Medieval Philosophy and Theology **9** (2000), 1–14. Printed in the United States of America.

The Discovery of a Normative Theory of Justice in Medieval Philosophy: On the Reception and Further Development of Aristotle's Theory of Justice by St. Thomas Aquinas

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Aristotle earns the distinction of having put forward the first comprehensive philosophical theory of justice. After the end of the antique world, St. Thomas Aquinas was the first philosopher and theologian to return to Aristotle's theory of the just. Not only did he do so with the requisite systematic precision; he also developed a new philosophical interpretation of justice. In the present article I shall outline, with the brevity expected of me here, the fundamentals of Aristotle's theory of justice. This will be followed by a summary of the core aspects of Aquinas's notion of justice, whose grounding in normative reason will be identified in Aquinas's treatise on law and political theory, and explicated accordingly.

I.

Aristotle's theory of justice had its precursors; there were interpretations of the just in Greek literature, rhetoric, and politics, as well as philosophy, to which Aristotle also makes explicit reference on a number of occasions. Aristotle, however, is the first to formulate a *comprehensive* theory of justice. To understand Aristotle's theory, we must turn to Book 5 of the *Nicomachean Ethics*.[1] Here, Aristotle first distinguishes between a type of justice that he interprets as "complete" and at the same time as "complete virtue" or "virtue entire," and a type of justice which is to be understood as "part of virtue."

1. Aristotle, *Nicomachean Ethics [EN]*, Book 5, 1129a3–1138b15.

This notion of justice as a particular virtue is further broken down by Aristotle into the categories that became common in the later interpretative tradition of "distributive justice" (*iustitia distributiva*), and "rectificatory justice," which only later was termed *iustitia commutativa*, that is, "commutative justice." The latter occurs either in the form of justice in the voluntary exchange of goods and services, and thus represents the sphere of civil law, or in the form of involuntary creation of just conditions through criminal law, which includes the institution of the judge. These conceptual distinctions within the notion of justice as a particular virtue possess systematic clarity, which is why they also had a sustained impact on the later jurisprudential and legal debates on the nature of justice.

Having said this, the reader's powers of comprehension are somewhat taxed by Aristotle's assertion that justice is also "complete virtue" or "virtue entire." In Book 5 of the *Nicomachean Ethics*, it is unclear how Aristotle might relate the general virtue of justice to the particular virtues of justice and the other ethical virtues. It is widely accepted that the concepts of *iustitia universalis* or *iustitia generalis* can be traced back within the Aristotelian tradition to the claim that justice should be understood as "complete virtue." Günther Bien has rightly noted that Aristotle does not distinguish between a general and a particular "justice"; rather, he asserts that "justice" should be considered on the one hand as "virtue in the fullest sense" or as "complete virtue," yet on the other hand as merely a part of virtue.[2] Seen in this context, the later discourse incorporating the categories of a general justice and a particular justice is misleading, at least with respect to the conceptual categories introduced by Aristotle. Inferences can also be drawn from such discourse that are very difficult indeed to reconcile with Aristotle's proposal.

Consequently, Aristotle's interpretation of justice as an ethical virtue is of fundamental importance for his theory of justice. It was developed later than the Pythagorean and Platonic doctrine of the so-called four cardinal virtues. When introducing the four cardinal virtues in *The Republic* for instance, Plato assigns the highest status to justice: While the virtues of wisdom, courage, and temperance are assigned to the three principles of the soul, and to the three hierarchically stratified classes acting in the ideal state, the virtue of justice enjoys the highest status because it underpins the other virtues; yet Plato defines "justice" per se only in very general terms as "doing one's own business and not being a busybody."[3] Aristotle evidently does not share this understanding of the concept of justice although he does, as we have seen, adhere for his own part to a definition of justice as the most complete, in other words as the supreme virtue. "Justice" as a virtue is a disposition to act justly or a habit (a *hexis* or a *habitus*) of so doing

2. Günther Bien, *Gerechtigkeit bei Aristoteles*, in O. Höffe (Hg.), *Aristoteles—Die Nikomachische Ethik*, Klassiker Auslegen, Band 2 (Berlin: Akademie Verlag, 1995), p. 139.

3. Plato, *The Republic* IV, 427e.

which a person does not already posses as a natural attribute, but must first of all acquire. Yet the virtue of justice is "complete" because, as Aristotle says, "he who possesses it can exercise his virtue not only in himself but toward his neighbor also."[4]

So "justice" means "complete virtue in the fullest sense" when its referent is construed as encompassing not only a potential or disposition to act justly, but also the exercise of virtue temporalized in the historic performance of just actions towards other persons. Otfried Höffe has pointed out that Aristotle appears already to assign to justice as a general virtue the nature of a required virtuous act on which "another" holds a (legitimate) claim.[5] In doing so, however, Höffe assumes that the description of justice as "another's good" that Aristotle uses in this context possesses obligatory force.[6] Aristotle's text does not bear out this assumption unequivocally; Höffe's ascription of obligatory force probably has its origin in traditional readings of Aristotle that construe his ethics in the light of later Stoic, Thomist, or Kantian moral philosophy.

It is indisputable that the reference to "another's good" as the end of the virtue of justice emphasizes the aspect of benefit to another, thus introducing to the general virtue of justice a dimension of "objective" normativity. This is also reflected in Aristotle's terminology: The general or "objective" normative end of acts motivated by the virtue of justice, that is, the telos of justice as a virtue, is termed by Aristotle "the just," rendered normative on intersubjective grounds. Having said that, Aristotle considers it easier to define the "just" once the contours of its contrary, the "unjust," have been identified more precisely. As in many other texts, Aristotle approaches the conceptual definition he is seeking by first observing common everyday parlance and usage.[7] Thus according to Aristotle, generally speaking we describe as unjust persons first of all the "lawless," secondly the "grasping," and thirdly the "unfair." From this usage, Aristotle infers his definition of the "just" as the intentional end of actions motivated by the general virtue of justice: "The just, then, is the lawful and the fair, the unjust the unlawful and the unfair."[8] The general virtue of justice is thus to be defined as the capacity and the will to do the just, (the lawful and the fair)[9] whereas its contrary, the vice of injustice, is to be understood as a habit by force of which a person does the unjust (the unlawful and the unfair, and intenionally so.)[10] In equating the just with the lawful and the fair, Aristotle further concludes that "all lawful acts are in a sense just acts," in which context his basic definition of "lawful acts" is acts that are "laid down by the legislative art." In his *Politics*, Aristotle goes so far as to describe each

4. *EN*, 1129b32–34.
5. O. Höffe, *Aristoteles* (Munich, 1996), p. 226.
6. *EN*, 1130a3.
7. *EN*, 1128a25ff.
8. *EN*, 1128a34–1128b1.
9. *EN*, 1128a–1128a6–10.
10. *EN*, 1121b11–14.

individual item of legislation as "just," insofar as it complies with and is conducive to the respective constitution and its end.[11]

Aristotle makes it clear that what is thus declared to be "just," and as such also to be the end of endeavors directed toward justice, not arbitrary. Aristotle points out that while the laws of the state may relate to anything, their aim is to support the end of the respective political order: either to foster the common good of a political community or to increase benefits for the aristocracy or benefits for the respective monarch. Evidently, Aristotle is referring here to the doctrine set out in Book 5 of *Politics* on the various state constitutions of democracy, aristocracy, and monarchy. Whereas Aristotle defines justice in Book 1 of *Politics* as an element of the state and judicial procedure as the power to judge what is "just" in specific instances,[12] in the context of his theory of justice in Book 5 of *Nicomachean Ethics* he defines the just, which constitutes the end of acts motivated by the virtue of justice, as that which produces and preserves happiness and its components for the political society, or sections thereof.[13]

When defining the aim of the general virtue of justice, the "just," Aristotle without a doubt accords priority to the "lawful" over the "fair." According to Aristotle, the "fair" is to the "lawful" as a part is to the whole.[14] This ascribed priority is cognate with the primacy of the general virtue of justice, which embraces the entire sphere of a person's attitudes toward other people, whereas the particular virtue of justice relates only to specific instances of acts of virtue. The salient examples of this are voluntary transactions, the distribution of "honor or money or the other things" in the political society, and criminal jurisdiction.[15] In this context, the notion of the "fair"—equated by Aristotle with the "equal"—is constantly in play. This results in the definition of right or just, understood within the conceptual framework of the particular virtue of justice, as the quantifiable "intermediate" between competing claims of the concerned persons, be it according to the mathematical principle of arithmetic proportionality as in the case of "rectificatory" or "commutative justice," or be it in accordance with the principle of geometric proportionality as in the case of "distributive justice."

In subordinating the particular to the general virtue of justice, and the criterion of the fair (or equal) to that of the lawful, Aristotle reaches the crux of his theory of justice. He not only claims that all cases involving the particular virtue of justice are in principle subject to legal regulation; he also defines the just, which is the quintessential aim of the general virtue of justice, solely in terms of its formal legality and its function. The latter consists in serving the particular political society and its ends, regardless of whether that means an autocracy, aristocratic rule, or rule by

11. Cf. Aristotle, *Politics*, 1301a17–1316b26.
12. Aristotle, *Politics*, 1253a35ff.
13. Cf. *EN*, 1129b17–19.
14. *EN*, 1130b10–20.
15. *EN*, 1130b30ff.

the *demos* or "populace." Aristotle does not infer from the general virtue of justice any normative force attached to the system of the "just." Apart from defining the just in terms of its formal legality and its function of serving the well-being of the respective form of rule, Aristotle does not specify any further aspects that might justify the distinction between "legality" and "legitimacy," a constitutive distinction in later conceptions of the just. Although it performs the function of linking all the individual virtues with the sphere of the political and the legal, the general virtue of justice does not provide any normative criterion on which Aristotle might base a distinction between "legality" and "legitimacy." Aristotle's particular virtue of justice does contain an element, albeit a weak one, of the "reasonable" normativity of the just, that is, the normativity of the proportionately equal. Yet due to its subordination to the general virtue of justice "like a part to the whole," it does not acquire any general normativity for the legal system as a whole; it remains particular, related to particular cases negotiated in the specific context of civil and criminal law. Neither does the concept of the "just by nature" as opposed to the law of the state positively defined "by human enactment," which Aristotle introduces in Chapter 10 of Book 5 of the *Nicomachean Ethics,* contain any indication of a normative account of the just.[16] Because unlike the natural phenomenon of fire, which burns in the same way no matter where, the "just by nature" is experienced only subjectively and is subjectively variable, but does not constitute a norm or a rule that might operate as a general yardstick for critique of a legal or constitutional system.

II.

In the second part of his *Summa Theologiae,* Aquinas puts forward an analysis of the concepts of "right" and "justice."[17] This follows his treatment of the theological virtues of "faith, hope, and charity," and can be considered the most sophisticated discussion of the concept of justice in the thirteenth century. Aquinas's exposition is evidently strongly influenced by the precedents set by Aristotle in Book 5 of the *Nicomachean Ethics.* Yet Aquinas does not confine himself to providing a commentary on Aristotle's text; on the contrary, he systematically develops Aristotle's contribution to the philosophical analysis of the notion of justice, and in so doing makes a key contribution to the formulation of a new paradigm—a normative theory of justice.

As the works of O. Lottin on the development of practical philosophy in the Middle Ages have shown, a fresh debate on the issue of justice had

16. *EN*, 1134b18–1135a5.

17. St. Thomas Aquinas, *Summa Theologiae [ST]* II–II, q.57 and q.58 ff.; see also from the perspective of legal history: John Finnis, *Aquinas, Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), esp. pp. 132–218.

already commenced in the twelfth century prior to, and therefore independently of, the Latin reception of Aristotle's texts of practical philosophy.[18] Characteristic of the earlier medieval treatment of justice was the establishment of a link between the doctrine of the cardinal virtues formulated by classical philosophy, coupled with Cicero's interpretation of justice, and the general biblical discourse of God's justice and the New Testament message of the justification of humankind.[19] This approach focused less on the forensic aspect of the notion of justice, and more on the soteriological issue of justification. The Venerable Bede, for instance, speaks of the virtue of justice as an attitude that leads people to act morally, but incorporates this into a theological panorama of the human being in which he systematically interprets the four cardinal virtues in terms of the three theological virtues of "faith, hope, and charity."[20] Rabanus Maurus employs the metaphor of the Holy Cross, to whose four points he assigns the cardinal virtues in expression of the fact that the force of God's soteriological agency is also at work in the ethical virtues.[21]

In the twelfth century, it is Peter Abelard, who accords inherent significance to the virtue of justice independently of the theological virtues, for instance, in his reception of the notion of justice taken from Cicero's Stoic ethics, contained in his *Dialogus inter Philosophum, Judaeum et Christianum.*[22] In contrast to earlier interpretations of justice, Abelard stresses that justice, like the other virtues, may only be sought as an end in itself, and not as a means to another end. This marks the formulation of the philosophically and theologically founded insight that human morality is an end in itself, and may not simply be interpreted as a path to salvation. As Abelard emphasizes, this does not exclude the notion of a person who acts morally being rewarded. What in Abelard's view is crucial, however, is that a person only acts truly morally when s/he acts solely in pursuit of virtue as an end in itself, without any intention of seeking reward. According to Abelard, happiness or everlasting bliss is bestowed on a person as a reward for a life lived in the spirit of justice as a virtue, subject to the proviso that the individual has firmly intended to be just, that is, to possess the virtue of justice as an end in itself and not as a means to another end.[23] In developing this argument, Abelard draws on a constitutive distinction in ethical reflection, which crops up again, for instance,

18. O. Lottin, "Le concept de justice chez les théologiens du moyen âge avant l'introduction d'Aristote," *Revue Thomiste* (1938): 511–21; Lottin, *Psychologie et morale aux XII et XIII siècle* (Gembloux/Louvain, 1942–1960).

19. Cf. Cicero, *De officiis* I, (7) 20, hg. v. K. Büchner (Munich/Zurich: Artemis Verlag, 1987), p. 19.

20. Cf. Beda Venerabilis, *De tabernaculo* III, 14, in: *Patrologia Latina* 91, 772.

21. Rabanus Maurus, *De laudibus crucis* II, 6, in: *Patrologia Latina* 107, 271.

22. Petrus Abaelardus, *Dialogus inter Philosophum, Judaeum et Christianum*, ed. R. Thomas (Stuttgart/Bad Cannstadt: Fromman Holzboog Verlag, 1970).

23. Abaelardus, *Dialogus*, 105 f and 117–25.

in Kant's distinction between acting in accordance with what duty commands, and acting/doing from duty.[24] In the wake of this recognition of the inherent value of the moral, and especially the moral frame of mind or intent, as introduced by Abelard and his school, a bifurcation emerges between the specifically theological, and the philosophical ethical treatment of the theme of justice. The assumption cannot be dismissed that this development is also a result of the emergence of a sphere of "earthly justice," which Harold Berman's study on the emergence of modern legal systems has interpreted as an implication of, and response to, the Gregorian reforms of the eleventh century.[25]

Aquinas too, like Aristotle before him, sees justice as an ethical virtue. A habit of the individual who possesses it, it is at the same time the "principle of a good act" at work within him/her.[26] But because in Aquinas's view an act gains the moral quality of the good "through attaining the rule of reason, which is the rule whereby human acts are regulated," the role of moral virtue can be characterized more precisely in this sense of the requisite attainment of the rule of practical reason with reference to the principle directing an agent's actions.[27] Aquinas assigns this task to the virtue of justice. The task is to "regulate" or "direct" a person's external actions in compliance with reason, where those actions relate to other persons. As Aquinas already explains in q.57, a.1, which is devoted to "right" (*ius*), this regulatory function of the virtue of justice consists in "adjusting" or bringing about "some kind of equality" (*aequalitas quaedam*) between the agents and the objects involved in the external exchange.[28] Thus Aquinas's basic definition of the role of justice as one of regulation to establish right consists in a directive attitude or habit on the part of intersubjective agents, directing them to perform acts of "right justice" in compliance with their recognition of the criterion of equality or adjustment. Aquinas thus makes unmistakably clear that for him, unlike for Aristotle, the fundamental provisions of the legal system are not simply already given on the basis of the respective form of rule or political con-

24. Cf. I. Kant, *Grounding for the Metaphysis of Morals*, Trans. James W. Ellington (Indianapolis: Hackett Publishing Company, 1993), BA 8. Concerning a comparison between the ethics of Abelard and Kant, see my essay "Modern Aspects of Peter Abelard's Philosophical Ethics," *The Modern Schoolman* 72 (1995): 213–32.

25. H. J. Berman, *Recht und Revolution. Die Bildung der westlichen Rechtstradition* (Frankfurt am Main: Suhrkamp Verlag, 1991).

26. Cf. *ST*, II–II, a.58, a.1: "Omnis virtus sit habitus qui est principium boni actus."

27. *ST* II–II, q.58, a.3: "Actus enim hominis bonus redditur ex hoc quod attingit regulam rationis, secundum quam humani actus rectificantur."

28. *ST* II–II, q.57, a.1: "Sic igitur justum dicitur aliquid, quasi habens rectitudinem justitiae, ad quod terminatur actio justitiae . . . Et propter hoc specialiter justitiae prae aliis virtutibus determinatur secundum se objectum quod vocatur justum. Et hoc quidem est jus."

stitution, but must first of all proceed from the requisite human habit of justice and practical reason.[29]

Aquinas's account of right grounded in normative reason corresponds to his reading of the general virtue of justice. Here too, Aquinas proposes a normative rational foundation, circumventing the lack of clarity in Aristotle's notion of the general virtue of justice. The innovative intention guiding Aquinas's reception of Aristotle's theory of justice becomes clear in the middle of q.58. In q.58, a.1 Aquinas first picks up on the famous definition of justice going back to Ulpian's *Digest,* and proceeds to link this with the Aristotelian concept of virtue.[30] And thus at the end of this Article, he defines "justice" as a "habit whereby a man renders to each one his due by a constant and perpetual will."[31] In this definition of justice, however, Aquinas is already aiming at the notion of the particular virtue of justice and the attitudes it represents of a partially distributive, and partially rectificatory or commutative justice subject to the guiding principle of proportionate equality. Aristotle had already assigned to this particular virtue of justice a certain degree of contextual normativity, and Aquinas shares this view. But he does so on the basis of modified overall concept of justice, which he puts forward in q.58, a.2–6. In q.57, a.1 Aquinas had already pointed out that the Latin noun denoting justice (*iustitia*) by virtue of its etymology already implied the task of "ad-just-ment." This adjustment takes place in relation to another or others (*ad alterum*). To be more precise, as already indicated the task of the virtue of justice viewed from a general perspective is to rectify human acts toward others (*actus humanos rectificare*).[32] Justice performs this task by regulating interpersonal actions and the external circumstances affecting those interpersonal actions. Aquinas identifies as the subject of the virtue of justice the human will (*voluntas*), which is assigned to practical reason, and not to the senses, and hence is to be understood as the rational part of the appetite.[33] It is therefore human practical reason itself, as whose habit the virtue of justice performs, directing the external and interpersonal acts toward the just.[34] The general virtue of justice performs this task primarily by directing all other ethically relevant human virtues toward the comprehensive objective of the common good (*bonum commune*). This is the point at which "the *general* virtue" (*virtus generalis*) of justice for the first time

29. In this context see also Aquinas's further discussion of natural law (*ius naturale*) in q.57, a.2, which in view of Aquinas's grounding of right in normative reason differs from the concept of the "just by nature" in Book 5 of the *Nicomachean Ethics;* see fn.16.

30. Cf. *ST* II–II, q.58, a.1: "Justitia est constans et perpetua voluntas ius suum unicuique tribuens."

31. *ST* II–II, q.58, a.1 "Justitae est habitus secundum quam aliquis constanti et perpetua voluntate ius suum unicuique tribuit."

32. *ST* II–II, q.58, a.2.

33. *ST* II–II, q.58, a.4.

34. *ST* II–II, q.58, a.4 "Quia apprehensio sensitiva non se extendit ad hoc quod considerare possit proportionem unius ad alterum, sed hoc est proprium rationis."

proves to be just that; the "general virtue," as which justice now occurs, can only perform its assigned task of directing all virtues and external acts toward the common good, as required by practical reason, by making use of "laws" (*leges*).[35] This is because, as Aquinas had already explained in *ST* I–II, q.90, the "chief and main concern of law" is to direct toward the common good.[36] He therefore also refers to the general virtue under discussion as "legal justice" (*justitia legalis*),[37] whereby: "man is in harmony with the law which directs the acts of all the virtues to the common good."[38]

At this point, the fundamental distinction between the arguments of Aquinas and those of Aristotle becomes evident. Aristotle does not understand the "legal," which he largely identifies as the goal of the general virtue of justice, in terms of normative reason; rather, he equates it with the de facto legal systems of states and their highly diverse ends. As such, Aristotle does not assign to the general virtue of justice any normative force founded in reason that would direct acts toward the idea of the common good, and which would support a claim of universal normativity for all polities.

Aquinas goes on to set out the reasons why legal justice can be termed the "general virtue." It does not, for instance, constitute a "genus" or generic term into which, logically speaking, all the other virtues are subsumed like "species" or specific terms. The general virtue of justice is rather assigned a universal normative force, articulated by its directing all acts motivated by any of the virtues toward the *bonum commune* as their most all-embracing end. On the basis of this task, the virtue of legal justice is assigned the position of the supreme ethical virtue, comparable in function to the position occupied by the virtue of charity within the triad of theological virtues faith, hope, and charity. As in the case of charity within the theological virtues, the general virtue of justice also remains constitutionally distinct from the other ethical virtues, which is why notwithstanding its general or complete nature it is always at the same time a "special virtue" (*virtus specialis*); this because it always seeks to achieve its proper end, that is, the common good, via a special route, namely by utilizing laws.[39] "Besides" justice as a "general" and a "special virtue," there is also, according to Aquinas, justice as an individual or particular virtue (*virtus particularis*).[40] Because just as Aquinas sees alongside legal justice, which directs man immediately toward the common good, the other virtues such as temperance and fortitude, he also sees in addition to legal justice directing normatively toward the common good, a "particular justice" (*iustitia particularis*)

35. *ST* II–II, q.58, a.5.
36. Cf. *ST* I–II, q.90, a.3.
37. *ST* II–II, q.58, a.5.
38. 38. *ST* II–II, q.58, a.5 "Quia scilicet per eam homo concordat legi ordinanti actus omnium virtutum in bonum commune."
39. Q.58, a.6.
40. Q.58, a.7.

"to direct man in his relations to other individuals."[41] The virtue of particular justice occurs in a plurality of forms, appropriate to the diversity of relations among the persons interacting with one another as individuals: in the form of distributive justice, commutative justice, or rectificatory justice based on the verdict of a judge. Aquinas assigns both the general and particular virtues of justice priority over the other ethical virtues. He assigns priority to the general virtue of legal justice because through its orientation toward the common good, it directs all the other virtues toward their end. Whereas he assigns priority to the particular virtue of justice firstly because it belongs to the will, the rational appetite that belongs to human practical reason, and secondly because it regulates human actions toward other individuals.[42] In the light of this definition of tasks, and especially that of particular justice, the ethical postulates such as the call to help those suffering misery or unhappiness (*subvenire miseris*), and the call to exercise compassion or generosity, are not inferences drawn from the human emotion of sympathy, but consequences of the call for justice deduced by means of practical reason.[43]

III.

The normative concept of a general virtue of justice founded in practical human reason, which Aquinas also terms "legal justice," does not occur for the first time in that section of the *Summa Theologiae* devoted to the ethical virtues. In the earlier *Treatise on Law* contained in the *Prima Secundae*, Aquinas makes reference to his notion of justice, even though, as we have already seen, he does not develop it systematically in the text of the *Summa* until later.[44] In q.90, Aquinas attempts to define the concept of law (*lex*) in highly general terms, before proceeding to examine its theological, philosophico-ethical, and legal applicability. Here, Aquinas sees "law" as nothing other than "a kind of direction [or rule] and measure"[45] for human activity, in which connection he identifies (practical) reason as being the originating or first principle (*primum principium*) from which actions proceed, the principle which "enacts" this rule as its foremost measure for action.[46] Before Aquinas proceeds to draw distinctions between the ethical and legal aspects of the notion of law, he assigns to the "Basic Law" of action "enacted" by reason the task of directing the individual toward the comprehen-

41. Q.58, a.7: "Oportet esse particularem quamdam justitiam, quae ordinet hominem circa ea quae sunt ad alteram singularem personam."
42. Cf. q.58, a.12.
43. Q.58, a. 1, *ad* 1.
44. *ST* I–II, qq. 90–105.
45. Q.90, a.1.
46. Q.90, a.1: "Unde relinquitur quod lex sit aliquid pertinens ad rationem."

sive end of all his/her actions, which he also defines here as the "common good."[47] Anticipating questions of practical and especially political philosophy, Aquinas further asserts that in principle "anybody's reason" can participate in law's directing of actions toward the common good by participating in the making of laws.[48] Later, however, Aquinas tends to assign the task of legislation—the task assigned by modern constitutions to the legislature—to a "public personage" (*persona publica*) who "has care of the community"—the approximate equivalent of the modern executive. As is on the whole customary for the laws of constitutional polities, Aquinas's general "law" of (practical) reason is also only able to take on binding force when promulgated.[49]

The fact that the principle of determination by reason applies not only to the positive laws of the respective political community, but also with respect to the ethical underpinnings of action, is made clear by Aquinas in the *Quaestiones* devoted to the characteristic features of "natural law." Here, Aquinas first refers to St. Augustine, whose Christian reinterpretation of the Stoic *lex naturalis* doctrine he further develops such that he discovers here for the very first time the principle of human moral autonomy. He joins Augustine in adhering to a definition of "natural law" as the "impression of divine light on us"[50] and as the "sharing in the Eternal Law by intelligent creatures."[51] Yet the significance of natural law becomes apparent by virtue of its being defined as "the light of natural reason by which we discern what is good and evil."[52] According to Aquinas, "natural law" contains the primary precept of practical reason. This is manifested as a principle whose form must determine all further practical judgments. It is the apprehension based on evidence of reason that: "good is to be sought and done, evil avoided."[53] This principle contains only the form of a moral judgment, and does not specify in any further detail what an agent might understand as "good." Since the "good" in the context of action needs to be understood as the "end" of an act, the sought definition of what precisely can be qualified as morally "good" and therefore "to be done" needs to be established in light of a structural analysis of action, and the practical tendencies of the human agent in question. On Aquinas's view, these tendencies reveal the individual subject to be in need of more precise definition in terms of his/her concupiscence, that is, sensuality, as well as in terms of reason, the power of speech, and membership of a community. Ludger Honnefelder has correctly pointed out that the "natural inclinations" (*inclinationes natu-*

47. Q.90, a.2: "Et ideo omnis lex ad bonum commune ordinatur."
48. Q.90, a.3.
49. Q.90, a.4.
50. Q.91, a.2: "impressio divini luminid in nobis."
51. Q.91, a.2: "Lex naturalis nihil aliud est quam participatio legis aeternae in rationali creatura."
52. Q.91, a.2: "lumen rationis naturalis quo discernimus quid sit bonum et malum."
53. Q.94, a.2: "Bonum est faciendum et prosequendum, et malum vitandum."

rales) such as the inclination to preserve the self and the species, to gain understanding, and ultimately to gain knowledge of God, which Aquinas here ascribes to practical human agency, merely demarcate "the framework" for normative ethical reflection. While these natural inclinations represent "a system of rules that is not arbitrary, but is of open design," they should not themselves be understood as norms.[54] As we have already seen, the norms directing action are not inherent in a human nature, but are determined solely by practical human reason, that is, by an agent's powers of reason as applied to actions and their ends.

Aquinas deals with the virtue of justice in the context of his discussion of "human law" (*lex humana*). In q.95, a.2, he appeals to the principles already established by St. Augustine in *De libero arbitrio* that an unjust law is no law. Augustine's rationale consists in his very general requirement that, for "laws" to be legitimate, they must participate in "justice": "A command has the force of law to the extent that it is just."[55] Aquinas develops these ideas of Augustine's, arguing that "human laws" can only be called "just" from their being "right according to the rule of reason."[56] As we have already seen, however, Aquinas defines as the first rule of reason affecting actions "natural law," which on the one hand contains the foremost, though formal basic rule for all moral judgments, and on the other hand determines the framework within which in all generality the ends of actions which can be qualified as "good" for the human agent can be determined. As in the case of ethical decisions that are always based on concrete particular cases, in the case of positive laws too, no immediate directions or norms for action can be directly inferred from "natural law." These first of all have to be derived from "natural law" through insight into the formal structure of moral judgments and through understanding of the general structure of human actions, in the context of the purview of state legislation.

Aquinas draws a general distinction between two modes of inference, the *modus conclusionis* and the *modus determinationis*. He understands the *modus conclusionis* as a deductive process of drawing logical, demonstrative

54. L. Honnefelder, "Naturrecht und Geschichte. Historisch-systematische Überlegungen zum mittelalterlichen Naturrechtsdenken," in *Naturrecht im ethischen Diskurs*, ed. M. Heimbach-Steins (Munster / W: Aschendorff Verlag, 1990), p. 13. See also Honnefelder, "Güterabwägung und Folgeabschätzung. Zur Bestimmung des sittlich Guten bei Thomas von Aquin," in *Staat, Kirche, Wissenschaft in einer pluralistischen Gesellschaft*, ed. D. Schwab (Berlin: Duncker u. Humblot Verlag, 1989), and W. Kluxen, *Philosophische Ethik bei Thomas von Aquin* (Hamburg: F. Meiner Verlag, 1980).

55. Cf. Augustinus, *De libero arbitrio*, cap. 5, in: *Patrologia Latina* 32, 1227 B: "Non videtur lex, quae iusta non fuerit." On the reception of this principle of Augustine's by St. Thomas Aquinas, see inter alia Norman Kretzmann, "Lex Iniusta Non Est Lex. Laws of Trial in Aquinas' Court of Conscience," *The American Journal of Jurisprudence* 33 (1990): 99–122.

56. *ST* II–II, q. 95, a.2: "Unde inquantum habet de iustitia, intantum habet de virtute legis. In rebus autem humanis dicitur esse aliquid justum ex eo quod est rectum secundrum regulam rationis."

conclusions from theoretical premises as in the theoretical sciences (the *scientiae*). He applies the term *modus determinationis* to the process customarily practiced in the arts (the *artes*). The arts do not offer proof, but concretize a general idea or form initially conceived as a rough outline, giving it "special shape," as when an architect determines that a house should be built in this or that particular style, thus concretizing an initially abstract design. In so doing, the architect supplements the initial prescriptions by further developing the initial ones in an innovative fashion, thus transforming them into their concrete shape as intended at the outset. According to Aquinas, both modes of inference can be seen at work in the relationship which in his view exists between the "natural law" of practical reason, and human (positive) law: A "just law" derives its normative force by virtue of its being right according to the compelling inference drawn by practical reason from "natural law," which according to Aquinas is a judgment arrived at *per modum conclusionis*.[57] The provisions of the "law of nations" (*ius gentium*) are also, according to Aquinas, derived from premises of "natural law" on a basis analogous to the deduction of scientific results from scientific premises; the law of nations in Aquinas's view comprises all that which does not proceed from the conclusion of covenants or positive legislation. He also includes in that the principle of just exchange "and so forth, without which men cannot live sociably together," also deliberated on in *ST* II–II, q.58.[58] But all constructions derived *per modum determinationis* from "natural law" are in Aquinas's view proper to civil law (*ius civile*): " . . . and here each political community decides for itself what is fitting."[59] Assuming that the political community in question is guided by the general virtue of justice, then that community is directed toward the end of the *bonum commune,* the latter only a general outline. Then, and only then, can the claim of legitimacy be raised for the positive laws flowing from that. Aquinas speaks of a "just law" in this context. Yet which law serves the common good to a greater or lesser extent in any given case is a particular question which can only be answered in light of the concrete circumstances, giving due consideration to possible alternative options.[60] In Aquinas's view, this process of formulating new laws can only be guided appropriately by an individual who is him- or herself in possession of the general virtue of justice, thus guaranteeing that individual's orientation towards the end of the common good. Yet the individual in question must also be in possession

57. *ST* II–II, "In rebus autem humanis dicitur esse aliquid justum ex eo quod est rectum secundum regulam rationis."

58. *ST* II–II, q.95, a.4.

59. *ST* II–II, "ius civile secundum quod quaelibet civitas aliquid sibi accommodum determinat."

60. Cf. *ST* II–II, q.96, a.l, "Hence human laws should be proportionate to the common good. Now the common good comprises many things. Wherefore law should take account of many things, as to persons, as to occupations, as to times, because the political community is composed of many citizens and its good is procured by many actions nor is it established to endure for only a short time."

of expert jurisprudential knowledge, since the task in hand is not to apply existing laws to particular circumstances as in the case of judicial decisions and precedents, but to further develop existing laws or replace them with new ones. This activity too must still be considered an inference drawn by practical reason *per modum determinationis*. From a normative perspective, however, what is crucial to the success of this process of derivation is that the agents participating in it are directed toward the common good through possession of the general virtue of justice.