DEPOSITUM GLADIUS NON DEBET RESTITUI FURIOSO PRECEPTS, *SYNDERESIS* AND VIRTUES IN SAINT THOMAS AQUINAS

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[Published in The Thomist, vol. 63, nº 2, April, 1999, pp. 217-240. ISSN0040-6325].
http://www.thomist.org/

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Careful readers of Thomas Aquinas' work soon become aware of his liking for illustrating all kinds of argument by using the same or similar examples. This method actually makes the researcher's task easier, as we can set out from the assumption that the subjects explained using the same examples are in some way interconnected. Moreover, if we look further into the history of these cases, we often find that they themselves provide an important key to unlock major problems that may arise. This is the case when we seek out all the occasions on which Aquinas uses a particular example to shed light on the controversial subject of the immutability of natural law. The example in question has a long history, going back to the first book of

Plato's *Republic*; Aquinas usually transcribes it as *depositum gladius non debet restitui furioso*, although some variations also occur. We shall first look at the context in which Plato situates this idea, then go on to examine the occasions on which Aquinas draws on it: in the *Summa*, when discussing the question as to whether the natural law is the same for everyone; in his *Commentary on the Nicomachean Ethics*, when he explains in what sense natural law may change, and in what sense it remains the same; and finally, where he examines the virtues of *gnome* and *epieikeia*, also in the *Summa*.

I. PLATO'S TEXT: *REPUBLIC* 331C-332A

The first book of the *Republic*, the *Thrasymachus* deals in a general way with justice. After Cephalus, the old man, speaks, Socrates responds by asking for an explanation of the definition of justice given by the former:

> An admirable sentiment, Cephalus, said I. But speaking of this very thing, justice, are we to affirm thus without qualification that it is truthtelling and paying back what one has received from anyone, or may these very actions sometimes be just and sometimes unjust? I mean, for example, as everyone I presume would admit, if one took over weapons from a friend who was in his right mind and then the lender should go mad and demand them back, that we ougth not to return them in that case and that he who did so return them would not be acting justly –not yet would he who chose to speak nothing but the truth to one who was in that state[1].

This is the example that Aquinas was to appropriate and apply to the issues mentioned above concerning the immutability of natural law and the nature of justice: *depositum gladius non debet restitui furioso*. It is therefore interesting to analyse this with care. Above all, Socrates' query "Are we to affirm thus without qualification that it is truthtelling and paying back what one has received from anyone, or may these very actions sometimes be just and sometimes unjust?". In this context, it is useful to bear in mind a nuance in the Greek text which the English translation does not always make clear. What Socrates says is not that the actions of returning what is owed and telling the truth may sometimes be just or unjust. What he says is that these actions are sometimes done justly, sometimes unjustly.[2]

As we can infer from the text, the counterpoint is set up between an excessively "casuistical" view of justice, as shown by the condition "in all cases", and a view of justice as a "way of acting", which is reflected in the use of adverbs: things that are done *justly* and *unjustly*. This view, as far as everything else goes, is valid not just for justice but in general for every other virtue. For the possession of a virtue means acting *in a certain way*, rather than materially carrying out certain actions. Plato himself insisted on this aspect on other occasions, as in the *Laches*, when he speaks of valour.[3] He uses this to draw attention to the shortcomings of a casuistic definition of the virtues: there are actions which generally show certain virtues, but which might in some cases not do so. Plato thereby diverts attention from the matter to the *form* of the act. Aristotle

was to emphasize this point more clearly by associating the form of acts with the moral disposition of the agent: "actions are called just and temperate when they are such that the just or temperate man may do; but the man who also does them as just and temperate men men do them."[4]

In the *Republic*, however, Socrates perseveres with the suggestion that the definition of justice should be modified, because he understands that the idea of justice must include *all the acts* of this virtue. Thus, according to Socrates, "this is not the definition of justice –to tell the truth and return what one has received",[5] as on occasions acting justly means that one should not give back what one has received. But Polemarchus, his conversation partner at this point, opposes this. Calling on Simonides' authority, Polemarchus insists that the just action is to return to everyone what one owes. Without passing judgement on Simonides' words, Socrates can do no more than repeat his difficulty concerning the way of interpreting these words:

> I must admite, said I, that it is not easy to disbelieve Simonides. For he is a wise and inspired man. But just what he may mean by this you, Polemarchus, doubtless know, but I do not. Obviously he does not mean what we were just speaking of, this return of a deposit to anyone whatsoever even if he asks it back when not in his right mind. And yet what the man deposited is due to him in a sense, is it not?[6]

The difficulty outlined by Socrates finds no satisfactory solution in the dialogue. In other places, Plato sets out the problem in a slightly different way: conflating the virtues and the arts almost entirely,[7] he understands that both have a single proper end,[8] which requires in practice

the intervention of a "royal art" which can direct the use of both in concrete cases.[9] This "royal art" which Plato mentions consists of "knowing how to use", which partly recalls Aristotle's concept of prudence. It seems clear that this "knowing how to use" is what Socrates felt the lack of in his definition of justice, when he claimed that this definition could cater for all possible cases. Aristotle resolved this problem in his own way: when he introduces the distinction between natural or imperfect virtue (which can be defined as the simple tendency to good works) and moral or perfect virtue, he points out that the latter cannot exist without prudence.[10]

To return to the main point, in the light of the above, what interests us here is to examine Aquinas' use of the example quoted by Socrates to see how far the philosophical issues latent in this example afford us a deeper understanding of the frequently contested Thomist doctrine of natural law.[11]

II. PRECEPTS AND PRACTICAL WISDOM

One of the places in which this example appears is in a. 4 e to q. 94, a. 4 of the *Prima Secundae* to illustrate the sense in which natural law can be said to vary. What this article asks is "whether the natural law is the same for all". To answer this question, Aquinas begins by establishing one basic thesis as his starting point: "to the natural law belong all those things to which man has a natural

inclination, among which there figures as proper to man the fact that he inclines towards acting according to reason."[12]

As he himself states, the way by which reason itself proceeds entails the method of setting out from common principles and reaching proper, more specific conclusions, even though this takes place in one way for speculative reason, and in another for practical reason. After comparing the way these two types of reason proceed, Aquinas concludes that, in contrast to what happens on the speculative level, where the conclusions enjoy the same universality as the premises, on the practical level the conclusions (secondary precepts)[13] do not always have the same validity in all circumstances. In fact, Aquinas says, if we are talking about "the particular conclusions of practical reason, truth or rectitude is not the same in all, nor is it equally known in those in which it is the same."[14] To illustrate this point, he brings in the example of the "depositum":

> Thus it is right and true for all to act according to reason. And from this principle it follows as a proper conclusion that goods entrusted to another should be restored to their owner. Now this is true for the majority of cases, but it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance if they are claimed for the purpose of fighting against one's country.[15]

According to Aquinas, then, the secondary precepts of natural law may fail or miscarry *ut in paucioribus* not only as far as knowledge of them is concerned (as in the case of people whose inadequate disposition means that

they never manage to understand that some precept is good)[16] but also as far as their reliability is concerned, *sicut etiam naturae generabiles et corruptibiles deficiunt ut in paucioribus, propter impedimenta*[17]: "in the same way that generable and corruptible natures are sometimes defective because of some impediment." (The reference to the mutability of generable and corruptible natures therefore constitutes a key for interpreting correctly the variable character of natural law. We shall return to this subject below.) None the less, this lack of reliability should not be attributed so much to the precept considered in itself, as to the precept seen through its application to action. This variation has taken place in its turn only because, in the action which that precept was designed to regulate, a "circumstance" has been introduced which notably modifies the object of the action itself, to the extent that this action can no longer be regarded *in the first instance* or exclusively as yet another case of the same precept, at least as long as the "perturbing" circumstances are present. While circumstances of this kind remain, the action has to be governed by a different precept which practical reason must determine.[18]

The fact that the secondary precepts of natural law are open to erroneous application demonstrates that this law cannot be reduced to a code of regulations, as this would be of less practical use. If natural law is to govern action effectively, it must provide us with certain knowledge as to what precept should be used in any particular case. If not, then how can we determine which precept to use? We must return here to the classic answer

that prudence, seen as a very special way of "knowing how to use" which does not exist without moral virtue, was for Aristotle the practical criterion governing action: only prudence equips us to discern in each case which precept (or habit) it is appropriate to use.[19]

For Aquinas too, prudence is at once an intellectual and a moral virtue: an intellectual one, because it is a way of knowing; and a moral one because it does not exist without the correctness of appetite that is the product of moral virtue.[20] Like Aristotle, Aquinas maintains that prudence is an acquired virtue, [21] and frames Aristotle's problem concerning moral learning in a similar way: if moral virtue cannot exist without prudence, and prudence cannot exist without moral virtue, and if all these virtues are acquired, then how can someone act righteously? In this context, it seems timely to underline that when we call prudence an acquired virtue, this does not rule out the previous existence of an imperfect form of prudence, that is, a more or less steady natural inclination to direct one's own conduct in accordance with reason. According to Aristotle, this inclination exists. It is an inclination which does not consist simply of acting in accordance with a morally neutral reason,[22] as for him, acting according to reason is the same as acting according to the virtues, to which we have a natural aptitude. However, to speak of an inclination within the reason, the reason being for Aristotle a potency for opposites,[23] presupposes the existence of something that robs reason of its original indeterminateness. Aristotle himself did not discuss this, but Aquinas alludes to the problem when he mentions the

existence of a natural habit of the reason known as synderesis[24] which he refers to elsewhere using the significant name of "the nursery of virtues".

Of course, the idea of a natural habit implies more when it comes to finding a basis for ethics. What interests us here, however, is that in the operational order Aquinas attributes to synderesis the function of prescribing *intellectually* the ends of the virtues of practical reason, thus clarifying a point that Aristotle left implicit.[25] Thanks to synderesis, then, practical reason knows two important things when the time comes to act: that it must act in accord with the ends of the virtues, and that it must avoid acts that are contrary to such ends. This knowledge of the principles is what makes practical learning possible later, in that it enables people to acquire moral virtues and prudence.[26] Moreover, this knowledge of the principles is what the prudent man has managed to incorporate naturally into his actions.

In Aquinas' thinking, synderesis constitutes this last instance which makes it possible to refer to natural law as something greater than a collection of codifiable precepts. Of course, every law, especially the natural law, is "something that belongs to reason"[27] and not just a habit. For this reason, it consists properly speaking of a series of precepts which are ordered towards the human good.[28] However, these precepts are "promulgated" by practical reason to regulate our concrete action in accordance with certain principles that we know through a natural habit. It is this natural habit which so to speak "feeds" the practical reason, guiding it in all cases. The fact that synderesis is a

habit means, among other things, that the judicial formulation of its contents, in the form of a code of precepts, will never be exhaustive. At most, it will be able to indicate the normal route by which the virtues are acquired, and the actions which never accompany virtue. All this means that the precepts alone, without synderesis, do not constitute a definitive criterion. There are times when a general precept must not be applied, as in the case of the borrowed sword. To recognize such cases, it is not enough to have a selection of precepts: what is needed is the practical wisdom proper to the prudent man, who can judge concrete actions in the light of the principles. The *formulation* of the precepts is always a later task, which, as has occasionally been noted, Aquinas does not credit with particular importance. That is why he does not seem concerned to enumerate them. All this shows us that if we want to understand the way that Aquinas sees the natural law, we must emphasize the connection of precepts through a form of wisdom responsible for directing action.

III MUTABILITY AND IMMUTABILITY OF NATURAL LAW

To shed further light on the connection of the precepts through wisdom as a kind of last instance, we can subject another passage referring to Plato's example to scrutiny, this time from the *Commentary on the Nicomachean Ethics*. This is the commentary on the text by Aristotle in which the latter asserts that "with us there is something that is just even by nature, yet al of it is changeable".[29] Aquinas, like Aristotle before him, understands that it is important to dispute this point, as the

thinkers who reject the existence of something that is by nature just use this as support for their arguments, maintaining that everything that is whatever it is by nature is immutable, whereas what is just varies on occasions, as in the case of the borrowed sword. In fact, "nothing would seem to be more just than returning what has been borrowed to its owner, and yet you do not have to return a borrowed sword to a madman, or money for arms to your country's enemy."[30]

To answer this objection, Aquinas begins by distinguishing two types of nature: the divine nature, which is immutable throughout, and human nature, which dwells among corruptible things and which thus lies halfway between the two spheres:

> For us men who live among incorruptible things, there is certainly something natural, yet everything in us is mutable, either per se, like having feet, or per accidens, like having a tunic, and similarly, even though everything that is just for us is in some sense mutable, it is also true that some of these things are just by nature. [31]

It is important to distinguish between what is mutable *per se* and what is mutable *per accidens*, because Aquinas' answer goes along the lines of asserting the mutability *per accidens* of what is just by nature. In fact, one of the features of what is natural or *secundum naturam* proper to corruptible natures is that it occurs *ut in pluribus* but may not be borne out *ut in paucioribus*. According to Aquinas, the secondary precepts of natural law are *secundum naturam* in this sense, like generable, corruptible natures, in such a way that they are mutable *per accidens*:

It is manifest that also in other things that are natural for us the same determination is true as in the case of naturally just things; since those things that are natural for us are certainly the same most of the time, but occasionally fail. For example, it is natural for the right side to be stronger than the left, even though there are some people whose left hand is as strong as the right and who become ambidextrous. Similarly, even those things which are naturally just, like returning a deposit, should be observed most of the time, but on occasions change (…).[32]

The above text hints at the possibility of a change in human nature, something that Aquinas states more clearly elsewhere. What I would like to do here is consider a text from the *Secunda Secundae* referring to the mutability of human nature, which then goes on to use the example of the borrowed sword:

That which is natural to one whose nature is unchangeable, must needs be such always and everywhere. But man's nature is changeable, wherefore that which is natural to man may sometimes fail. Thus the restitution of a deposit to the depositor is in accordance with natural equality, and if human nature were always right, this would always to be observed; but since it happens that man's will is unrighteous, there are cases in which a deposit should not be restored, lest a man of unrighteous will make evil use of the thing deposited: as when a madman or an enemy of the common weal demands the return of his weapons.[33]

What is natural for man is modified as his nature undergoes modification. What is permanent is the relationship between nature, which is the origin, and what is natural, which is what is originated. It is interesting to

note that in the above text the reference to a possible perversion of the human will appears as a cause of human nature's lack of rectitude and, in the last instance, of the fact that a precept which is naturally right ceases to be so when it is put into practice. On such an occasion, Aquinas maintains that the perversion of the human will is not only responsible for the defective knowledge of a precept of natural law, as is the case in the text of the *Prima Secundae* referred to above, but even for the fact that this precept is not always correct (a shortcoming that is always relative to the application of this precept in a given situation).

The term "perversion of the will" is a way of referring to sin, as when someone sins, the will becomes sick, not so much because it wants something that is positively bad, as because it wants something good, but the manner of its wanting is bad. This is why Aquinas says that sin occurs *praeter intentionem*:[34] what the agent wants when he/she sins is not something bad, but a given good, though in such a way that *per accidens* the will is perverted and is diverted away from the good apportioned to it. In any case, by stating that sin has a cause *per accidens*, and that the variable correctness of the precepts of natural law ultimately depends on this cause *per accidens*, Aquinas excludes an essential mutation of natural law, for the same reason as he rules out an essential mutation of nature.

In fact, in Aquinas' view, nature is always a teleological principle which, of itself - *per se* - always strives for a good, although it sometimes, *per accidens*, gives rise to a defect.[35] The same goes for the movements and properties we call natural, as we can see from his

commentary on the text in the *Ethics* in which Aristotle speaks of the right hand and the left hand. According to Aristotle, the right hand is stronger *by nature*, and this, which is *secundum naturam*, is true for the majority (*ut in pluribus*). If in other cases this is not true, then the reasons are accidental (*per accidens*), be it for natural reasons or through habit (because someone exercises the other hand).

It is clear that in this last sense (by habit) we could also talk of a change in the natural law (as long as this is a secondary precept) - exercising the other hand gives rise to a contrary disposition which seems to be natural. However, this type of change does not so much affect the correctness of the precepts as the knowledge and practical application of them. What we are interested in here is the other kind of variation: variation in the correctness of a precept or rather, variation relative to the correctness of its application in a given case. In this sense, there is evidence that Aquinas admits a certain variation analogous to that which is registered in the natural/physical order - a variation through accidental causes which, as we have read in the text from the *Secunda Secundae*, Aquinas also attributes to the perversion of the human will.

Nevertheless, it is important to point out that the ailing will in this case is not that of the agent (e.g. the person who ought to act in accord with the precept of giving back borrowed items), but rather that of the sword's owner (who was to be given it back), in view of which the agent decides not to apply a precept which is correct in principle. Presuming that the sword's owner will use it badly, the agent decides not to return it. To the extent that

the bad use of something is the product of an ailing will, and an ailing will is nothing other than a will that has become used to sin, we must assert that sin has introduced an accidental factor to the world which the prudent man must not ignore when exercising his power of judgement. This is a factor which, for example, makes it inappropriate in some cases to apply the positive precept recommending the return of property. Thus,

> When the thing to be restored appears to be grievously injurious to the person to whom it is to be restored, or to some other, it should not be restored to him there and then, because restitution is directed to the good of the person to whom is made, since all possessions come under the head of the useful.[36]

By saying this, Aquinas is not inviting us to reason exclusively with regard to whatever consequences might follow: he adds an essential reason. For him, external goods are ordered by their very nature to the good of the body; at the same time, external goods are ordered by their very principle to humanity in general (if private property belongs to natural law, this is only because in principle, private property is a better way of safeguarding the common good). This means that external goods are also ordered by their very nature to usefulness or the common good.

It is vitally important to have this ordering of goods in mind if we are to understand why in some cases it is justifiable not to return a borrowed item. A careful reading of the versions Aquinas offers of a possible variation in the rightness of the precept of restitution will show us that all

cases are justified with reference to a definite practical damage to the common good (almost always illustrated by the idea of an "attack against the *patria*"). Plato before him had considered the possibility that the man who is given the sword back might use it against himself.[37] These are not contradictory motives, as both the man who uses an external good to attack his own physical integrity and the man who uses it against the common good are contradicting the natural use of goods which is presupposed in the exercise of justice.[38] According to this, returning the borrowed sword in certain cases would mean betraying the very essence of justice. In effect, this virtue cooperates with the human good, by guaranteeing that in human relationships each person wants everyone to have his/her own property, in the conviction that having one's own things is good for everyone. In our example, keeping the precept of restitution would mean attacking the very essence of justice, because giving the madman his sword back would mean giving him the opportunity to misuse it by doing harm to himself and to others. Naturally, if we are to take this decision, and deprive someone of something that in principle belongs to him, then we must have well-grounded reasons. Where such reasons are not present, the just action is always to return the sword.

In principle, all this is in keeping with Aquinas' thesis that the lack of rightness of a precept goes back to the perversion of the human will. We have seen repeatedly that, considered in themselves, all the precepts that derive from the first principles are correct. Any possible lack of rectitude would depend on their application to certain

actions which appear to come under the heading of that precept, but which really do not, because the course of the action has been crossed by some circumstance which actually turns round the meaning of the precept if it is applied. If the precept is of itself ordered to justice, the presence of this circumstance will rightly make us fear that justice itself would not be a good, should that precept be applied. The only thing capable of inverting the sense of a precept which is good *per se* is a bad use of the precept on the part of a will. For this reason, Aquinas states that these "perturbing" circumstances depend on the perversion of the human will. In this sense, if there were no sin, all precepts would be universally applicable, as such circumstances would not arise.[39]

Thus the variation in the rightness of a precept depends on accidental causes. This would seem also to be confirmed in Aquinas' commentary on Aristotle's text, as there Aquinas echoes word for word the comparison which Aristotle draws between the mutability of physical nature (illustrated by the example of the hand) and the mutability of what is just by nature. Just as the right hand is stronger by nature, but this may not be the case *per accidens*, so the secondary precepts of natural law are right by nature (in themselves and in their application) but can vary *per accidens*, for accidental reasons.

However, according to Aquinas this mutability has a limit, as does the mutability of human nature. Continuing the analogy with the natural-physical order, Aquinas expresses this limit as follows:

> And given that the essences of mutable things are themselves immutable, if there is something natural in us which belongs to the very essence of man, this cannot vary in any way: for example, that man is an animal; however, what follows nature, for example, the dispositions, actions and movements, changes from time to time. Similarly, those things which belong to the very essence of justice cannot change in any way, for example, that one must not steal, as this is to commit an injustice; however, what follows from this may change from time to time.[40]

In both the natural-physical and the natural-moral order, it is necessary not to lose sight of a fundamental metaphysical distinction which is the very reason why Aquinas was able to maintain the essential immutability of the natural law, at the same time as he accounts for the variable reliability of the secondary precepts.[41] This distinction is between what, in the order of essence, belongs to human reason, and what is the consequence of essence in the order of performance. What belongs to human reason *per se* is mutable: some things are mutable *per se*, others *per accidens*. Among the first, to borrow an example from Aquinas, there is the fact of possessing a tunic. Among the second, there is the fact of having feet. Analogously, what belongs *per se* to the reason of justice is immutable, whereas what is a consequence of the reason of justice is mutable - some things *per se* (like what is legally just) and others *per accidens* (like what is naturally just).

Among "what is a consequence of the reason of justice" there figures the precept of returning borrowed items,[42] a precept of natural law which does not have universal validity, only general validity, *ut in pluribus*. We

have already seen why this is: on some occasions this precept may not be just, not so much because of the precept itself, as because circumstances may be present at the time of action which are not normally taken into account when considering things only from the point of view of what is generally just. So to be able to judge whether or not it is rational to apply the precept in given circumstances, it is necessary to understand the good towards which this precept is ordered, and the way in which this good plays a part in the integrity of the human good. This is what the prudent man does.

What the prudent man assumes in his judgement is that, on the one hand, the precepts are not irrational, but obey principles, and on the other, that these principles are accessible to us. This last condition is always fulfilled because, as we have seen before, such principles are contained in natural reason or synderesis. And it is to this very synderesis, through which we learn the ends of all the virtues and therefore also of the "reason of justice", that Aquinas attaches the essential immutability of the natural law. In fact, according to Aquinas, synderesis is never extinguished,[43] which is compatible with two of his other statements: on the one hand, that the light of synderesis is the light of the agent intellect itself, which is numbered among the incorruptible natures, and on the other, that synderesis is the basis for the reason of justice, which, as we have seen, is also immutable.

IV. TYPES OF ACTION

Synderesis is the habit of the practical first principles. These principles are immutable. To the extent that the agent keeps the principles, the "seed-bed of the virtues", when he acts, his action will be good/virtuous. If the opposite is the case, his action will be bad, and it will constitute vice. Good acts can be divided into types, as different specific virtues exist, and can become the object of positive precepts which are valid *semper sed non ad semper*: *semper* because one must always act *secundum virtutem*; *sed non ad semper* for the simple reason that we cannot fulfil all the precepts under all circumstances. Nor is it necessary to do this. What we must do is act virtuously, and to do this is it necessary to discern when one precept should be applied, and when another. And this is the task which falls to prudence.

None the less, as Finnis has emphasized,[44] the nature of negative precepts is quite different, as they are valid *semper et ad semper*. There are acts which must never be performed, because they themselves entail a contradiction of the principles. To continue using our own example about justice, it is one thing to prescribe an action like returning borrowed items because it is an act of justice (leaving open the possibility that in some concrete case, in Aquinas' view because of sin, it is not), and quite another thing to prohibit theft absolutely, because stealing is always and in all circumstances an act which runs counter to justice (and this can also be said of keeping other people's property).[45]

What is permanent in both cases is the principle of the "essence of justice", which is nothing other than the very essence of the virtue of justice, that is, *the habitual disposition of the will by which we wish to give each person what is his*. For this very reason, even when in a particular case the appropriate action is not to return the borrowed item, the will to do justice must remain intact, which means that there must be a desire to give it back when circumstances return to normal. So after pointing out the possible "exception" to the precept of restitution, Aquinas concludes:

> Yet he who retains another's property must not appropriate it, but must either reserve it, that he may restore it at a fitting time, or hand it over to another to keep it more securely.[46]

This serves to bring out an aspect of Aquinas' moral doctrine which has occasionally been obscured, but which is of prime importance: rather than being a morality of precepts, Thomist morality is a morality of virtues, for one basic reason - because it is the function of virtue (not only human virtue but all supernatural virtue) to rectify the human will. As Aristotle writes, "all virtue perfects the condition of the person whose virtue it is, and makes him perform his operation well."[47] According to this, human virtue is what makes man act according to his specific nature: it is what makes a man into a good man. If we lose sight of this, it is easy to end up with a rationalist vision of Aquinas' morality, which has often been the case in modern treatises on morality, and even in the manuals of this century.[48]

At the heart of a rationalist view of ethics there are often "conflicts" between precepts which do not appear in an ethics based on virtues. Thus using one good habit instead of another, for example liberality instead of justice, does not contradict the essence of the moral virtue when this use is governed by prudence. The only thing that contradicts the essence of moral virtue is any act which, in its very structure, includes a contradiction to *any* virtue, because this kind of contradiction perverts good will, which is central to moral action.[49]

Understanding the nature of moral virtue and its central role in ethics is in itself a hermeneutic key that can be used to interpret properly those cases which seem at first sight to be "exceptions to the law", like the case of the borrowed sword. If we bear in mind the unity of the virtues, it is clear that *acting counter to justice is different from acting according to criteria that are higher than justice*. Not everyone who does not practise the habit of justice (by which we wish to give everyone his/her own property) acts against this habit: there are times when it is appropriate to apply another habit, and by doing so one is not failing in justice. It would not occur to anyone to say that, for example, being generous or showing solidarity constitutes a lack of justice. Yet it is obvious that in this case we are not giving "each man his own", at least not in the literal sense of the expression. In other cases, it is perfectly possible for the practical reason to prescribe such an action to someone with particular urgency, simply because what is at stake is, according to moral wisdom, not some precept or other, but the good of man.

V. *GNOME* AND *EPIEIKEIA*

Prudence and moral virtue are what the agent needs in order to act well in practice: moral virtue which rectifies his ends (so that he can deliberate correctly), and prudence so as to consider the circumstances and prescribe the most appropriate act in each case. With this very aim in mind, Aquinas mentions three potential virtues in prudence: *eubulia*, by which the deliberation preceding the precept of prudence is perfected,[50] and *synesis* and *gnome*, by which the judgement of prudence is perfected.[51] The difference between the latter two (*synesis* and *gnome*) lies in the fact that the first judges those cases which fit easily under the general headings, and the second is used in cases which do not obey the general rules:

> It happens sometimes that something has to be done which is not covered by the common rules of actions, for instance in the case of the enemy of one's country, when it would be wrong to give him back his deposit, or in other similar cases. Hence it is necessary to judge of such matters according to which *synesis* judges: and corresponding to such higher principles it is necessary to haave a higher virtue of judgment, which is called *gnome*, and which denotes a certain discrimination of judgment.[52]

Gnome, which is the virtue that perfects the judgement prior to the precept of prudence in those matters which are not covered by the general rule, is also a necessary virtue to exercise *epieikeia*. In recent years, *epieikeia* has been the object of increasing attention,[53]

because it has often been interpreted as being in conflict with the idea of a natural law of universal validity. In this respect, it is useful to remember that in Aquinas' thought, *epieikeia* is above all a virtue which, like any other, presupposes respect for the ends generally known through synderesis and which can therefore never be counter to the reason of justice.

The object of this virtue is the equitable which, as Aristotle explains, is "just, but not the legally just, but a correction of legal justice."[54] What is presumed is that the literal application of the law might turn out to be unjust. Thus *epieikeia* is the virtue which makes it possible to rectify possible injustices resulting from applying the law literally in all cases.[55] This description of *epieikeia* concurs with what Aristotle says in his *Rhetoric*, where he contrasts *epieikeia* with legal justice, because he is taking the latter in its literal sense.[56]

Aquinas distinguishes two ways of referring to *epieikeia* according to whether legal justice is regarded as the law in its purely literal sense, or as including the intention of the legislator.[57] In the former case, *epieikeia* is distinguished from legal justice, which it governs. In the latter case, it is not: *epieikeia* itself is part of legal justice. The following text from the *Commentary on the Ethics* seems to reflect the first sense best:

> That which is equitable is certainly something just, but not like what is legally just, but like a certain direction of what is legally just. In fact, it has been said to be contained within what is naturally just,

from which what is legally just takes its origin; and each thing is born to be directed according to its principle.[58]

However, whether we say that *epieikeia* can be distinguished from legal justice or not, what is certain is that it is responsible for rectifying the injustices occasioned by literal applications of the law, and this by virtue of its referring back to the principle of law itself. At this point, to avoid unnecessary arguments about the scope of *epieikeia*, it is necessary to look back at how Aquinas envisaged the relationship between natural law and positive law. In concrete, we have to remember that first and foremost for Aquinas, both originate in the same source - the reason of justice - even though they emanate in different ways.[59] We should also note that in the Thomist view, what is just by nature - and therefore, natural law - includes obedience to positive law; and that positive law is only just if it adheres to the principles of natural law. This apparently circular argument becomes clear if we distinguish between principles of law on the one hand, and the conclusions and resolutions of law on the other. For Aquinas, natural law includes the principles, on the one hand, and on the other, all the precepts which derive directly from the principles: these precepts are conclusions of the principles, and as such are known as secondary precepts. Positive law also originates in these principles, but it decides or specifies the way in which they are to be put into practice in a particular society and particular circumstances.

Since this is the case, it would appear to be obvious that it is impossible to draw a clear dividing line between natural law and positive law: natural law is embodied in

positive law. Living positive law is usually the same as living natural law. This is the reason why we are bound by conscience to obey the law. The problem raised here - that of the unjust law - falls outside the scope of *epieikeia*. Aquinas offers a series of criteria for discerning unjust laws.[60] None the less, when he writes of *epieikeia* he does so on the basis that the laws are just. In this context he asserts repeatedly that the purpose of *epieikeia* is not to call into question the rightness of the law, which he does not doubt, but only to judge whether, in some particular case, it is just to apply it literally. To do this, it has to judge this case in the light of the principles of law, that is, in the light of the essence of justice.

For this very reason, it is immaterial whether the case in question is supposed to be governed by a secondary principle of natural law or a principle of positive law. After all, these are not distinguished from the point of view of the use made of them by the agent, but only in the means by which this principle proceeds. It would be quite another thing to apply *epieikeia* to the principles of law themselves: this goes against the very concept of *epieikeia*, as if it is a virtue, it cannot exist away from those principles.[61] But as this is a conclusion of natural law, Aquinas has no objection to discussing *epieikeia*. This is what he does when he applied it to the precept of restitution, which is a (secondary) precept of natural law, independently of the fact that its formulation as a law has to be attributed to a human legislator:

> Since human actions, with which laws are concerned, are composed of contingent singulars and are innumerable in their

diversity, it was not possible to lay down rules of law that would apply to every single case. Legislators in framing laws attend to waht commonly happens: although if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good, which the law has in view. Thus the law requires deposits to be restored, because in the majority of cases this is just. Yet it happens sometimes to be injurious –for instance, if a madman were to put his sword in deposit, and demand its delivery while in a state of madness, or if a man were to seek the return of his deposit in order to fight against his country. In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good (*sequi id quod poscit iustitiae ratio et communis utilitas*). This is the object of epiekeia which we call eqiuty. Therefore it is evident that epieikeia is a virtue.[62]

Like Aristotle, Aquinas insists that *epieikeia* does not conspire against the law, which is good in itself, as long as it is directed towards the common good,[63] nor does it speak of a defect in the legislator, who introduced the law because of what happens *ut in pluribus* regarding a specific matter. Indubitably, the need for *epieikeia* implies some kind of deficiency, but this is an intrinsic shortcoming of the very nature of human acts,[64] which are not always of the same kind: "just as returning a borrowed item is just in itself, and good most of the time, it may also be bad in some cases, for example, if a sword is returned to a madman."[65]

According to the text quoted, the possibility of disagreement between the letter of the law and the intention of the legislator lies in the contingency of human actions itself. Earlier, we saw that Aquinas attributes this

disagreement to the disorder introduced to the world by a bad will, as the negative use which is practically sure to result from returning the sword in such cases is something that depends on the will. In any case, it is patent that the defect in question is not in the law itself, about whose goodness *epieikeia* does not judge. *Epieikeia* confines itself to evaluating the advisability of applying the law literally in certain problematic cases,[66] which it does by reference to the essence of justice,[67] a principle generally known through synderesis. This reference to synderesis is what, in the last instance, justifies the application or non-application of a positive secondary precept, and which in all cases justifies the universal validity of the prohibitions against intrinsically evil acts.

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[1] Plato, *Republic*, 331 c 1-12.

[2] tou`to dΔ aujtov, th;n dikaiosuvnhn, povtera th;n ajlhvqeian aujto; fhvsomen ei\nai aJplw`" ou{tw" kai; to; ajpodidovnai a[n tiv" ti parav tou lavbh/, h] kai; aujta; tau`ta e[stin ejnivote me;n dikaivw", ejnivote de; ajdivkw" poiei`n… oi|on toiovnde legw: pa`" a[n pou ei[poi, ei[ ti" lavboi para; fivlou ajndro;" swfronou`nto" o{pla, eij manei;" ajpaitoi`, o{ti ou[te crh; ta; toiau`ta ajpodidovnai, ou[te divkaio" a]n ei[h oJ ajpodidou;", oujdΔ au\ pro;" to;n ou{tw" e[conta pavnta ejqevlwn tajlhqh` levgein (Plato, *Republic* I, 331 c, 1-12).

[3] Plato, *Laques* 190 e 2 ss.

[4] Aristotle, *Nicomachean Ethics*, II, 4, 1105 b 6-9.

[5] Plato, *Republic*, 331 d 1-2.

[6] Ibid. 331 e 8-16.

[7] Ibid. 332 d 1-2.

[8] *Cratylus*, 386 e 8-387 b 9.

[9] Plato, *Euthydemus*, 278 e 4-282 a 9; 288 e-292 e. See Volker Hildebrandt, *Virtutis non est virtus: ein scholastischer Lehrsatz zur naturgemässen Bestimmung vernünftigen Handelns in seiner Vorgeschichte* (Frankfurt am Main, Lang. 1989).

[10] Aristotle, *Nicomachean Ethics*, VI, 13, 1144 b 31.

[11] See Robert A. Gahl, "From the Virtue of a Fragile Good to a Narrative Account of Natural Law," in *International Philosophical Quarterly*, vol. XXXVII, no 4, (Dec. 1997): 457-472.

[12] *S.Th.* I-IIae, q. 94, a. 4, sol.

[13] See R. A. Armstrong, *Primary and Secondary Precepts in Thomistic Natural Law Teaching* (Den Haag, Martinus Nijhoff, 1966).

[14] *S.Th.* I-IIae, q. 94, a. 4. sol.

[15] Ibid.

[16] "(...) Et hoc propter hoc quod aliqui habent depravatam rationem ex pasione, seu ex mala consuetudine, seu ex mala habitudine naturae; sicut apud Germanos olim latrocinium non reputabatur iniquum, cum tamen si expresse contra legem naturae, ut refert Iulius Caesar, in libro de bello Gallico." *STh* I-IIae, q. 94, a. 4, sol.

[17] Ibid.

[18] These are not circumstances which play a part as sources of the morality of a given action, aside from its object and its end, but rather circumstances which, by modifying the object of the act, place it under a different moral species.

[19] Although I do not share all his criticisms and analyses, see D. M. Nelson, *The Priority of Prudence. Virtue and Natural Law in Thomas Aquinas and the implications for modern Ethics* (The Pennsylvania University Press, 1992).

[20] This was to be modified in Duns Scotus' writing, as Professor Fernando Inciarte (Münster) has shown me.

[21] See P. Hall, *Narrative and the natural law: an interpretation of Thomistic Ethics* (Notre Dame University Press, 1994), 94.

[22] As could be understood from the explanation by A. Gómez Lobo in "The *ergon* inference," *Phronesis*, XXXIV (1989), 170-184.

[23] Aristotle, *Metaphysics*, IX, 2, 5.

[24] See *STh* I-IIae, q. 49, a. 4, ad 3; *De Ver.*, q. 16, a. 2, ad 4, 132-137.

[25] The idea that Aquinas' moral thinking attempts in part to address the problems which Aristotle had left open, making explicit aspects which in Aristotle were only implicit, is the main thesis of the book by M. Rhonheimer, *Praktische Vernunft und die Vernünftigkeit der Praxis. Handlungstheorie bei Thomas von Aquin in ihrer Entstehung aus dem Problemkontext der aristotelischen Ethik* (Berlin, Akademie Verlag, 1994).

[26] See D. Westberg, *Right Practical Reason. Aristotle, Action and Prudence in Aquinas* (Oxford, Clarendon Press, 1994).

[27] See *STh* I-IIae, q. 90, a. 1, sol.; q. 91, a. 1, sol.; q. 94, a. 1, sol.

[28] See *STh* I-IIae, q. 94, a. 1, sol. M. Rhonheimer emphasizes this: see *Natur als Grundlage der Moral*, 67-76.

[29] Aristotle, *Nicomachean Ethics*, V, 7, 1134 b 30. According to Jaffa this is one of the most mysterious passages in the *Nicomachean Ethics*. See Jaffa, H. V., *Thomism and Aristotelianism: a study of the Commentary by Thomas Aquinas on the Nicomachean Ethics* (Chicago, The University of Chicago Press, 1952), 179.

[30] "Nihil enim videtur esse magis iustum quam quod deponenti depositum reddatur et tamen non est reddendum depositum furioso reposcenti gladium vel proditori patriae reposcenti pecunias ad arma." *In Ethic. Nic.*, V, 12, 1134 b 24, 147-153.

[31] "Apud nos homines, qui inter res corruptibiles sumus, est aliquid quidem secundum naturam, et tamen quicquid est in nobis est mutabile vel per se vel per accidens; nihilominus tamen est in nobis aliquid naturale, sicut habere pedes, et aliquid non naturale, sicut habere tunicam, et sic etiam, licet omnia quae sunt apud nos iusta aliqualiter moveantur, nihilominus tamen quaedam eorum sunt naturaliter iusta." *In Ethic. Nic.*, V, 12, 1134 b 27, 160-168.

[32] "Manifestum esse quod etiam in aliis naturalibus quae sunt apud nos eadem determinatio congruit sicut et in naturaliter iustis; ea enim quae sunt naturalia apud nos, sunt quidem eodem modo ut in pluribus, sed ut in paucioribus deficiunt, sicut naturale est quod pars dextera sit vigorosior quam sinistra et hoc in pluribus habet veritatem, et tamen contingit ut in paucioribus aliquos fieri ambidextros qui sinistram manum habent ita valentem ut dexteram; ita etiam et ea quae sunt naturaliter iusta, utputa depositum esse reddendum, ut in pluribus est observandum, sed ut in paucioribus mutatur." *In Ethic. Nic.*, V, lectio XII, 1134 b 33, 185-196.

[33] *STh* II-IIae, q. 57, a. 2, ad 1.

[34] See J. M. Boyle, "Praeter Intentionem in Aquinas", *The Thomist*, 42, 4 (1978), 649-665.

[35] See A. Quevedo, *Ens per accidens: contingencia y determinación en Aristóteles* (Pamplona, EUNSA), 1989.

[36] *STh* I-IIae, q. 62, a.5, ad 1.

[37] "He who has to return gold to a lender does not give back what he owes if there is some disadvantage incurred by returning or receiving," Plato, *Republic* I, 332 a 11-b 2.

[38] The idea of the "natural use" of goods does not entail any kind of fixity. It is not an attempt to limit the ends of human action *a priori*, but of expressing a condition for their moral consistency. Using is always a voluntary act (the active use of the will), and as such, it can be morally good or bad, which is different from a good or bad technical use. Unlike the technical use, a good moral use makes it necessary to preserve the integrity of the human good, and this only happens if the agent, while it pursues its particular objectives, preserves in its action the prescribed order: external goods for the well-being of the body, and the body for the well-being of the soul.

[39] See Aristotle, *Politics*, VII, 13, 1332 a 11-25.

[40] "Quia rationes etiam mutabilium sunt immutabiles, si quid est nobis naturale quasi pertinens ad ipsam hominis rationem nullo modo mutatur, puta hominem esse animal, quae autem consequuntur naturam, puta dispositiones, actiones et motus, mutantur ut in paucioribus; et similiter etiam illa quae pertinent ad ipsam iustitiae rationem nullo modo possunt mutari, puta non esse furandum, quod est iniustum facere, illa vero quae consequuntur mutantur ut in minori parte." *In Ethic. Nic.* V, Lectio XII, 1134 b 33, 184-207.

[41] In reality, it is this very immutability which offers us a criterion for discernment and thus enables us to judge on the variable nature of the secondary precepts. See P. Lee, "The Permanence of the Ten Commandments. St. Thomas and his Modern Commentators," in *Theological Studies*, 42 (1981), 422-443, 442.

[42] "Per restitutionem fit reductio ad aequalitatem commutativae iustitiae, quae consistit in rerum adaequatione, sicut dictum est. Huiusmodi autem rerum adaequatio fieri non posset nisi ei qui minus habet quam quod suum est, suppleretur quod deest. Et ad hanc suppletionem faciendam necesse est ut ei fiat restitutio a quo acceptum est." *STh* II-IIae, q. 62, a. 5, sol.

[43] See *De Ver*., q. 16, a. 3, sol.

[44] See J. Finnis, *Moral Absolutes. Tradition, Revision and Truth* (Washington D.C., The Catholic University of America Press, 1991), 91.

[45] Taking or keeping someone else's property is intrinsically bad. The problem that can be raised here does not lie in questioning the suitability of the precept,

but in determining what *someone else's property* is. As is well known, in Aquinas external goods are naturally ordered for the human race to use them. Private property is only justified in the name of this common use. It is part of natural law, but only a secondary part, deriving from common use (see *STh* I-IIae, q. 94, a. 5, ad 3). Therefore in the case of extreme need, property becomes common, and so someone who takes or keeps what in normal circumstances would be someone else's, cannot be accused of theft. Something analogous happens in the case of keeping things back: "Quando aliquis non potest statum restituere, ipsa impotentia absolvit eum ab instanti restitutione facienda: sicut etiam totaliter a restitutione absolvitur si omnino sit impotens. Debet tamen remissionem vel dilationem petere ab eo cui debet, aut per se aut per alium." *STh* II-IIae, q. 62, a. 8, ad 2.

[46] *STh* II-IIae, q. 62, a. 5, ad 1.

[47] Aristotle, *Nicomachean Ethics*, II, 6, 1106 a 14-15. See *STh* I-IIae, q. 55, a. 2, *sed contra*.

[48] See M. Rhonheimer, *Natur als Grundlage der Moral. Die personale Struktur des Naturgesetzes bei Thomas von Aquin: Eine Auseinandersetzung mit autonomer und teleologischer Ethik* (Innsbruck-Wien, Tyrolia Verlag, 1987), 141-142.

[49] See D.M. Gallagher, "Aquinas on Goodness and Moral Goodness," in *Thomas Aquinas and his legacy*, ed. D.M. Gallagher (Washington, D.C., The Catholic University of America Press, 1994), 37-60.

[50] See *STh* II-IIae, q. 51, a. 1 and 2.

[51] See *STh* II-IIae, q. 51, a. 3 and 4.

[52] *STh* II-IIae, q. 51, a. 4 sol.

[53] See A. Rodríguez Luño, "La virtù dell'epicheia. Teoria, storia e applicazione (I)" in *Acta Philosophica, Rivista Internazionale di Filosofia*, vol. 6 (1997/2), 197-236.

[54] *Nicomachean Ethics*, V, 10, 1137 b 11-13.

[55] Thus he defines the equitable man as "the man who chooses and does such acts, and is no stickler for justice in a bad sense but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state" *Nicomachean Ethics*, V, 10, 1137 b 35-1138 a 3.

[56] See Aristotle, *Rhetoric*, I, 13.

[57] "Epieikeia correspondet proprie iustitiae legali: et quodammodo continetur sub ea, et quoadammodo excedit eam. Si enim iustitia legalis dicatur quae obtemperat legi sive quantum ad verba legis sive quantum ad intentionem

legislatoris, quae potior est, sic epiekeia est pars potior legalis iustitiae. Si vero iustitia legalis dicatur solum quae obtemperat legi secundum verba legis, sic epieikeia non est pars iustitiae communiter dictae, contra iustitiam legalem divisa sicut excedens ipsam." *STh* II-IIae, q. 120, a. 2, ad 1.

[58] "Id quod est epiikes est quidem aliquod iustum, sed non est iustum legale, sed est quaedam directio iusti legalis. Dictum est enim quod continetur sub iusto naturali, a quo oritur iustum legale; unumquodque enim naturm est dirigi secundum principium a quo oritur," *In Ethic. Nic.,* V, 16, 1137 b 11, 76-82.

[59] Both the secondary precepts of natural law and the precepts of positive law have one and the same principle, the essence of justice. However, natural law and positive law have diverse origins, as the force of the former follows directly from the principles of law as a kind of conclusion, and the latter as a kind of determination or concrete expression.

[60] See *STh* I-IIae, q. 96, a. 4, sol.

[61] Aquinas sometimes places the treatment of epieikeia on the same level as that of the dispenser of the law. See *STh* I-IIae, q. 97, a. 4, ad 3.

[62] *STh* II-IIae, q. 120, a. 1, sol.

[63] See *STh* I-IIae, q. 96, a. 6, sol.

[64] See *STh* II-IIae, q. 120, a. 1, sol.

[65] The complete text reads as follows: "Praedictus defectus non tollit rectitudinem legis vel iusti legalis, dicens quod, licet peccatum accidat in aliquibus ex observantia legis, nihilominus lex recta est, quia peccatum illud non est ex parte legis, quae rationabiliter posita est, neque ex parte legislatoris, qui locutus est secundum condicionem materiae, sed est peccatum in natura rei. Talis enim est materia operabilium humanorum quod non sunt universaliter secundum se iustum est et ut in pluribus bonum, in aliquo tamen casu potest esse malum, puta si reddatur gladius furioso." *In Ethic. Nic.*, V, 16, 1137 b 17, 116-130.

[66] "Ille de lege iudicat qui dicit eam non esse bene positam. Qui vero dicit verba legis non esse in hoc casu servanda, non iudicat de lege, sed de aliquo particulare negotio quod occurrit." *STh* I-IIae, q. 120, a. 1, ad 2.

[67] "(...) Epieikeia est pars subiectiva iustitiae. Et de ea iustitia per prius dicitur quam de legali: nam legalis iustitia dirigitur secundum epieikeiam. Unde epieikeia est quasi superior regula humanorum actuum." *STh* II-IIae, q. 120, a. 2, sol.