or orderliness i.e. self-sufficiency and a constitution, it will be difficult to enforce the law which is itself an order.

What is one to make of this argument, if it is an argument? As I see it, there are four possible ways of interpretation; of these only the fourth appears to me acceptable. Aristotle *may* mean that there is a correlation or equivalence between certain quantitative and material determinations on the one hand and certain qualitative and spiritual conditions on the other. If this is his meaning the correlation would in the last resort be one between factual statements such as are made in economics, geography, or science and value judgments concerning obligation as they arise in ethics, law, or politics. This correlation would be unacceptable to those who wish to draw a line between facts and norms, description and evaluation. Secondly, Aristotle may mean that to say 'if there is law and a general habit of obedience to law in a given community, then there is self-sufficiency and orderliness in that community' is to utter a tautology. However, it is clear that the statement quoted is in a logically different class from saying 'if this person is a brother, then this person is male'. In other words, one can accept the statement that law exists in a given community and deny that there is self-sufficiency or what Aristotle calls a system of orderliness in that community. Thirdly, Aristotle, like St Thomas after him, may have inferred the rule of law as an order by an analogy with nature and from something like the argument from unity: every multiplicity, in order to become one harmonious whole requires one unitary principle controlling or governing it, 'just as what is hot is best suited to heat things'.² The analogy is not compelling and, besides, involves reference to two different senses of 'unity' and 'oneness'—two very ambiguous phrases.

Finally, Aristotle may offer an analysis of the concept of law as a system of order. This may be illustrated from the case of analysing a concept such as anger. It has been suggested³ that this concept cannot be properly employed unless the following three necessary conditions are satisfied: a person other than the angered person; that person causing harm; and, in so doing, acting intentionally. In a similar sort of way, in his analysis of law as an order, Aristotle may distinguish a number of conditions which, in his view, are presupposed

¹*Politics*, Bk. VII, ch. iv, para. 11.

²Thomas Aquinas, *De regimine principum*, Bk. I, ch. ii.

³Cf. J. Cook Wilson, *Statement and Inference*, Oxford, 1926, vol. I, p. 328.

by the meaningful use of the word 'law'. He might say that, unless a state is self-sufficient and has a moderately sized population and a 'way of life', there can be no law as a system of order in that state, nor *a fortiori* a habit of obedience to such a law. I think, if we understand Aristotle's doctrine in this way, it becomes more intelligible than on any other interpretation; it also leaves scope for genuine argument. For instance, just as the meaningful use of the concept of anger might survive the elimination of one or other of what I have cited as necessary conditions for its application, so might it be still true to say that the concept of law as a system of order presupposes, among other things, the element of self-sufficiency, though not perhaps a limited size of population and territory.

III. THE MORAL NATURE OF LAW

From his notions of the sovereign rule of law as a rational principle and as a system of order Aristotle would have thought it easy to pass on to the idea that law has a moral purpose: it is to make men good and righteous, above all to serve the common interest.

The transition is tempting, especially because the term 'rational' can itself be used as a normative term. In some sense it would be odd to say that 'the rational thing for you to do is to do X, but you ought not to do X'. On the other hand, one of the difficulties in traditional doctrines of a natural moral law as a law of reason was the equation of moral values with rational validity and some sort of rational insight. And it is indeed difficult not to affirm that neither human reason nor any process of rational justification can be regarded as a self-depending source of moral obligation.

The issue to which I propose to confine myself here is that of clarifying the sense in which Aristotle was a natural-law theorist and *not* a legal positivist. If, to quote Professor H. L. A. Hart,¹ we understand by legal positivism 'the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality', Aristotle can, on the whole, be shown to advocate the opposite of such a contention. A few examples may illustrate this. Aristotle considers that there can be no law which runs contrary to a person who is pre-eminently superior in goodness, 'like a god among men'.² In his view, such a person cannot be considered part of the state because he would be a law to himself. I think Aristotle would regard the words 'can' and 'cannot' in the last two sentences not merely as expressions of a matter-of-fact truth but as having the force of a logical truth. Elsewhere Aristotle distinguishes between two senses

¹*The Concept of Law*, Oxford, 1961, p. 181.

²*Politics*, Bk. III, ch. xiii, paras. 13-14.

of the phrase 'rule of law'.¹ One is where obedience is expected to such laws as have been enacted; another where obedience is to laws which have been *well* enacted. Since it is possible to pay obedience to badly enacted laws, it is clear where Aristotle's preference in this matter lies. Similarly, among well enacted laws some are the best possible *for the men obeying them*, while others are absolutely the best. Again it is obvious that Aristotle's preference is for laws which are generally and absolutely the best. His reason would be that the concept of law implies justice, moral purpose, and finally general validity, all of which differ from mere rational self-interest. In one passage,² in fact, Aristotle expressly states that the better a man is the more he must use and stand fast by unwritten laws which he equates with the unchanging, universal law of nature.

The sense, then, in which on Aristotle's view there is *no* necessary connection between law and morality is that it is possible to make morally iniquitous laws and that there may be an ensuing conflict between obedience to bad legal rules and the basic requirements of justice and morality. Furthermore, one might argue independently of Aristotle that, though justice is a very important part of morality, it is possible to speak of it, in a legal context, regardless of moral values or ethical concepts. Compulsory school education, national insurance, may be justified in accordance with principles of distributive justice, without introducing any of the specific common criteria of moral evaluation, except perhaps such vague notions as the 'public interest' or the 'common good'. Finally, a case can be made out for drawing hard and fast lines of demarcation between legal rules and legal obligation on the one hand, and moral rules and moral obligation on the other. Though there may be, at all times and places, a partial overlap in content and terminology between morals and the law, the distinction between them is not unlike that between 'internal' factors such as motives, voluntariness, conscience, guilt, or remorse, and deliberate acts of legislation or threats of physical penalties for breaches of the law.³ In all other respects, it must be admitted, there are important relations between morality and the law: hence Aristotle was no doubt entitled to regard the two as partially coextensive. However, the question whether a legally valid system must *necessarily* conform to certain demands of morality requires careful scrutiny and remains an open issue. Perhaps the most that can be said, if one were to answer the question affirmatively, is that providing traditional natural-law theorists lower their sights, reformulate their theories unambiguously and in secular

¹*Politics*, Bk. IV, ch. viii, para. 6.

²*Rhetoric*, Bk. I, ch. xv, para. 8; cf. also ch. xiv, para. 7.

³For details see H. L. A. Hart, *The Concept of Law*, pp. 168 ff.

terms, with a minimum of content and claims, the more chance there is of showing that law and morality have of necessity some elementary truths and some basic rules of obligation in common.

IV. THE ANTIQUITY OF LAW: HABITS OF OBEDIENCE

Finally, there is a strong emphasis in Aristotle's doctrine on the mode of origin of laws and on habit as a basis for validating a law: 'Law derives its validity from habit upon which obedience is founded. But habit can be created only by the passage of time.'¹

There is such a thing as 'customary morality', and, besides Aristotle, philosophers like Hume and Burke have argued that on certain grounds what is traditional can be held to be in itself morally good. Customary morality is largely identical with habitual behaviour in a social group. And just as custom originally constituted something sacred and its rules accordingly had coercive power, so does habit in some sense constitute a binding force. Part of what is meant by saying that both customary and habitual forms of behaviour correspond to rules with a compelling force behind them is that deviations from uniform group habits might meet with disapproval, social pressure for conformity, and indeed outright hostility. International law is in part customary, and some of the sanctions behind it are also ultimately based on the likelihood of organised hostile reaction to deviation. If one wishes to distinguish between habit and custom, one might do so by regarding habit as an embodiment of popular opinion in a given place and during a particular period of time; by contrast, custom would represent something more elemental or 'natural' and which would also be more universal, both in a geographical and historical sense. English Common Law, as interpreted by Sir Edward Coke in his controversy with James I and Francis Bacon, is a clear example of how a whole body of law can be assumed to be grounded in custom and tradition, 'refined and perfected by all the wisest men in former succession of ages, and proved and approved by continual experience'.² The fundamental importance of common law in Coke's view lay in its ability to limit decisively the king's authority and even that of parliament as the chief legislative power. And he thought that some at least of the authoritative nature and compelling force of common law resided in the fact that it was 'given' and 'cannot but with great hazard and danger be altered and changed'. These illustrations and comments may show that Aristotle's notions of the antiquity and customary nature of law describe an important aspect of the subject-matter under consideration. However, as we shall see, his doctrine falls quite

¹*Politics*, Bk. II, ch. viii, para. 24.

²*Institutes of the Laws of England*, 1628, Bk. IV, Introductory Essay.

justifiably into two parts, one in favour of tradition and customary rules of law, the other in defence of progress and changes in the law.

On the one hand, Aristotle regards laws resting on unwritten custom as more sovereign than written rules of law; he also thinks that the former are concerned with issues of greater importance.¹ Besides, in his view, there is nothing to be gained from the best of laws, unless one can ensure the stability of a constitution and accordingly educate citizens, by force of habit, in the right constitutional temper.² It follows that (a) in order to form habits, one has to presuppose fairly long periods of time; and (b) a customary rule of law presupposes that this law has existed unchanged ever since some remote time. Habit formation certainly occupies a decisive place in Aristotle's theory of education. He regarded it as something like 'second nature', placing it between reason and nature as the three factors which make men virtuous. Thus according to Aristotle, the function of laws is to inculcate habits which in their turn enable men to become virtuous. Alternatively, one might say that, in order to achieve their effect, laws presuppose a process of habituation from which they derive their power to command obedience. In either case, a change in law, for whatever reasons, must constitute a blemish and certainly a risk: it might lead to a weakening of the general power of the law.

On the other hand, in a progressive frame of mind, Aristotle realises that customs express human desires and, if the latter change, may have to be altered by an *ad hoc* decision.³ In fact, he admits that customs *develop* in proportion as a political community develops towards its natural 'form'. Changes in the law might thus be required, and they would be natural and binding just as successive stages of development in any organism represent something natural and, in a sense, normative. Besides, both written and unwritten laws may not be sufficiently determinate for application in every new case or matter of detail: 'rules must be expressed in general terms, but actions are concerned with particulars'. Hence, qualifications and modifications of the law are sometimes necessary in the light of men's further experience, changing circumstances, and also, as we have seen earlier, in order to do justice to the claims of equity. Aristotle also has in mind the constant need to prepare for changes brought about by circumstances which are beyond human control and to which, when they occur, one has to adjust oneself as quickly as possible.

The merits of Aristotle's 'traditionalist' attitude lie in (i) the recognition that some rules of law, in almost every legal system,

¹*Politics*, Bk. III, ch. xvi, para. 9.

²*Politics*, Bk. V, ch. ix, paras. 11-12.

³*Politics*, Bk. II, ch. viii, paras. 16 ff.

originate in custom. The fact he has in mind is that certain defined kinds of customary rule may appear as 'reasonable' and chiefly in this sense as binding, either independently of, or following, a decision that they should have the status of law. Alternatively, what he is considering is that a statute law may explicitly deprive a customary rule of its previous legal status. (ii) He recognised that not all laws are necessarily enacted, nor that they are all the expression of a conscious act or thought. (iii) He had arrived at the justifiable notion of a *habit* of obedience on the part of legal subjects and of the resulting continuity of both laws and the law-making power.

The shortcomings of Aristotle's 'traditionalist' attitude, or alternatively the merits of his 'progressive' attitude towards the question concerning the role of habit *versus* the policy of changing laws, are at least two. He realised that habits are not in themselves normative nor traditions self-justifying; that therefore neither constitutes obligations or confers rights. If, then, habitual regularities of behaviour are not necessarily standards of correct or virtuous conduct the way is open, at least on certain occasions, for justifying the elimination of old rules of conduct and the adoption of new ones. Secondly, the assumption that standards of morality or law are either universally valid or permanent is difficult to substantiate. We are all aware that the different social, cultural, or religious backgrounds of the members of a particular community can give rise to different ethical standards within that community at any given time (e.g. in connection with such issues as divorce or capital punishment). Similarly, if moral needs should change from one generation to another, must this not bring about a diversity of outlook and, consequently, the substitution of new law for old? As Messrs Benn and Peters observe,¹ some traditionalists like Edmund Burke thought that the very survival of an order is evidence that it satisfies a nation's moral needs. But suppose that these moral needs fail to be satisfied. Surely, on Burke's own premises, this should be sufficient grounds for concluding that a change in a given legal order is essential.

V. SUMMARY AND CONCLUSION

These then are the four main strands in Aristotle's thought concerning the law, or in other words, the four elements he might have distinguished in his conception of law. The analysis I have attempted seems to me to reflect both Aristotle's view of the complex nature of law and also what he would look upon as the different grounds for its validity. I think that the several elements in his doctrine are fundamentally independent of one another, and similarly that they do not compete with one another since they embody answers to different

¹*Social Principles and the Democratic State*, London, 1959, p. 62.

questions concerning law. Also the recurrent theme of my own comments has been the assumption that 'law' is a complex term, comprising in its application a number of different definitions concerning rules and validity, authority and obligation, sources of law, and the like. In my opinion it is the merit of Aristotle's conception of law that he appears to recognise the multiple meaning of the word 'law' and, accordingly, the need for a multiple definition.

There are, however, a number of issues which Aristotle's doctrine of law leaves unsatisfactorily vague. To the extent that he advanced, in a rudimentary form, the notion of law as general and rational, he can be held responsible for some of the confusions inherent in the concept of a law of nature.¹ Some of the terms he uses, such as the words 'general', 'universal', and 'rational', are clearly ambiguous. His views on the law as general, i.e. indeterminate, are undoubtedly important. On the other hand, the possible fusion of different meanings of words like 'general' or 'rational' and the possible transition from one *kind* of discourse to another which such a fusion invites constitute a trap for the unwary. For instance, does 'rational', if applied to law, mean that the contents of the law are discoverable by reason, or alternatively are demonstrable by reason, or again that the law embodies a set of timeless truths and values? Aristotle might have accepted one or the other, possibly all three of these different meanings, though none of them, I believe, would be altogether acceptable to anyone today.

Moreover, the discovery of a rational or uniform pattern of human behaviour and the description of resistance to deviations from such a uniformity of conduct do not in themselves indicate the existence of an over-all prescriptive 'law of nature'. Besides, Aristotle at times failed to distinguish clearly between logical proof and the necessitation associated with moral obligation. Similarly, there is a crucial difference between the conclusion of a chain of mathematical reasoning and a legal decision arrived at according to a rule and in the light of certain evidence. Even if it is assumed that there are some rules of either law or ethics which are axiomatic, i.e. supply a general criterion of all legal or moral duties, it is by no means obvious that these would be axiomatic in the same sense as principles in mathematics. But there is not only failure on Aristotle's part to distinguish clearly between descriptive and prescriptive laws and between logical validity and moral value. He also tends to blur the distinction between legal validity and moral value and to assimilate legal to moral rules. Yet to ask the moral question 'Why ought people to

¹See for details my *John Locke: Essays on the Law of Nature*, Oxford, 1954, pp. 44 ff.; and 'John Locke and Natural Law', *Philosophy*, vol. XXXI, January 1956, pp. 27 ff.

obey the law?' is different from asking 'What conditions must be satisfied for a rule to be a valid part of a legal system?'¹ Furthermore, both these questions are logically independent of the question 'Is the chief motive for obeying a law the fear of its coercive sanctions?' It would be yet another confusion to say that the validity of law is the same as its 'efficacy', i.e. the fact that either a legal order as a whole or a particular rule within that order is obeyed more often than not.² And finally, an assertion of legal validity is not the same as to predict the enforcement of a given system of law or that penalties will follow non-observance of any of its rules.

As regards Aristotle's doctrine of the desirability for ancient and stable laws and the need for habits of obedience on the one hand, and the reasons for modifying or altogether replacing customary or too generic rules of law by new laws or by principles of equity on the other, it is clear that his thoughts, if *combined*, have much to recommend them. They have provided the basis for what is sometimes referred to as 'a theory of natural law with variable content'. Such a theory would incorporate rules that are general but not static in meaning and therefore variously applicable under different conditions. Similarly, though these rules may perhaps be in some sense discoverable by reason, they would allow for further detailed reflection and a wide exercise of discretion even to the point of a possible repeal of their validity in certain specified cases. To make provision for such a body of rules would make the notion of development of, or within, a legal system not only possible but justifiable. To say, however, that changes in the law are characteristic of the law and can as such be described, explained, appreciated, and even justified is one thing. To say that they embody norms prescribing what men ought to be like or do is another, very different thing. With his teleology, particularly his assimilation of politics and law to moral purpose, Aristotle would have wished to urge the importance of the prescriptive aspect of this issue. On the other hand, the difference between the two kinds of statement involved here would have been for him almost non-existent. For this and the other reasons I have mentioned one might wish once more to part company with Aristotle, in spite of the relevance of some of his remarks about the justifiability of substituting new law for old.

Throughout his discussion Aristotle rightly conforms to the principle of specification or, in Locke's words, 'distinctly weighs' some of the aspects that constitute the multiple meaning of 'law'. But then, after construing the word as a general principle, certified by reason, and associated with moral purpose and custom, he allows

¹Cf. S. I. Benn and R. S. Peters, *Social Principles and the Democratic State*, p. 72.

²H. L. A. Hart, *The Concept of Law*, pp. 100, 247.

these diverse aspects to merge with each other. As I have tried to show, this is as fallacious as to maintain that, if one of the different ways of construing the word is accepted, this necessarily entails rejecting the others. Just as each meaning of the word can live and survive in its own context, separately from the rest, none is more 'essential' than any other. In fact, Aristotle's different analyses of 'law', in modern perspective, neither exclude nor alternatively imply each other. Whatever their merits or shortcomings, this is probably the chief moral to be drawn by us today.

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