Discoursing with Finnis and Revisiting *Tshwane* – A Legal-philosophical Refocusing on Commutative Justice and Estoppel by Representation in Public Law*

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Samevatting

John Finnis se interpretasie en toepassing van Thomas Aquinas se morele, politieke en regsteorie huisves interessante nuwe perspektiewe oor die relevansie van die klassieke natuurreg-teorie in die algemeen en die moontlike toepassing op huidige vraagstukke betreffende geregtigheid en die regte van die mens in besonder. Die artikel ondersoek die moontlike toepassing van die klassieke Thomistiese natuurreg-beginsels op kontemporêre regsproblematiek en die relevansie van die kommutatiewe geregtigheidsidee in hierdie verband.

1. Introduction

John Finnis' interpretation and application of Thomas Aquinas' moral, political and legal theory carries interesting new perspectives on the relevance of classical natural law theory in its wake generally speaking, and possibilities of application to current issues concerning justice and human rights in particular. In the domain of natural justice, three aspects

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of Aquinas' thought highlight the possibilities of applying Aquinas' views to current public law issues in particular: firstly, serving the common good starts from submitting to the moral duty of treating the good of other people as a reason for acting according to one's own practical deliberation and choosing;[1] secondly, general justice aiming at the common good can be specified into forms of particular justice, primarily fairness in the distribution of the benefits and burdens of social life, and proper respect for the personhood (dignity of being) of others (*reverentia personae*) in all conduct that affects them – moral duty towards others presupposes the dignity[2] of personhood that all human beings have,[3] and thirdly, the practical reasonableness required for the common good and securing fundamental rights are shaped by the principles and norms of natural reason and any relevant and authoritative rules which have given to natural law some specific *determinatio* for a given community.[4]

From these three viewpoints Finnis concludes that although Aquinas' main discussion of right(s) is in the context of justice considered as a virtue – as an aspect of good character – he makes it clear that justice's primary object is the *right(s)* of the human person entitled to the *equal treatment* we call justice; therefore, Aquinas' arguments concerning justice are a matter of rights to equal treatment just as fundamentally as they are a matter of duties and of "excellences of individual and communal character".[5]

This essay questions Finnis' "weakening" of moral obligation in the field of justice generally and in the domain of rights in particular; it argues in favour of a more fundamental view of personal dignity as the "basis" for rights and investigates the possibilities of widening the application of commutative justice in instances concerning *estoppel* in the public sphere, and addresses

1 Finnis, *Aquinas*, 2004, 132. In his *Natural law and natural rights* (1980), 155, Finnis distinguishes a number of different meanings attached to "common good".

2 To Aquinas, "dignity" signifies something's goodness for its own sake (*propter seipsum*) – it connotes the superiority and intrinsic non-dependent worth; the inherent rational superiority to "instantiate every level of being" (Finnis, *Aquinas*, 179).

3 *Aquinas* (2004), 133. It is at this "high" moral level that the "Rule of Law" finds itself. See e.g. Finnis *Natural law and natural rights* (1980), 272, where he decribes the rule of law as a "virtue of human interaction and community" – individuals can only be *selves* – i.e. have the "dignity" of being "responsible agents" – if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a "lifetime".

4 *Aquinas* (2004), 135. I.e. *lex positiva* or, synonymously, *ius positivum*, usually denoted *ius civile.*

5 *Aquinas* (2004), 138. In practice it may go further – justice's very object is to regard the *right(s)* of the human person entitled to the *equal treatment* we call justice (*Summa theologica*, Q(57)-A(1)).

some of the aspects involved in the question of whether judges have a moral duty to apply/extend the application of *estoppel* by representation in this field.

2. The human person's knowledge of the "weight" of justice and the issue of *synderesis*

2.1 Aquinas and the human person's ability to glean knowledge of justice

Although Aquinas speaks of "innate cognition" of truth, *a priori* elements of "natural inclination" that are divinely instilled in human beings by God, and the human mind being "naturally endowed" with principles "not known by investigation" but bestowed on us by nature, he does not come out particularly strongly in favour of *a priori* principles *in the process of acquiring knowledge.* To a limited extent, however, his statements on "synderesis" do open the way for identifying criteria of importance in establishing the "weight" of ideas in guiding human knowledge, and particularly in guiding legal judgment. In his *Summa*, Aquinas observes that man's act of reasoning proceeds from the understanding of those things which are "naturally" known without any investigation on the part of reason, "as from an immovable principle".[6] Man's act of reasoning ends at the understanding; by means of those principles naturally known, we judge of those things which we have discovered by reason.[7]

To Aquinas there is a clear distinction between speculative reason and practical reason – both bestowed on human beings by nature. Whereas the first "speculative principles" bestowed on humankind by nature belong to the habit of "the understanding of principles", the first "practical principles" belong to the special power called "synderesis".[8] The

6 *Summa theologica* (abbreviated to *Summa*), P(1)-Q(79)-Q(12). In *De Veritate*, Q(16)-A(2)-Arg(6) Aquinas states about these "first principles" of practical reason: "Praeterea, sicut se habet intellectus principiorum in speculativis, ita synderesis in operativis. Sed omnis operatio rationis speculativae ex principiis primus oritur. Ergo et omnis operatio practica rationis ex synderesi initium sumit. Ergo sicut synderesi attribuitur operatio rationis practicae quae est secundum virtutem, ita attribuetur ei operatio rationis quae est secundum paccatum."

7 *Summa*, P(1)-Q(79)-A(12). Also note *Summa*, P(1b)-Q(100)-A(1) – every judgement of practical reason proceeds from certain naturally known principles. These first principles are sometimes called principles of common right (*iuris communis*); to know them is not yet to be able to make right moral judgements or have moral virtues, but rather to have the "seeds of virtues" (*Summa*, P(1b)-Q(51)-A(1)).

8 The first principles of practical reason are "indemonstrable" and "self-evident" (*Summa*, P(1b)-Q(91)-A(3) (*principia indemonstrabilia*); P(1b)-Q(94)-A(2) (*principia per se nota*).

particular function of "synderesis" is to "incite to good, and to murmur at evil inasmuch as through first principles we proceed to discover, and judge of what we have discovered".[9]

Having stated the human person's natural ability to acquire knowledge and the tendency to good, he does not adequately explain man's ability to weigh greater and lesser forms of human good. For example, how do we know that we should obey the will of God and submit to the authority of a ruler, or any authority whatsoever? How do we explain the human appreciation of justice as a value of great "weight" relative to other values, or to following the will of the legislature?; or that benevolence is a primary moral good subject to truth as a virtue of value? Furthermore, how do we assess the proper place of moral ideas relative to others, within the rich complexity of human existence?

Aquinas' answer to these issues concerns the recognition, existence, dignity and apprehension of a sphere of rational and ethical values in which the standard (good or virtue) of justice is also manifest. However, proceeding from the dignity and power of man, who is able to participate intellectually in the rational order of the universe, Aquinas moves on to the moral standards of justice without having sufficiently explained the human being's ability to appreciate and acknowledge moral ideas for what they are. Prior to accepting the fact that justice is the ideal standard for all law, coming to expression through natural law as the basis of political allegiance – the ground upon which social and political relations are secured and comprehended – a more foundational (primary or fundamental) law of moral "weighing" and judgement is needed in order to universalise the human being's knowledge of distinguishing between the various forms of moral good (virtue) and justice.

2.2 The ontological shift in the knowledge and the common human understanding of justice

Philosophical concerns about the inherent limitations of human rationality in the classical statements of natural law theory surfaced in the wake of the traditional scholastic statements of natural law. Some of the more influential efforts to "transcend" the traditional limitations of human rationality pursued the avenues opened up by the Ciceronian statement of a primary law of human judgement preceding the act of rational enquiry in terms of the existence of a foundational idea or notion for forming

9 *Summa*, P(1)-Q(79)-A(12).

moral judgements, not originating with the learned, nor with the decrees of the people, but possessed by nature in the form of "a wisdom with authority to command and forbid, governing the whole world".[10]

Eloquently expressing Cicero's appeals to the standards of virtue understandable by human beings "endowed with common sense", the reformational philosopher, Melanchthon, for example, addresses the issue concerning the needs for "nodal points"[11] of human knowledge in the human intellect, providing all human beings with the ability to distinguish moral uprightness from human vice.[12] In the human mind there are "inborn elements of knowledge" (*notitiae nobiscum nascentes*)[13] representing a "natural light", "rays of divine wisdom" inhering in the human intellect for making individual and communal life possible in civil society,[14] by enabling the human person to state the definitions of the virtues[15] in the totality of human existence.

Different from Aquinas, Melanchthon does not, in the first instance, have recourse to natural law as the traditional "hideout" or "last resort" for demanding obedience to the principles of justice. Prior to practical reason he identifies the "nodal points" of human knowledge for making universal discourse on moral uprightness and vice possible. In line with the Thomist

10 Cicero, *De Legibus*, II: "hanc video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitam, nec scitum aliquod esse populorum sed aeternum quiddam, quod universum mundum regeret, imperandi, prohibendique sapientia." Julián Mariás, *History of philosophy* (1967), 91, reckons the developments regarding the notions of *notiones communes* (common ideas), that are present in everyone and determine a universal consensus, among some of the most influential "of all the ancient systems that were rediscovered".

11 Linked with *notus*, *notitia* means "to know", "to recoknize", "to be acquinted woth", "to acknowledge" – the "beginnings of knowledge". Personally I prefer to refer to these as "nodal points", from *nodus* as an orientation point in the form of a "knot" or "knob" or "measures", rflecting the meaning of "standards", "propositions" or "units".

12 *Law and revolution II* (2003), 81, 82. Sachiko Kusukawa, *Philip Melanchthon. Orations in philosophy and education* (1999), xviii, summarises Melanchthon's position regarding "innate knowledge" as follows: "Melanchthon affirmed, in opposition to Aristotle, that there is innate knowledge given by God to all human beings, namely natural light. Drawing on Stoic ideas, Melanchthon explained that there were three criteria of certainty. Moral principles (e.g. killing one's parents is wrong) and scientific principles (e.g. two plus two equals four); universal experience (e.g. fire is hot), the opposite of which would lead to destruction of the thing concerned; and understanding of the procedures of syllogism."

13 Cf. Berman, *Law and revolution II*, 79. These *notitiae* could be regarded as ideas or measures from which knowledge originate.

14 See e.g. Melanchthon's remarks in his *Liber de Anima* (*Corpus reformatorum*[*CR*], 13:150).

15 Berman, *Law and revolution II*, 82.

statements on natural law, Melanchthon firstly subscribes to the moral principles inscribed in the hearts of all people by which they should be governed in their relations with one another – principles that are accessible to human reason in the form of the law of nature (*lex naturae*) or natural law (*jus naturale*); secondly by postulating that human reason is a divine gift to discern and apply these principles of natural law.[16] However, different from Aquinas, Melanchthon grounds the faculty for determining the "weight" (or authority) of natural law precepts, compared to other legal norms (or demands), much deeper in the essential nature of man than does Aquinas.[17]

The universal discourse as such on the authority (or "weight") of the demands of natural law is, therefore, made possible by the presence of "nodal points" of knowledge for determining the weight of fundamental notions or ideas. Without these *notitiae* human beings are not able to make fundamental decisions on basic issues concerning their duties and obligations in civil society.[18] These "nodal points" for weighing moral duties cover the whole spectrum from logic, through morals, to choices in the domain of law. So for example, the nodal points of knowledge concerning natural law "teach" that offences which harm society are to be punished and that promises should be kept.[19] These nodal points of knowledge function with the same weight as facts, they form the objects

16 Berman, *Law and revolution II*, 82.

17 Berman, *Law and revolution II*, 79. Karl Gottlieb Bretschneider & Heinrich Ernst Bindseil, eds., *Philippi Melanchthonis Opera Quae Supersunt Omnia*, *CR,* 13: 150 & 647. In *CR*, 21: 712 Melanchthon calls these elements of knowledge "a natural light in the intellect [*naturalis lux in intellectu*", "a light of the human faculty [*lux humani ingenii*]", etc. Melanchthon describes his general theory of the inborn elements of knowledge in greater detail in his *Compendaria Dialectices Ratio* (1520) (*CR*, 20: 748), and *De Loci Communibus Ratio* (1526) (*CR*, 20: 695).

18 Berman, *Law and revolution II*, 79, regards the contribution of Melanchthon to German legal philosophy as being situated in his "radically new theory of the ontology of natural law, that is its origin in the essential nature of man" (see Heinrich Bornkamm, "Melanchthon's Menschenbild", in Walter Elliger, ed., *Philip Melanchthon's Forschungsbeiträge zur Vierhundertsten Wiederkehr seines Todestags* (Berlin, 1961), 76-90). Berman, *Law and revolution* II, 86, observes that Melanchthon's influence in German legal thought was immense: "Melanchthon helped to shape the context and character of German legal philosophy until well into the seventeenth century." A whole generation of Germany's leading jurists in the sixteenth century – Johan Oldendorp (ca. 1486-1567), Hieronymous Schuepf (1481-1554), Johann Apel (1486-1536), Konrad Lagus (ca. 1499-1546), Basilius Monner (ca. 1501-1566), Melchior Kling (1504-1571), Johannes Scheidewin (1519-1568), Nicolas Vigelius (1529-1600), and many others came under his direct influence as students, colleagues, and correspondents. Berman concludes: "His basic jurisprudential insights dominated German legal scholarship at least until the late seventeenth century."

19 Berman, *Law and revolution II*, 79.

of rational enquiry and as such are beyond the power of human reason either to prove or disprove.

Melanchthon's ontological statement of natural law theory differs in three marked respects from the traditional Thomist tradition: first, he shifted the emphasis in natural law discourse from the content of natural law as such to the essential nature of man; second, the proof of natural law principles is a matter of *a priori* "common sense" judgement, rather than the *a posteriori* argument of the scholastics that human reason can prove moral propositions that are consistent with divine revelation and that the universal acceptance of a given principle of justice is proof of its rationality; and third, that the law of nature is not autonomous in respect to both its own authority and its infallibility and should therefore be subjected to higher moral authority of duty and right.[20]

Although mainly following the classical natural law tradition as stated by Aquinas, Melanchthon's natural law thought reflects a much greater sensitivity to the moral order of reality (being) reflected in the moral-jural tenets of divine and natural law. This "ontological sensitivity" to reality (being) – both eternal and creational – generates perspectives on the weight of justice and jural-moral duty markedly different from those of traditional scholasticism.[21]

What then is the first condition for legitimate jural argument in the formation of human judgement? The acknowledgement of everything in reality as it presents itself to us, followed by the persevering and steadfast will not to alter or change it in accordance with what is useful or pleasurable to us. In simple terms: accept everything as it is in reality and treat it with a persevering will of benevolence (in other words justice).

3. The nature and limits of commutative justice

3.1 Aquinas on commutative justice

In the traditional Thomist legal philosophy, natural law is regarded as the insurmountable barrier against injustice. To Aquinas natural law reflects certain supreme ethical values of an objective rule of justice expressed in

20 Note Berman, *Law and revolution II*, 78-80.

21 Different from Aquinas, this implies that the dignity of the intelligent subject arises from the dignity of being, the source of the subject's understanding – the intelligent subject is "outwardly focused" at the start of the quest for knowledge: it enables the human person (subject) to forget self by considering things as they are in themselves; to look at things impartially and justly; and in so doing, to render homage to being itself, without thought of self, in all the degrees in which it knows being.

the law of nature. In his *De Regimine Principium* Aquinas links this to the "natural" and "necessary" fellowship of human beings demanding rule for the common good, "just as the body of a person or of any animal would disintegrate were there not in the body itself a simple controlling force, sustaining the general vitality of all the members".[22] However, promotion of the common good does not imply the promotion of that which is pleasurable in the first place, but to further that which is truly good.[23] The two mechanisms for attaining the supreme good are natural and positive justice respectively.

To Aquinas the basic good of practical reasonableness demands benevolence – the principle of love of neighbour as oneself is the avenue to obtain the virtue of general justice in promoting the common good.[24] On its part, general justice can be specified into the forms of particular justice – fairness in the distribution of the benefits and burdens of social life, and proper respect for others in any conduct that affects them.[25] Finnis translates this into statements concerning rights: "The object of particular justice is the other person's right(s) {*ius*}. It follows therefore, that one cannot respect or promote common good without respecting and promoting rights. Respect for rights is the specific form which respect for common good and for the 'bond of human society' must take."[26] Finnis adds: "When Aquinas says that *ius* is the object of justice, he means: what justice is about, and what doing justice secures, is the *right* of some other person or persons – what is due to them, what they are entitled to, what is rightfully theirs."[27]

The wrongs individuals do to one another stand in opposition to the virtue of commutative justice.[28] Although Aquinas portrays the central characteristic of commutative justice as the making of recompense of one individual towards another in "involuntary interaction" ("commutatio"), the field of commutative justice is not limited to instances of recompense (compensation or restitution) but also covers rights and wrongs in any

22 *De Regimine Principium*, I. 1.
23 *Summa* P(2a)-Q(92)-A(12).
24 See Finnis, *Aquinas*, 132-133. This in itself is a particular manifestation of benevolence (in the form of friendship) between human persons [amacitiae hominis ad hominem].
25 Finnis, *Aquinas*, 133. Cf. *Summa* P(2b)-Q(7), P(2b)-Q(61) & P(2b)-Q(62).
26 Finnis, *Aquinas*, 133. Common good is primarily the object of general justice (*Summa* P(2b)-Q(6)).
27 Finnis, *Aquinas*, 133.
28 *Summa*, P(2b)-Q(63)-Intr.; P(2b)-Q(64)-Intr.

interaction (or dealing) (*commutatio*) between individuals beyond the duty of recompense; it also includes the *prior issue* of whether one individual's conduct amounts to the wronging of another.[29]

Aquinas' interpretation and application of Aristotle's notion of *corrective justice*, in the form of commutative justice, carries with it a number of most important considerations: first, Aquinas broadened the application of this form of justice to apply to all dealings between persons (including groups) in determining the "proper-ness" of such dealings;[30] second, the distinction between distributive and commutative justice is merely an analytic convenience so that even acts aimed at distributive justice may have clear implications of a commutative nature – a judge applying irrelevant considerations in a judgement violates not only distributive justice, but may also violate commutative justice by making an "unfitting" judgement and unduly harming one of the parties to the case;[31] third, tensions between considerations of distributive and commutative justice shift according to the prevailing views of the times – one area in English law being the issues concerning the common law of contract, which may fluctuate between the view that the parties to a contract are treated as individuals dealing with one another at arm's length, each pursuing his own interests which remain entirely individual and are merely "juxtaposed" to the other party's interests by and to the extent defined by the contract, and in case of breach of contract to restore the other party to a position *equivalent* to that which he, the promisee, would have enjoyed but for the promisor's non-performance (i.e. commutative justice); to be distinguished from the view that every party to a frustrated contract would be entitled to restitution for any performance of any part of his contractual obligations, while losses would be apportioned equally between the parties making and receiving restitution;[32] fourth, the fact that commutative justice concerns relations between ascertained individuals,

29 See Finnis, *Aquinas*, 216. There is a "strong" rights-dimension involved – what is due to a person (*suum ius*) means giving a person "what is his/hers (*quod suum est*) (P(2b)-Q(1)-A(5) and "what is his/her right" (*ius suum*) (P(2b)-Q(57)-A(4)), is a matter of equality; he/she is entitled to (*quod eis secundum proportionis aequilitatem debetur*) (P(2b)-q(58)-a(11)), i.e. justice demands that a person's right to equality be maintained.

30 See Finnis, *Natural law and natural rights,* 179.

31 Finnis, *Natural law and natural rights*, 179-180. Finnis (at 179) points out that Aquinas, purporting to interpret Aristotle faithfully, "silently shifted the meaning of Aristotle's second class of particular justice and invented a new term for it 'commutative justice'".

32 Finnis, *Natural law and natural rights*, 181-182.

does not imply that adherence to duties of commutative justice does not concern the common good – how, for example, can a society be said to be well-off in which individuals do not respect each other's rights?;[33] fifth, commutative justice does not concern individuals and their duties only – the state and its officials also have duties in commutative justice to the subjects of the state;[34] six, Finnis legitimately points out that commentators[35] on Aquinas' views misunderstood and misapplied his distinction between general justice and the two species of particular justice (distributive and commutative), thereby reducing it to a distinction between the individual's duty to the state, the state's duty (distributive) to individuals, and individuals' duties (commutative) to each other.[36] The over-simplification of Aquinas by his commentators, to Finnis, obscures from view the distortion involved (1) in treating distributive justice as a responsibility and virtue only of the state (or its rulers), as if individuals as such do not also have duties of fair distribution, and (2) in treating the state (rather than any and every community to which one is related) as the only direct object of general justice. For example, where a community itself owes someone recompense for services rendered to it (e.g. as soldier or member of the government), the obligation is one of commutative not distributive justice.[37]

3.2 The need for "credible reasonableness" through the acknowledgement of and regard for being

Philip Melanchthon's interpretation of the Aristotelian notion of justice[38] reflects a much stronger concern for justice and the human dignity and equality of all persons flowing therefrom than does Aquinas with his focus on the common interest. Regarding justice, Melanchthon follows Simonides' definition that "justice is a virtue giving to each his own" because justice is a virtue governing man in so far as he lives with others; that is, "it either regulates persons or it shares matters with definite equality".[39] In the whole of human society we share or exchange goods or we arrange persons like governments, officials, the stations in communities and in large and small families.[40]

33 See Finnis, *Natural law and natural rights*, 184.
34 Finnis, *Natural law and Natural rights*, 186.
35 Particularly Cardinal Cajetan's famous commentary on Aquinas' *Summa Theologica* (*Commentaria in Secundam Secundae Divi Thomae de Aquino* (1518).
36 Finnis, *Natural law and natural rights*, 184-188, 196-197. Also see Del Vecchio, *Justice*, 35-36 & 37-39, who states that this interpretation falsifies both Aristotle and Aquinas.
37 Finnis, *Aquinas*, 217. See *Summa contra gentiles* III.135.15.
38 See his *Ethicae doctrinae elementa* (1554). The essential references to this work are provided in the original Latin because no published translation of this work is extant.
39 *Ethicae*, 97: "Est igitur definitio iusticiae particularis, quam recitant Iuris consulti, sumpta à Simonide: *Iusticia est virtus, suum cuique tribuens.* Nam iusticia virtus est,

The aims of commutative justice are promoted through the sharing of goods, and "since this sharing which becomes the reason for our livelihood spreads boundlessly, it is necessary that the highest degree of equality be brought about in it, that is, that equal things be rendered for equal things". Melanchthon adds: "For there could be no everlasting sharing unless there were natural recompense, because if those who give do not receive equal compensation they will eventually be exhausted and will perish due to famine."[41] Melanchthon directs his focus at sound commercial interaction and practice; the primary aim of commutative justice is to prevent undermining of commercial transactions of trade and commercial sharing in civil society.

Not only does commutative justice serve sound commercial practice, it also aims at preserving "human nature" – in other terms, the dignity of human personhood. Melanchthon argues as follows: Aristotle defined commutative justice as that which in the sharing of goods maintains equality in arithmetic proportion; that is, "it simply accomplishes a limitless equality of diversities".[42] In fact, it is an arithmetic proportion in which three or more numbers are placed at equal distances without regard to relation.[43] Just as the boundary lines are here plainly apart from equal numbers, "the highest equality is sought between buyer and seller so that human nature can be preserved".[44] Commutative justice goes further than

gubernans hominem, quatenus cum aliis agit, hoc est, vel personas ordinans, vel res communicans certa aequilitate."

40 *Ethicae*, 97-98: "Sunt autem duae species iustitiae particularis, distributiva et communitativa, nec sunt plures. Ac ut intelligas hanc partitionem ex ipsa natura eruditissimè & aptissimè sumptam esse, tota hominum societas intuenda est. Nam in universa hominum societate tantum duo sunt genera communicationis. Aut enim res seu commutamus, aut ordinamus personas, ut imperia, magistratus, gradu in civitatibus, in familiis magnis & parvis."

41 *Ethicae*, 98: "Ac manifestum est, totam societatem hominum gubernari his duolus modus, personarum ordinationem, & rerum commutatione. Res autem communicamus per contractus, & cum haec communicatio, quae fit victus causa, in infinitum vagetur, necesse est in ea summam aequilitatem effici, hoc est, aequilia pro aequalibus reddi. Nequaquam enim perpetua communicatio esse posset, nisi mutuae vices essent, quia si qui dorent sine aequali compensatione, ii tandem exhausti, fame perituri essent."

42 *Ethicae*, 98: "Ideo Aritoteles devinivit commutativam iustitiam esse, quae in commutatione rerum servat aequilitatem proportione Arithmetica, idest, quae simpliciter efficit differentiarum in infinitum."

43 *Ethicae*, 98.

44 *Ethicae*, 98: "Sicut enin hic omnes termini distant simpliciter aequilibus numeris, sic quaeritur summa aequilitas inter emptorem & venditorem, ut conservari genus humanum possit." In his Preface to Johannes Vogelin's *Book on the elements of geometry* (1536) (*CR*, 3: 107-114), he remarks on the width of the application of natural justice that it rules "not only contracts, but any exchange of things, such as merchandise, damage, harm and penalties".

preserving human nature – together with distributive justice, commutative justice aims at maintaining the bond of human association through equality, "because the upkeep of equality suits human nature and is the guardian of peace".[45]

Justice (both distributive and commutative), being the constant and perpetual will to give to each his own, reflects the virtues in the minds of human beings as "rays of divine wisdom" as it were, discerning between "virtues and dishonourable values". From this perspective it means that commutative justice as such – more so than distributive justice – is reflective of the "weight" of the good needed for human association.[46] In effect it means that *justice* culminates in acts that are *just* only if the human acts of will – proceeding from the perpetual commitment to benevolence – produce results that meet certain required standards, through the mind judging correctly and submitting the will to proper judgement.[47]

How are deviations from intellective "good" judgements concerning the standards of justice to be explained? Wrong desires, says Melanchthon, disturb accommodation of the ideas of natural law by departing from the light of the mind on account of which human beings experience "vicious whirlwinds contrary to natural law", disturbing the "weight" of values in the order of existence (being).[48] The degrees of principles and moral conclusions demand for example, that goods deposited for safe-keeping must be returned, and that if a mad person should demand his deposited sword back, the superior law may rule deliberation.[49] In the case where inferior principles are in conflict with superior ones, the latter prevail, "because if these which hold the first place are destroyed, the total destruction of nature follows".[50]

What happens when the strict upholding of positive law conflicts with justice? To Melanchthon positive law is a decree of a legitimate power and is not supposed to be in conflict with the law of nature, "but adds to the law of nature a certain quality of credible reasonableness, not necessarily

45 *Ethicae*, 100, 101.
46 *Ethicae*, 102-104.
47 *Ethicae*, 104.
48 *Ethicae*, 106: "Sed assensio cordis propter pravas inclinationes languidor est, & coecae cupiditates turbant assensionem, propter quas discedunt homines à luce mentis, & recupiunt pravas consuetu clines contra ius naturae."
49 *Ethicae*, 106.
50 *Ethicae*, 106: "Sed cum incidunt casus, in quibus inferiora principia pugnant cum superioribus, plus valent superiora, quia primis illis destructis, sequitur."

something definite, as the law of nature generally teaches that thieves must be punished".[51] The legislature or the judge adds the model, namely the method of punishment, in the determination of which a "credible reasonableness" is the result.[52] In effect Melanchthon is implying that the concretization of the "decisive points" of natural law engrafted in the human mind – within the context of the complex reality of human relationships and their systems of belief contained in the idea of being – should govern the human will as a result of being acknowledged for what they are; to refrain from injuring anyone if not affected by injustice, to be truthful, temperate, chaste, a defender of the legitimate society of citizens, and so forth.[53]

The act of acknowledging being for what it is – including the dignity of human personhood in all human relations – has a determinate part (that which concerns the knowledge of right and wrong), and an indeterminate part (the act of free acknowledgement of personhood for what it is). The "nodal points" of human knowledge, for example the "weight of commutative justice", provide light to human judgment in making decisions regarding inter-individual relationships. Besides these universals of human knowledge, there are also "casual events", which are good, "beneficial events like peace and the common use of property", which may change with time, "because a part of nature has changed and a wicked will must now be curbed so that the above norms can be saved".[54]

Does Melanchthon's focus on the good of acknowledging being for what it is, "under-value" the common good? No! The good of an individual party to a promise for example – the good which, by virtue of the promise, gains some priority of claim upon the care and concern of the promissor – is not something distinct from the common good. The good of individuals, which should be respected in the way required by these considerations, is itself a further component of the common good – it is one of the conditions for the well-being of each and all in the community. An individual person

51 *Ethicae*, 106-107: "Sed cum incidunt casus, in quibus inferiora principia pugnant cum superioribus, plus valent superiora, quia primis illis destructis, sequitur universalis destructio naturae."

52 *Ethicae*, 108.

53 *Ethicae*, 110: "Discrima quaedam sunt eorum, quae dicuntur esse iuris naturae. Alia sunt noticiae nobis insitae, quae sunt praecepta, quae regunt voluntatem erga Deum & erga homines, ut agnoscito esse Deum, & ei obedias. Neminem laedas non affectus iniuria. Diligito & servato sobolem. Esto vera, temperans, castus, defensor ligitimae societatis civium."

54 *Ethicae*, 111.

acts most appropriately for the common good by performing his/her contractual undertakings, and fulfilling his/her other responsibilities towards others, for example those who have particular rights correlative to his/her duties.[55]

The sensitivity towards human personhood contained in the acknowledging of being entails answering to a standing need for individuals to be able to make reliable arrangements with each other for realising of the goods of individual self-constitution and of community. Mutual trustworthiness is not merely a means to further distinct ends; it is in itself a valuable component of any common life shared in civil society.[56] Therefore it is appropriate that there be a judicially enforceable law of contract (and judicial doctrines of good faith, equity, *estoppel*, etc.) and a right of parties (and sometimes beneficiaries) to sue on the promises covered by that law.[57]

What then does "credible reasonableness" entail? "Credible reasonableness" demands that human judgement, in order to be "true", "credible" or "legitimate" or "trustworthy", should reflect the minimum levels of benevolence contained in the steadfast will to give to each person his/her due, and to translate this into concrete efforts (or acts) of "being just".

3.3 Commutative justice and the aims of recompense

Although the principle inherent to commutative justice appears simple enough to comprehend, the application of the principle related to recompense could be very complicated. Although it is not the purpose of this essay to reflect on all the intricacies to which the application of recompense (*recompensatio* or compensation) may lead, it would nonetheless be useful to get a glimpse of the intricate implications inherent to the application of commutative justice directed at recompense.

The fundamental purpose of recompense (in a wide sense) through commutative justice concerns the restoration of an upset equality, the elimination of an unjustified inequality between persons; therefore, the restoration which justice requires is called "a recompense" (*recompen-*

55 Finnis, *Natural law and natural rights*, 305: "Indeed, it is a truth of wide application that an individual acts most appropriately for the common good, not only by trying to estimate the needs of the common good "at large", but by performing his contractual undertakings, and fulfilling his other responsibilities, to ascertained individuals, i.e. to those who have particular rights correlative to his duties."

56 Finnis, *Natural law and natural rights*, 306.

57 Finnis, *Natural law and natural rights*, 307.

satio). This form of justice looks to the losses incurred by specific persons. Compensation (*reparatio; restitutio; satisficatio*) is essentially a matter of restoring to specific losers – to those who now have less than they ought.

Although, broadly speaking, the essence of *recompensatio* is clear, a number of difficulties arise. For example: what is loss within the context of Aquinas' views on recompense? A person (A) suffers loss from Z when, as a result of Z, A has less than he ought to (*minus habeo debeo habere*). This could happen in two different ways: first, A being deprived of what he already has (such as when his property is destroyed), and second, A being impeded or prevented from getting what he on the way to having (*in via habendi*) (such as when Z digs up the seed A has sown). For loss or damage of the first type, A should receive the full value of what he lost. For the loss of the second type, however, the compensation to which A is morally entitled is the value he realistically had in view, *discounted* to make fair and realistic allowance for the fact that quite apart from Z's conduct, what A potentially (*virtute*) possessed might in many ways have been prevented or impeded (*multiplicater impendiri*) from actually (*actu*) becoming A's full measure or at all.[58]

From the above it appears that all actions and remedies in law directed at *recompensatio* would fall under the broad category of commutative justice, for example enrichment, damages for economic loss and estoppel by representation, to mention but a few. Aquinas' interpretation of the Aristotelian principles related to *recompense* of *compensation* covers a wide spectrum: (1) questions (though not all) about what forms of transaction are fair, (2) all issues about how wrongdoers should compensate victims for the losses which unfair transactions or other forms of wrongdoing have imposed, for example how the rights (including dignity rights) of the unjustly treated are to be restored, and (3) all questions about the punishment of offenders for the violation of the equality which just laws establish between all of a community's members.[59] The categories of "recompense" identified by Aquinas include contractual obligations, just prices, and compensation for usury. In all its forms it includes the "healing" of a disorder – an unjust inequality, a *defectus in statu reipublicae* – introduced into the community by the wrongdoer's conduct.[60]

58 Note Aquinas' comments at *S.T.*, II-II, Q(62a) 4c, ad 1, ad 2 and Q62a, 2ad 4.
59 *Aquinas,* 211-212.
60 *Aquinas*, 212.

The justice of recompense, like the determination and supervision of restitution and the maintenance of rights of property and contract, calls for a kind of social organisation which can rightly claim a special, if not unique, completeness and priority: the state.[61]

The various forms of justice cannot be successfully implemented if they do not figure at the highest level of a legal system's commitments. This implies first, that justice (in all its forms) should be regarded as having a position of supreme authority in society; second, positive law must be ruled by justice – it should stand as the unshaken foundation of every human authority and of every legislation which flows from such authority; third, the science of justice should amend, tutor and interpret positive jurisprudence; fourth, justice is not something "out there" – it is the first element to enter the construction of every human society and, therefore, is a part of the theory of society; fifth, "just" has to be distinguished from "justice – whereas "just", taken as a quality of an action, can be considered in itself as something on par with a measure, that is, as fulfilling a law without more ado, the same is not true of "justice" as a virtue: "justice" should give guidance to law and steer a legal system towards being committed to virtue: "A habit through which we give to all, with a constant, persevering will, that which is just, that is, their right."[62] Therefore, "what is just" is the "object of justice" – *manifestum est quod jus est objectum justitiae;*[63] all the organs (or functionaries) in a legal system should go further than the meaning of the word *justum*, towards accomplishing a culture of "justitia" – to avoid too much focus on legal minutiae, and not enough appreciation of jural context.

4. Commutative justice and estoppel

4.1 Justice and the basis of estoppel by representation

George Spencer Bower and Turner[64] ground the principle of estoppel by representation in the idea of justice. They cite in support Lord Blackburn's observations in *Burkinshaw v Nicholls:*[65] "But the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which the law of this country could not satisfactorily be administered. When a person makes to another the representation, I take

61 *Aquinas*, 215.
62 *Summa*, P(2b)-Q(58)-A(1).
63 *Summa*, P(2b)-Q(57)-A(1).
64 *The Law relating to Estoppel by representation* (1977): 20.
65 (1878), 3 App. Cas. 1004, H.L., at 1026.

upon myself to say such and such things do exist, and you may act upon that basis, it seems to me to be of the very essence of justice that, between these two parties, their rights shall be regulated not by the real state of facts, by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation."

In Australian law the same view applies. In *Thompson v Palmer*,[66] Sir Owen Dixon CJ, speaking in the High Court of Australia, linked the object of estoppel to the idea of justice: "The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment."

The ground of the South African law of estoppel is similarly explained by reference to the ideals of justice. J.C. Sonnekus[67] states that estoppel prohibits the "estoppel denier from contradicting what was intimated earlier, because such an action is perceived as unfair and unjust". He continues: "The doctrine of estoppel by representation is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice."[68]

Whereas in some instances in English law it was held that the law of estoppel by representation must be considered as part of the law of evidence for the most part, in South African law estoppel by representation has gained the status of being applied as a substantive rule of law in most instances. In the recent case of *The City of Tshwane Metropolitan Municipality*, regarding the substantive application of estoppel by representation, the court distinguished a so-called "second category" of application where persons contracting in good faith with a statutory body or its agents are not bound in the absence of knowledge to the contrary, to enquire whether the relevant internal arrangements or formalities have been satisfied, "but are entitled to assume that all necessary arrangements or formalities have indeed been complied with".[69] Such persons may then rely on estoppel if the defence raised is that the relevant internal arrangements or formalities were not complied with.[70]

66 (1933), 49 C.L.R. 507 at 547, H.C. of Aust.
67 *The law of Estoppel in South Africa* (2000), 3.
68 At 3.
69 In support of this view the court cites *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A); *Potchefstroom se Stadsraad v Kotze* 1960 (3) SA 616 (A).
70 Para 12.

4.2 Estoppel by representation and the public law/private law distinction

The distinction between public and private law is an inherent element of South African law. This distinction comes to South African legal doctrine from Roman law[71] via Roman Dutch law.[72] According to traditional common law principles the state's acts are deemed to be public law-related if they proceed from the state (through its organs) acting from a position of state authority. So, for example, if the state decides not to buy private property through an agent, but rather to expropriate, such acts are deemed to be typical public law acts of the state.[73] If, on the other hand, the state as legal institution, performs acts not reflecting typical state authority, the state (through its organs) is deemed to be performing typical private law acts, for example the buying of goods or property.[74] In such instances the state will be liable on the same basis as any individual or private body.

In our law the doctrine of estoppel was developed in order to prevent a person from "unconscionably" departing from a representation upon which another party has relied, where departure from this representation would cause detriment to the second party. Similar to the development of estoppel by representation in English common law, the application of estoppel in our law has moved beyond the mere application of estoppel as an evidentiary rule.

In the light of the private law/public law distinction in our law, it appears that in terms of the standard principles of private law, nothing should prevent our courts, in principle, from applying the normal criteria pertaining to promissory estoppel to the private law acts of organs of state. Because the duties and functions of organs of state are usually determined by and subject to a wide spectrum of statutory provisions and requirements, the normal principles pertaining to the lawfulness/unlawfulness of state actions of a private law nature should apply. In the English case of *Maritime Electric Co Ltd v General Dairies Ltd*[75] the requirement of lawfulness and the accompanying duties of the parties were stated as follows: "The duty of each party is to obey the law. To hold … that in such

71 D 1.1.1.2 (Ulp) and Inst. 1.1.4.
72 See e.g. Grotius 1.2.26-27.
73 See e.g. *John Wilkinson & Partners (Pty) Ltd v Berea Nursing Home (Pty) Ltd* 1966 1 SA 791 (D).
74 See e.g. Van der Vyver and Van Zyl, *Inleiding tot die regswetenskap* (1982) (2nd ed.), 343-344.
75 [1937] AC 610 at 620 per Lord Maugham, delivering the reasons of the Privy Council.

a case estoppel is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect to approach the problem from the wrong direction; the Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory position."

However, two important aspects should be noted in relation to the traditional public law/private law distinction alluded to above: (1) Because the application of estoppel in private law aims at furthering the idea of justice, the application of the doctrine of estoppel should be similarly oriented; and (2) due to the fact that considerations of justice may under given circumstances lead to the amending of existing rules, for example the rules pertaining to the lawfulness of state action, the typical nature of private law applications should be clearly discerned.

A typical instance of the state acting in the domain of private law is to be found in the facts of *City of Tshwane Metropolitan Municipality*. In this case the City of Tshwane Metropolitan Municipality (the defendant in the court below) concluded a contract for the delivery of coal with the respondent, RPM Bricks Proprietary Limited (the plaintiff in the court below). Both parties acted in their private law capacity, subject to the provisions of the Gauteng Rationalisation of Local Government Affairs Act 10 of 1998 and the formalities prescribed by s 38(3) of the Act. The fact that the defendant's employees were debarred from amending or varying the supply contract as they did, does not materially influence the private law capacity of the City of Tshwane Metropolitan Municipality in this instance.

The consequential application of the principles of private law estoppel to the facts of this case carries a number of important consequences in its wake: firstly, it implies that the provisions of s 38(1) serve as conditions for determining the lawfulness/ unlawfulness of the acts of the public body involved – because the defendant's employees were not authorised to amend the supply contract, the defendant "had thus not acted in fact nor, for that matter, is it considered in law to have acted at all".[76] Under normal circumstances, the fact that the plaintiff was misled into believing that the defendant's employees were authorised to vary an agreement that had earlier been lawfully concluded with it can hardly operate to deprive the defendant of that power which had been bestowed upon it by the legislature. To do so would be to deprive the *ultra vires* doctrine of any

76 Para 17.

meaningful effect.[77] However, given the prevalent culture of nepotism, patronage, careless (or even reckless) behaviour by public administration, and even fraudulent dealings with self-elicited "clients", the demands for doing justice of a commutative nature in transactions of the state with individuals or private bodies can't be as simple as the principle stated above. So for example it would be important to determine the "blameworthiness" of the respective parties concerned which culminated in approaching the court.

Secondly, although a party contracting with the state should limit, as far as is possible, the risks inherent in dealings with public authorities suffering from the maladies enumerated above, and sometimes spilling over into individuals or private bodies participating in schemes to circumvent the application of provisions of law, it would not be demanding too much to expect from such non-public entities to take all reasonable steps to acquaint themselves with the legal position applicable to their specific field of endeavour.

Thirdly, if it is found that the individual or private body involved had taken all reasonable steps to limit his/its risks in contracting with the state, the duty should shift to the public body concerned to show that it did not act carelessly, recklessly or grossly negligently in its dealings with the individual or private body concerned.

Fourthly, in the event where the individual or private body involved had acted with reasonable precaution, and the public body had acted recklessly, carelessly or grossly negligently, the court should have the discretion to order the reimbursement of the individual by placing him/it in the same position as he/it would have been had the contract been duly performed.

Fifthly, there are distinct differences between the interests involved in the public administration's public and private law acts respectively, and which have to be considered in matters where demands for estoppel surface. It is clear, for example, that in the event of private law acts of the state, the interests to be protected would mostly be those of a particular individual or private body, whilst in the case of the public law acts of the public administration, the interests of larger segments of society could be prejudiced. The court should, therefore, be more reluctant to allow estoppel to operate in instances of private law acts of the state, except in instances where it would be manifestly unjust or highly oppressive to disallow estoppel to apply. On the other hand, the wider application of

77 Para 18.

estoppel appears to be necessary in instances of public law acts of the public administration. It would therefore be necessary for courts to determine the private law/ public law nature of state action before considering the possibility of allowing estoppel, thereby amending the operation of rules determining the lawfulness/unlawfulness of state action.

Sixthly, in the case of public law actions by the state, the values to which public administration are subject under the Constitution, in terms of s 195, should be used for determining the weight of the unconscionable conduct of the state by allowing estoppel to operate in public law actions of the state. The basic values and principles governing public administration listed in s 195 of the Constitution provide a legitimate and reasonable basis for determining the duty of public administration to act reasonably and fairly in the public interest. Furthermore, the fact that these principles apply to administration in every sphere of government,[78] to organs of state[79] and public enterprises,[80] make it easier to apply them over a wide area of public functions and the economic enterprises of public administration. Some of the values contained in s 195 are particularly instructive for determining the "unconscionable" conduct of public bodies: efficient, economic and effective use of resources must be promoted;[81]; public administration must be development-oriented;[82] services must be provided impartially, fairly, equitably and without bias;[83] transparency must be fostered by providing the public with timely, accessible and accurate information,[84] and so forth. Considered in conjunction with s 39 (2) of the Constitution – demanding the promotion of the spirit, purport and objects of the Bill of Rights when interpreting any legislation, and when developing the common law – estoppel could produce much more satisfactory results in cases of unconscionable conduct of the state, in the domain of public law, than has hitherto been the case.

5. Conclusions

Do the remarks by Boruchowitz J on developing the common law in furthering the aims of justice fit into the test for developing the common law in the application of estoppel? In effect the results produced by

78 S 195 (2) (a).
79 S 195 (2) (b).
80 S 195 (2) ©.
81 S 195 (1) (b).
82 S 195 (1) ©..
83 S 195 (1) d).
84 S 195 (1) (g).

developing such a refined approach to the possibilities of applying estoppel involving the unconscionable conduct of public administration could come close to the views expressed by Burochowitz J in *Eastern Metropolitan Substructure v Peter Klein Investments (Pty) Ltd* 2001 (4) SA 661 (W). In that case the court expressed the view that the Constitution obliged him to reconsider the existing common law rule which precludes the raising of an estoppel where its effect is to prevent or excuse the performance of a statutory duty or discretion, as he puts it:[85] "The difficulty, as I comprehend it, is not with the rule (estoppel) but with its application. The rule itself does not infringe any provision of the Bill of Rights, and is in conformity with the doctrine of legality implied in the Constitution … As the facts of the present case amply demonstrate, the blanket application of the rule may in certain instances run counter to a fundamental right provision or value which underpins the Constitution." Elsewhere,[86] Boruchowitz J, to the author's mind, in a very balanced and nuanced approach, expressed a more refined approach towards the consideration of estoppel in dealings involving the state: "What is required, in the present instance, is not a setting aside of the common law rule but an incremental change in its application, necessary to ensure that the underlying values and constitutional objectives are achieved. Instead of permitting a barrier to the raising of estoppel against a public authority exercising public power, the common law should be developed to emphasise the equitable nature of estoppel, and its function as a rule allocating the incidence of loss."[87]

Does this approach imply developing the common law beyond existing precedent? The answer is unequivocally "yes"! The idea of justice is not a static rubric of days gone by; neither is it a concept "frozen in time". Rather is it a jural idea constantly transposing the demand of giving each his/her due into jural terms.[88] More specifically, commutative justice implies "rectifying" an inherently unjust position or state of affairs by "rewarding" or "compensating" the sufferers of unconscionable conduct and who had not contributed to their own detriment. The jural values reflected in s 195 of the Constitution could fruitfully be applied as values concretizing the aims of justice in the public jural sphere. Furthermore, it

85 Para 34.
86 At para 40.
87 At para 19.
88 See Grotius' remarks in his *Introduction to Dutch Jurisprudence*, I.1.4: "Justice is a virtue displaying itself in a steadfast resolve to give to every man his own." He cites Int. I.1.pr.

should also be clear that the common law should be developed beyond existing precedent because the traditional public law paradigm of legal positivism, reflecting an outdated application of the liberal philosophy of the rule of law, does not adequately cater for a value-oriented approach to Constitutional matters directed at furthering the aims of justice, in areas involving the functioning of the public administration.

Does the development of the common law beyond existing precedent imply going against the jural theory undergirding the common law? The answer is emphatically "no"! In his *Introduction to the Dutch jurisprudence* Hugo Grotius also follows the classical distinction between, firstly, general and particular justice respectively,[89] and secondly, he distinguishes between distributive and commutative justice as distinct categories of particular justice.[90] Grotius' notion of expletive justice corresponds with the traditional description of commutative justice, whilst his views on attributive justice fit the traditional description of distributive justice.[91] In Ulrich Huber's *Jurisprudence of my time* he follows the same avenue of not limiting the particular manifestations of justice to the enclaves of public and private law respectively.[92] A consequence of both of their views is that commutative justice, whether as "corrective", "restorative" or

89 *Introduction to Dutch Jurisprudence*, I.1.9: "That kind of justice which has reference to right in its wider sense is, by the learned, termed either *universal*, because it embraces all other virtuous action, though considered from a particular point of view, viz., in so far as they are subservient to the maintenance of a society; or *legal*, because it is co-extensive with, and, is restricted and regulated by, law." (*Introduction to Dutch jurisprudence*, I.1.8.1). To emphasise the application of the principles of "attributive" and "expletive" to both public and private law respectively, Grotius adds: "Not more true, again, is that which some say, that attributive justice is concerned with public property, while expletive justice is concerned with private property. On the contrary, if a man wishes to give a legacy from property belonging to him, he acts in conformity with attributive justice, and the state pays back from public funds, what a citizen has advanced for the public interest, is discharging the function of expletive justice."

90 *Introduction,* I.1.10.

91. In his *De Jure Belli ac* Pacis I.1.8. Grotius remarks: "On expletive justice; that these are not properly distinguished by geometrical and arithmetical proportion and that the latter is not concerned with public property, the former with private property." He adds: "1. Legal rights are the concern of expletive justice (*iustitia* expletrix), which is entitled to the name of justice properly or stricly so called. This is called 'contractual' justice by Aristotle, with too narrow a use of the term; for though the possessor of something belonging to me may give it back to me, that does not result 'from a contract', and nevertheless the act falls within the purview of this type of justice; and so the same philosopher has more aptly termed it 'restorative' justice." Because aptitudes are the concern of attributive justice (*justitia* attributiva) these are called by Aristotle "distributive" justice. It is associated with the views of doing good to others.

92. Huber, *The Jurisprudence of my time*, refers to *commutative justice* as "commercial justice" (I.1.5). The principle applicable is "simple equality" (I.1.10).

"rectificatory" justice, also applies to the acts of public administration whether in a private or a public law context.

Why should commutative justice be the "vehicle" or "basis" for developing the common law position regarding estoppel beyond existing precedent? John Finnis' interpretation of the traditional Thomistic views on justice are very closely associated with the traditional principles of natural law theory and the idea of the autonomous authority of human reason. As such the ongoing debate concerning natural law versus legal positivism (in all its manifestations) tends to draw the idea of justice into the murky depths of establishing the universality and authority of natural law principles produced from within natural law itself. *A posteriori* experience shows that this is not possible without addressing the need of human rationality being guided or receiving "validating" ("legitimating") authority from elsewhere. Human reason is in need of criteria inhering in human nature in the form of nodal points of human knowledge for authoritatively establishing the weight of fundamental values (e.g. justice) in the process of jural judgement.

What is the first law in the process of human judgement which makes possible the correct "weighing" and authoritative stating of the fundamental value of human justice? The first law in jural argumentation demands the acknowledgement of being in the order of human existence. The acknowledgement of being entails, amongst other things, sensitivity, receptivity and regard for human beings, for their moral personhood (dignity) and their status as beings with value in the moral order. By acknowledging human beings for what they are, by accepting the value of human dignity in the moral order of human discourse, by recognising human being as a first principle of overriding moral value, and accepting the moral value of human dignity, prior to any (or all) argumentation about the weight of positive law versus natural law values, the value of jural justice can be launched. It is at this point that Finnis' natural law argumentation fails to rise above the limitations of practical rationality – the value of justice figures too low in Finnis' legal philosophy. The judgment in the case of *City of Tshwane Metropolitan Municipality* flounders even lower on the rocks of legal positivism. Albeit rationally argued from "existing legal precedent" it lacks the credible rationality needed to "steer" the judgement in the direction of more fundamental jural considerations transcending the narrow enclaves of traditional positivistic arguments. Recourse to the fundamental idea of justice in a commutative sense could, supported by the relevant constitutional provisions, navigate judgements in similar cases, based on the relevant legal principles, to a more acceptable and just destination of credible rationality.