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The Method of Judicial Determination of *Ius* in the Thought of Thomas Aquinas

Elvio Ancona

University of Udine
elvio.ancona@uniud.it

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Abstract

For Thomas Aquinas, the right of each is determined according to justice in the judgement of the judge, always in relation not only to a common measure, the law, but also to what is due to others. From some indications in his writings, we can infer that the method by which this result is made possible is dialectics, specifically disputative dialectics, which operates through the same argumentative, comparative, and selective procedures employed to resolve a scholastic dispute. This kind of dialectics has a logical structure that still proves its relevance today, despite the changing times and customs. It therefore proves to be particularly well suited to determining one's right even in complex and pluralistic societies such as ours.

Keywords: *Ius, Iustitia, Iudicium, Quaestio Disputata, Dialectics*

CONTENTS

1 *IUS*, *IUSTITIA* AND *IUDICIUM* IN THE THOUGHT OF THOMAS AQUINAS

We know that Thomas Aquinas, though not a jurist, was well versed in Roman law, in particular he was a good connoisseur of the passages collected in the *Corpus iuris*[1]. He quotes the *Digest* and the *Codex* with remarkable precision, often showing that he shares their conception, without forgoing a distinctly original interpretation[2].

Among the passages quoted, a role of no small importance is reserved for Ulpian's definition of justice[3]: *iustitia est constans et perpetua voluntas ius suum cuique tribuendi*[4]. It specifies the very object of the opening *quaestio* of two articles of the *Summa theologiae* (thus entering the title by which they are distinguished in modern editions[5]) and is found in two other passages of Aquinas[6].

This definition is important because it allows Thomas to recover the teachings of ancient thought, not only of Roman law but also of Greek philosophy[7], placing them in the service of his own treatment of justice as a saving moral virtue. In this way, he also gives it a legal form and a metaphysical foundation.

Well, it is immediately apparent that in the article expressly devoted to the ulpian definition a special prominence is given to the proper act of justice, the *reddere unicuique quod suum est*[8], subsequently identified with the judgment[9]. It is indeed through judgment that justice says, defines or determines the law, the *ius sive iustum*[10]. And by judgement must precisely be understood "the act of the

[1]Thomasian texts will be cited, without mentioning the author's name each time and always referring to the *editio optima* reported in the Navarrese *Corpus Thomisticum* (cfr. http://www.corpusthomisticum.org/reoptedi.html), with the following abbreviations: *S. Theol.* = *Summa Theologiae*, in *Opera omnia iussu Leonis XIII P. M. edita*, tt. 4-12, Ex Typographia Polyglotta S. C. de Propaganda Fide, Romae 1888-1906; *IV Sent.* = *Scriptum super Sententiis magistri Petri Lombardi*, t. 4, ed. M.F. Moos, P. Lethielleux, Parisiis 1947; *De Ver.* = *Quaestiones disputatae de veritate*, in *Opera omnia iussu Leonis XIII P. M. edita*, t. 22 (3 voll.), Ad Sanctae Sabinae/Editori di San Tommaso, Romae 1970-1976; *In Met.* = *In duodecim libros Metaphysicorum Aristotelis expositio*, cura et studio M. R. Cathala, R. M. Spiazzi, Marietti, Taurini-Romae 1971; *Exp. Post.* = *Expositio libri Posteriorum*, in *Opera omnia iussu Leonis XIII P. M. edita*, t. 1*/2, ed. R. A. Gauthier, Commissio Leonina-J. Vrin, Roma-Paris 1989.

[2]Cfr. J. M. Aubert, *Le droit romain dans l'œuvre de Saint Thomas*, Libraire Philosophique J. Vrin, Paris 1955, p. 134.

[3]Cfr. *ibid.*, pp. 89-90.

[4]Ulpianus, 1 *regularum* L. 2362, reproduced in *Dig.*, I, 1, 10 pr.

[5]They are precisely: *S. Theol.*, II-II, 58, 1 (*Utrum convenienter definiatur quod iustitia est constans et perpetua voluntas ius suum cuique tribuendi*); *ibid.*, II-II, 58, 11 (*Utrum actus iustitiae sit reddere unicuique quod suum est*).

[6]Cfr. *Super IV Sent.*, 33, 3, 1, ad 3; *De ver.*, 1, 5, ad 13.

[7]Cfr. W. Waldstein, *Saggi sul diritto non scritto*, introduzione e cura di U. Vincenti, Cedam, Padova 2002, pp. 89 ff.

[8]Cfr. *S. Theol.*, II-II, 58, 11.

[9]Cfr. *ibid.*, II-II, 60, 1.

[10]Cfr. *ibid.*

judge as such"[11]. The judge in fact is said to be such, — the Dominican master argues — because, being "animated justice", he is *ius dicens*[12].

2 JUDGEMENT AS DISPUTATORIAL PRACTICE

For Aquinas, therefore, the determination of law (*ius*) according to justice occurs in the judgement that *ius suum unicuique tribuit*[13]. But how does it happen? How is each person's *ius suum* concretely determined? Thomas does not tell us this clearly in his treatise *de iustitia*. However, one can find in it, as in his *quaestiones* and commentaries, scattered hints about the process of forming the judgement and the problems that must be solved for the judgement to be 'just'.

Of particular interest in this regard are the results reached by Isaac, who in his study on dialectic points out how "le parallélisme entre le jugement scientifique et le jugement judiciaire", can be found in Aquinas' writings down to the last detail: both judgments, that of the judge and that of the wise man, consist in the affirmation of a truth; both are a work of virtue and a manifestation, albeit provisional, of certainty; both refer to criteria, norms or principles, and apply them to particular cases; both represent the conclusion of a reasoning and can be considered as much from the point of view of matter as from that of form[14].

Thomas himself, moreover, — continues the French scholar[15] — developed the comparison between the two species of judgement on several occasions, for example in the article on the *interpretatio in meliorem partem* of what is doubtful[16], in the one on the greater probability of the *testimonium duorum vel trium*[17], and also in the one on the *peccatum consensus in actum*[18], where "l'on baigne du début à la fin dans une ambiance de palais de justice"[19].

In this way, Isaac concludes, "il nous manifeste expressément ce qui se trouve supposé tout au long de son oeuvre"[20].

But perhaps the most significant document of this awareness is found in the *expositio* of Book III of Aristotle's *Metaphysics*. There, among the reasons why *ad veritatis considerationem* one must proceed *modo disputativo, ostendens ea quae*

[11] «[…] *iudicium proprie nominat actum iudicis inquantum est iudex*» (*ibid.).*

[12] Cfr. *ibid.*

[13] Cfr. *S. Theol.,* II-II, 58, 1.

[14] Cfr. J. Isaac, *La notion de dialectique chez Saint Thomas*, «Revue des Sciences Philosophiques et Théologiques», 34 (1950), pp. 481-506, at pp. 484 ff., with the quotations given there.

[15] *Ibid.*

[16] Cfr. *S. Theol.,* II-II, q. 60, a.4, ad 2 and ad 3.

[17] Cfr. *ibid.,* II-II, q. 70, a. 2.

[18] Cfr. *ibid.,* I-II, q. 74, a. 7.

[19] J. Isaac, *La notion de dialectique*, cit., p. 485, n. 39.

[20] *Ibid.*, p. 485.

sunt dubitabilia circa rerum veritatem, Aquinas enunciates the following *quae sumitur ex parte auditoris*:

> he who listens must in fact judge the things heard. Just as, however, in trials no one can judge without having heard the reasons of both sides, so he who studies philosophy will be able to judge better if he has considered all the objections or doubts as they might be raised by the opponents[21].

This passage is of special relevance because, based on the annotated place[22], it presents a precise reference to forensic practice, to what occurs *in iudiciis*, to justify the adoption of the 'disputatorial' method in the search for truth.

3 THE 'DISPUTATORIAL' METHOD

What kind of method is it? We know that *disputatio* was a widely used form of teaching in medieval universities, less frequent, but certainly more important than the traditional *lectio*. Thomas himself was a master of it, as is shown by the impressive presence in his work of *quaestiones* and *articuli*, which are nothing more than a simplified literary transposition of *disputationes*, realized for primarily didactic purposes.

In this typology of texts, once a problem had been posed and a possible answer indicated, arguments were made *pro et contra*, the solution was given and justified, the contrary arguments were refuted[23]. A particular form of dialectic was thus developed, the 'disputative' dialectic, which made it possible to arrive at the most reliable knowledge about the object of investigation.

Well, the excerpt from the *expositio* quoted seems to suggest that for Thomas there was in fact, from a methodological point of view, a structural analogy between scholastic disputation and judicial controversy.

After all, even leaving aside the discussion about their possible legal origin[24], the scholastic disputations recalled the forensic procedure of the time, and indeed, in law faculties, took the form of a trial in which two students, playing the roles of the plaintiff (*actor*) and the defendant (*reus*), had to put forward arguments

[21] «*Auditorem enim oportet iudicare de auditis. Sicut autem in iudiciis nullus potest iudicare nisi audiat rationes utriusque partis, ita necesse est eum, qui debet audire philosophiam, melius se habere in iudicando si audierit rationes quasi adversariorum dubitantium*» (*In Met.*, III, l. 1, 339-342).

[22] Cfr. Aristoteles, *Metaph.*, III, 1, 995 b 3 ff.

[23] Cfr. M. D. Chenu, *Introduction a l'étude de Saint Thomas d'Aquin*, Institut d'études médiévales-Vrin, Montréal-Paris 1954, pp. 78-79.

[24] See, for a recent review, A. Novikoff, *The Medieval Culture of Disputation. Pedagogy, Practice, and Performance*, University of Pennsylvania Press, Philadelphia 2013, pp. 93 ff.; O. Weijers, *In Search of the Truth. A History of Disputation Techniques from Antiquity to Early Modern Times*, Brepols, Turnhout 2013, pp. 71 ff., esp. 88 ff.

in support of their respective theses, while the master concluded the debate by formulating a *solutio* in the form of a sentence.

4 *VIA INVENTIONIS* AND *VIA IUDICII*

We can therefore assume that for Thomas the disputative dialectic is the method of the judicial determination of *ius*, and we can understand how it operates precisely by considering what happens in the context of a judicial controversy, *in iudiciis*.

The disorder determined by the controversy presents itself as a divergence between two different representations of the order, so that the legal order, as a settlement of the controversy, is only realized if and insofar as between the two representations determining the disorder a dialectical relationship of the type we have seen realized in the disputation is established.

Dialectically, then, the judicial controversy is resolved through the recognition, always inexhaustible and revisable but authentic if conveniently conducted, of what is proper to the parties involved, thus implementing *iustitia* precisely in the Ulpian sense that identifies it with *ius suum cuique tribuere*[25].

The way in which this dialectic is articulated constitutes another important manifestation of the structural analogy between judicial controversy and scholastic disputation. In fact, we find within the trial, which represents the coherent unfolding of the controversy, the same dual cognitive development of which the disputation is interwoven, articulated in the argumentative paths of discovery (*via inventionis*) and justification (*via iudicii*), moreover in accordance with what is found, more generally, in the Thomasian methodology of probable knowledge[26].

Thus, just as in the *via inventionis* of the scholastic disputation, on the basis of the problem posed and the arguments of the disputants, the common principles are specified so as to allow its *determinatio*, in the same way, in a judicial controversy, on the basis of the representations of the parties involved, the principles of

[25]Cfr. F. Gentile, *Ordinamento giuridico tra virtualità e realtà*, Cedam, Padova 2000, p. 50.

[26]The correlation between *via inventionis* and *via iudicii* recurs throughout Aquinas's production in contexts inherent to both practical and speculative life. In particular, in the context of speculative life, the distinction of the two *viae* makes it possible to determine the relationship between *intellectus* and *ratio* (cfr. *De Ver.,* q. 15, a. 1; *S. Theol.,* I, q. 79, a. 8), between *ratio superior* and *ratio inferior* (cfr. *S. Theol.,* I, q. 79, a. 9), and, what concerns us above all, between the different logical configurations of reasoning (cfr. *Exp. Post.,* I, l. 1). Regarding the detection of their co-presence in the logical structure of a *quaestio disputata*, see E. Ancona, *Via iudicii. Contributi tomistici alla metodologia del diritto*, Cedam, Padova 2012, ch. 1; Id., *Veritas est adaequatio rei et intellectus. L'epistemologia tommasiana di fronte alle problematiche del processo penale*, Giappichelli, Torino 2020, pp. 88-96.

the legal system are specified down to the normative detail so as to allow its decision. And just as in the *via iudicii* of the scholastic disputation, based on the same common principles, the two possible solutions and their respective arguments are judged, so in a judicial controversy the claims of the parties and their reasonings are assessed on the basis of the principles and norms of the legal system, so as to recognize the right of each.

We can therefore conclude, from the elements collected, that for Thomas the *ius* of each person must always be determined in relation not only to a common measure, but also to what is owed to others, and that this is only possible by operating dialectically, through comparative and selective procedures of a disputatorial type.

The critical comparison with the claims of the parties is then decisive in the determination of the *ius*, which will therefore not only be the application of the law, being also commensurate with the circumstances of the case.

5 CONCLUSIONS: A METHOD FOR OUR TIME

But if, by incorporating these dynamics, Aquinas' jusphilosophical reflection seems merely to anticipate the more sophisticated acquisitions of contemporary proceduralist doctrine[27], in its reference to justice we can grasp the indication of an alternative foundation, capable of giving the determination of *ius* an important qualitative connotation, identifying it with the *iustum*, the *ipsa res iusta*[28]. It is justice, in fact, that by operating *dialectically*, both through the common measure of the *lex*, both natural and positive, and through the critical examination of the legal positions of the parties, leads to the identification and substantiation of the *ius suum*, and thus of *ius* as *medium iustitiae* and *medium rei*[29].

Justice thus plays in this perspective a decisive discriminating role, as timely as it is unfortunately unknown, apart from rare exceptions[30], to the jurist of our time.

However, the Thomasian peculiarity must also be emphasized on the methodological level: the Dominican master in fact shows us the way by which to proceed in judgment to the determination of *ius* according to the measure of justice, the

[27] See also in this regard *S. Theol.,* II-II, q. 67, a. 3, where the Dominican master shows that he is referring to an accusatory type of procedural model.

[28] *S. Theol.,* II-II, q. 57, a. 1.

[29] Cfr. *ibid.,* II-II, q. 58, a. 10.

[30] I recall, among all, the contribution of the late Francesco D'Agostino, expressed in numerous essays, for example in *Diritto e giustizia. Per una introduzione allo studio del diritto*, San Paolo, Cinisello Balsamo (MI), 2004.

way of the disputative dialectic[31]. It proves particularly apt, especially in complex and pluralistic societies such as ours, to lead us to judge according to an objective measure in attributing each person his or her right[32]. In this way, moreover, the Thomasian rethinking of the Ulpian formula still demonstrates its relevance today, despite changing times and customs.

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[31]See in this sense also M. Villey, *Questions de Saint Thomas sur le droit et la politique ou le bon usage des dialogues*, PUF, Paris 1987.

[32]On this point I would like to refer specifically to E. Ancona, *Casi difficili contemporanei e soluzioni classiche. La via della metodologia tomista*, «*Atti dell'Istituto Veneto di Scienze, Lettere ed Arti. Classe di scienze morali, lettere ed arti*», 167/3-4 (2008-2009), pp. 493-516.