

Constitutional Thomism: On *Ius* and the Theory of Constitutional Government

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Abstract

This article argues that Aquinas defines ius as the object of justice in its relation to individual persons, in which justice as virtue directs man in his relation to other individuals toward the common good. Considering that it belongs to the law to direct men toward the common good, justice in this context is called legal justice. While Aquinas favors the state's role in cultivating legal justice, he believes that the state must respect the freedom of its citizens. Aquinas believes the common good as the end of law must be accomplished through interior freedom. The perfect order of the common good can only come through a correct interior movement of the soul, not through reward and punishment. Therefore, man needs the divine law to bring about perfect order of the common good by reaching the interior movement of the soul, which makes possible the meaning of constitutional liberty.

Keywords: *Ius, Legal Justice, Common Good, Mixed Government, Constitutional Liberty, St. Thomas Aquinas*

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1 INTRODUCTION

Many scholars have discussed Aquinas' theory of *ius* in connection with Aquinas' theory of natural rights and the theory of justice.¹ Nevertheless, there is still an underdeveloped discussion on Aquinas' concept *ius* within the context of his theory of constitutional government.² Thus, this article will analyze Aquinas' theory on *ius* in connection with his theory of constitutional government.

This paper argues that Aquinas defines *ius* as the object of justice in its relation to individual persons, in which justice as virtue directs man in his relation to other individuals toward the common good. Considering that it belongs to the law to direct men toward the common good, justice in this context is called legal justice (*iustitia legalis*). This paper also argues that while Aquinas favors the state's role in cultivating legal justice, he believes that the state must respect the freedom of its citizens. Aquinas believes the common good as the end of law must be accomplished through interior freedom. The perfect order of the common good can only come through a correct interior movement of the soul, not through reward and punishment. The lawmaker, however, cannot directly reach the interior movement of the soul through human law. Therefore, man needs the divine law to bring about perfect order of the common good by reaching the interior movement of the soul and, at the same time, respecting the diversity of individuals, which makes possible the meaning of constitutional liberty.

¹For the historical origin of the discussion of the concept of *ius*, please see B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625*, Eerdmans, Grand Rapids, MI 2001; in the English-speaking world, the discussion on the concept *ius* gains some traction after World War II through the works of some neo-Thomists such as Heinrich Rommen, Jacques Maritain and Yves-René Simon; please see H. Rommen, *The State in Catholic Thought: A Treatise on Political Philosophy*, Cluny Media, Providence, RI 2016; Id., *The Natural Law: A Study in Legal and Social History and Philosophy*, Liberty Fund, Indianapolis, IN 1998; J. Maritain, *Man and the State*, The Catholic University of America Press, Washington, D.C. 1998; Id., *The Rights of Man and Natural Law*, Ignatius Press, San Francisco, CA 2011. At the end of the 20th century, a new generation of scholars brought revival to the discussion of *ius*; please see J. Finnis, *Natural Law and Natural Rights*, Clarendon Press-Oxford University Press, Oxford-New York, NY 1979; R. Hittinger, *The First Grace: Rediscovering the Natural Law in a Post-Christian World*, ICI Books, Wilmington, DE 2007.

²One of the few scholars who discuss the concept of *ius* within the context of political theory is Charles McCoy; please see C. McCoy, *St. Thomas Aquinas* in L. Strauss, Joseph Cropsey (eds.), *History of Political Philosophy*, Rand McNally, Chicago, IL 1963, pp. 201-226. See also C. McCoy, *The Structure of Political Thought: A Study in the History of Political Ideas*, Routledge, New York, NY 2017.

2 *IUS* AND THE LAW OF THE CONSTITUTION

2.1 *Ius* as *Obiectum Iustitiae*

Before exploring the connection between *ius* and constitutional government in more detail, it is important to have a proper understanding of Aquinas' definition of *ius*. Aquinas starts his Treatise on Justice in the *Summa Theologiae* by dealing with an objection that *ius* is not the object of justice.³ He responds that justice "directs man in his relations with others because it denotes a kind of equality".⁴ The work of justice is to establish equality, for instance, the payment of wage due for a service rendered, and therefore the aim of equality is designated as *ius*. Aquinas then concludes, "It is evident that *ius* is the right object of justice (*obiectum iustitiae*)".⁵ Aquinas discusses this issue in Question 57, just at the beginning of his Treatise on Justice. In Question 58, Aquinas moves to define justice as "a habit whereby a man renders to each one his due by a constant and perpetual will".⁶ To understand the connection between *ius*, habit, and justice, we have to look back at Aquinas' treatment of *habitus* in *Prima Secundae*, in which he explains that *habitus* is distinguished with respect to different objects.⁷ Considering that justice is *habitus*, it is specified by its own object, *ius*.

Aquinas proceeds to define *ius* in a more precise way by distinguishing its main meaning and its secondary meaning. He uses an analogy of the word *nomen medicianae*, which first signified a remedy used for curing a sick person, but later it signified the art by which this cure was done. The term *ius* also has multiple meanings:

The word *ius* was first of all used to denote the just thing itself (*ad significandum ipsam rem iustam*), but afterward, it was transferred to designate the art whereby it is known what is just, and further to denote the place where justice is administered thus a man is said to appear in *iure* and yet further, we say even that a man has the office of exercising justice, administers *ius* even if his sentence be unjust.⁸

According to Aquinas, the first meaning of *ius* is *ipsa res iusta*. This first meaning raises a question about the connection between *ius* as *ipsa res iusta* with the

³St. Thomas Aquinas, *Summa Theologiae*, trans. Laurence Shapcote, The Aquinas Institute for the Study of Sacred Doctrine, Lander, WY 2012, II-II, q. 57, a. 1: "*Videtur quod ius non sit obiectum iustitiae*" (Hereinafter ST).

⁴ST II-II, q. 57, a. 1, co: "*ut ordinent hominem in his quae sunt ad alterum. Important enim aequalitatem quondam...*"

⁵*Ibid.*: "*unde manifestum est quod ius est obiectum iustitiae*".

⁶ST II-II, q. 58, a. 1, co: "*quod iustitia est habitus secundum quem aliquis constanti et perpetua voluntate ius suum unicuique tribuit*".

⁷ST I-II, q. 54, a. 2, co: "*Secundum obiecta specie differentia*".

⁸ST II-II, q. 57, a. 1, ad 1.

earlier explanation *ius* as *obietctum iustitiae*. In his explanation on *ius* as the object of justice, Aquinas posits that a thing is said to be just (*iustum*) as having the rectitude of justice.⁹ For Aquinas, the *ipsa res iusta* is nothing other than the *iustum*, which constitutes the object of the act of justice. For this reason, he states that the object of justice, which is called the just (*iustum*) is the same as *ius*.¹⁰ Aquinas reasserts this statement in article 2 of Question 57, when he begins by stating, “*ius sive iustum* is a work that is adjusted to another person according to some kind of equality”.¹¹

At this stage, the meaning of *ius* as *ipsa res iusta* is a bit ambiguous because it only tells us that *ius* involves the rectitude of justice and it refers to an act of justice. We have to look further into Aquinas’ definition of justice. As explained earlier, Aquinas defines justice as *habitus*, in which, with constant and perpetual will, *ius suum* (his due) is attributed to each one. This statement must be understood from Aquinas’ previous explanation on *ius* that “a man’s work is said to be just when it is related to some other by way of some kind of equality”.¹² In other words, *ius* is a work that is adequate to the other according to a certain equality.¹³ In the later part of his Treatise on Justice, Aquinas adds, “Each man’s own is that which is due to him according to equality of proportion”.¹⁴ Here we can conclude that *ius* as *ipsa res iusta* is what each individual owns, not as what he already possesses, but rather as what is due to him by others. In sum, Aquinas points out that *ius* as the object of justice is unique because it directs man in his relations with others by disposing one to render to others what is due to them.

2.2 *Ius and Political Community*

Aquinas’ definition of *ius* raises a new question of whether *ius* as the object of justice is related to social groups in general or specifically related to the political community. This question is further complicated by Aquinas’ distinction of justice between legal justice and particular justice. Having defined justice, Aquinas moves the discussion of justice in the following sequence in *Summa Theologiae* Question 58: whether justice is always toward another (article 2); whether justice is a virtue (article 3); whether justice is in the will as its subject (article 4); and

⁹ST II-II, q. 57, a. 1, co: “*Sig igitur iustum dicitur aliquid, quasi habens rectitudinem iustitiae*”.

¹⁰*Ibid.*: “*Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obietctum, quod vocatur iustum. Et hoc quidem est ius*”.

¹¹ST II-II, q. 57, a. 2, co.

¹²ST II-II, q. 57, a. 1, co: “*illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri*”.

¹³ST II-II, q. 57, a. 2, co: “*ius, sive iustum, est aliquod opus adaequatum alteri secundum aliquam aequalitatis modum*”.

¹⁴ST II-II, q. 58, a. 12: “*Hoc autem dicitur esse suum uniuscuiusque personae quod ei secundum proportionis aequalitatem debetur*”.

whether justice is a general virtue (article 5). For our purpose of understanding *ius* and the political community, we will skip the discussion of articles 2 through 4 and jump to article 5. In article 5, Aquinas explains that justice directs man in his relations with other men in two ways: first, as regards his relations with individuals, and second, as regards his relations with others in general, as a man who serves a community.¹⁵ Aquinas explains further that such virtue that directs man in relation to himself or to other individuals is referred to as the common good. Thus, all acts of virtue can pertain to justice, insofar as justice directs man to the common good. Considering that it belongs to the law to direct men to the common good, justice in this way is called legal justice (*iustitia legalis*).

We now turn back to the question of whether *ius*, as the object of justice, is related to social groups in general or specifically to the political community. Some scholars have different interpretations on Aquinas' account on this subject, especially concerning legal justice. John Finnis equates Aquinas' legal justice with general justice¹⁶ and Finnis believes that general justice is ordered toward the good of all mankind instead of the good of any particular community.¹⁷ Mary Keys also agrees that legal justice pertains to the human community beyond particular communities.¹⁸ Keys argues that Aquinas' 'general' legal justice is akin to the theological virtue of charity, or the love of God and neighbor, and, therefore, it transcends particular political societies and their borders. It is true that Aquinas makes a comparison between charity and legal justice, but his conclusion is different than Keys and Finnis' interpretation. In comparing justice and charity, Aquinas argues that the latter directs all virtues to the divine common good. In contrast, the former directs all virtues towards the political common good. In Aquinas' view, charity is ordered to the specific community that we love: "Man loves who are more closely united to him, with more intense affection as to the good he wishes for them, than he loves those who are better as to the greater good he wishes for them".¹⁹ If charity is ordered towards those with whom we have concrete fellowship, so too legal justice is primarily ordered for the good of a particular political community.

Although legal justice can refer to a common good beyond particular communities, it is an inaccurate interpretation of Aquinas' theory to downplay the

¹⁵ST II-II, q. 58, a. 5, co.

¹⁶J. Finnis, *Aquinas: Moral Political and Legal Theory*, Oxford University Press, Oxford, 1998, p. 132.

¹⁷Id., *Social Virtues and the Common Good*, in *The Truth About God and its Relevance for a Good Life in Society* (Doctor Communis, 2012), Pontificia Academia Sancti Thomae Aquinatis, Vatican City 2012, pp. 96-106.

¹⁸M. Keys, *Aquinas Aristotle and the Promise of the Common Good*, Cambridge University Press, Cambridge 2007, p. 193.

¹⁹ST II-II, q. 26, a. 7, co.

political community by dissolving it into a universal community of mankind. In his explanation of legal justice, Aquinas states:

Now it is evident that all who are included in a community stand in relation to that community as parts to a whole, while a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole. It follows, therefore, that the good of any virtue, whether such virtue directs man in relation to himself or in relation to certain other individual persons, is referable to the common good, to which justice directs so that all acts of virtue can pertain to justice, in so far as it directs man to the common good.²⁰

This statement shows that legal justice refers to the common good of particular political communities instead of the common good of all mankind or a universal community. Thus, *ius* as the object of justice refers to the political communities instead of the universal community of mankind.

A political community can only exist among groups of people if there is a government to look after the common good. Aquinas states, “Wherefore the Philosopher says, in the beginning of the *Politics*, that wherever many things are directed to one, we shall always find one at the head directing them”.²¹ In another instance, Aquinas argues, “Since man is a part of the home and state, he must need to consider what is good for him by being prudent about the good of the many”.²² In sum, men in a political community must be prudent about the good of the many by appointing an authority to administer the common good. The political community is a community of equal freemen, so it is impossible for them to rule over each other and impose any rule without consent in some fashion. At the same time, because the common good is impossible without an authority to administer it, it is within the competence of the whole community to make the law of the constitution by which the government of whatever form is set up.

3 *IUS* AND MIXED GOVERNMENT

In Aquinas’ view, the constitutional principles that emerge from the interconnection between *ius* and political community are the principle of consent and the principle to rule based on the consent that is given. The combination of the principles of consent and of possibility are the pillars of the best form of government. But it is a challenging task to achieve a combination of these two elements because both principles require stability. The principle of consent requires ruling

²⁰ST II-II, q. 58, a. 5, co.

²¹ST I, q. 96, a. 4, co: “*Et ideo philosophus dicit, in principio Politic., quod quandocumque multa ordinantur ad unum, semper invenitur unum ut principale et dirigens*”.

²²ST II-II, q. 47, a. 10, co: “*cum homo sit pars domus et civitatis, oportet quod homo consideret quid sit sibi bonum ex hoc quod est prudens circa bonum multitudinis*”.

and obeying, in which the citizen at times rules and at other times is ruled. This rotation of position may create instability as some are not well equipped to rule and to be ruled. The principle of possibility allows for the choice of government, which includes an inferior and less good form of government depending on the circumstances, though it does not extend to permit a form of government that is contrary to the natural law, such as tyranny. Retaining the principle of possibility may also entail political instability because people are able to change the forms of government they prefer to adopt.

3.1 *The Principles of Royal and Political*

Aquinas' solution to the problem of instability is the combination of different forms of government, that is, a combination of the principles of 'royal' and 'political'. He writes:

The political community has two kinds of regimes, namely, the political and the royal. A royal regime is one in which the ruler has complete power, and a political regime is one in which the ruler has coercive power in accord with the particular laws of the political community [...]²³

For when the ruler rules absolutely and regarding everything, we call the regime royal (*regimen regale*). And when the ruler rules according to scientific rules (i.e., according to laws established by political science), the regime is political (*regimen politicum*). That is to say, the ruler partially rules, namely, regarding things subject to his power, and is partially ruled, insofar as he is subject to the law.²⁴

Aquinas believes that the combination of the principle of royal and political can contribute to political stability. Aquinas sees effective leadership as the manifestation of the combination of royal and political systems. He proposes the notion of effective leadership by referring the exercise of government to the one best-qualified man as the representative of the people; in this way he introduces the 'political' into the concept of 'royal' regime.

The basis of Aquinas' combination of the 'royal' and 'political' regime can be traced to Aristotle, who argues that the virtuous man rules as 'royal and political'. Aristotle finds an analogy of civil rule in the household relationship between a husband, a wife, and children. He writes in *Politics*: "Of household management

²³Id., *Sententia Libri Politicorum*, lib. 1, l. 1, n. 5, <https://www.corpusthomicum.org/cpo.html>: "*Civitas autem duplici regimine regitur: scilicet politico et regali. Regale quidem est regimen, quando ille qui civitati praeest habet plenariam potestatem. Politicum autem regimen est quando ille qui praeest habet potestatem coarctatam secundum aliquas leges civitatis*".

²⁴Id., *Sententia Libri Politicorum*, lib. 1, l. 1, n. 7: "*Quando enim ipse homo praeest simpliciter et secundum omnia, dicitur regimen regale. Quando autem praeest secundum sermones disciplinales, idest secundum leges positas per disciplinam politicam, est regimen politicum; quasi secundum partem principetur, quantum ad ea scilicet quae eius potestatem subsunt; et secundum partem sit subiectus, quantum ad ea in quibus subiicitur legi*".

we have seen... A husband and father... rules over wife and children, both free, but the rule differs, the rule over his children being a royal, over his wife a constitutional rule".²⁵ The father's rule over the children is likened to 'royal' rule because the father rules over them by love and for their own good. The husband rules over his wife is likened to 'political' rule in the sense of the rule of equals over equals in civil society, though in the family, the wife is naturally subject to her husband. Nevertheless, Aristotle sees that the household government is similar to the state government. A king's rule is both 'royal and political,' but a king should not rule his subjects as if they were children because a king rules over freemen who choose their ruler by knowledge and will. Similarly, a king cannot rule as husband to his wife as there is no rotation of power between husband and wife. But in most constitutional governments, "the citizens rule and are ruled by turns, for the idea of constitutional state implies that the natures of the citizens are equal, and do not differ at all".²⁶

The combination of 'royal' and 'political' is the seed of St. Thomas Aquinas' theory of mixed government. Aquinas' theory of the 'mixed government' has been the subject of a good deal of discussion, including the subject of many misunderstandings. Part of the misunderstanding is that people refer erroneously to Aquinas' observation in his Treatise on Law that the best form of government is made up of all the good forms together: monarchy, aristocracy, democracy, and oligarchy.²⁷ His theory of mixed government is not simply a combination of good forms of government. To understand Aquinas' theory of mixed government better, one has to visit the philosophical roots of his theory, which is closely related to the concept of *ius*.

As explained earlier, Aristotle argues that a virtuous man rules over himself as 'royal and political'. In interpreting Aristotle, Aquinas argues that the 'justice' that becomes the principle foundation of the virtuous man's rule over himself is 'metaphorical justice'. In explaining whether justice is always directed toward another, Aquinas states:

Since justice by its name implies equality, it denotes relation to another, for a thing is equal, not to itself, but to another. And forasmuch as it belongs to justice to rectify human acts, as stated above, this otherness which justice demands must needs be between beings capable of action.²⁸

²⁵Aristotle, *Politics*, I, 1259b, 1-2, in J. Barnes (ed.), *The Complete Works of Aristotle*, vol. 2, Princeton University Press, Princeton, NJ 1995.

²⁶*Ibid.*, 1259b, 5.

²⁷ST I-II, q. 95, a. 4, co.

²⁸ST II-II, q. 58, a. 2, co: "*cum nomen iustitiae aequalitatem importet, ex sua ratione iustitia habet quod sit ad alterum, nihil enim est sibi aequale, sed alteri. Et quia ad iustitiam pertinet actus humanos rectificare, ut dictum est, necesse est quod alietas ista quam requirit iustitia, sit diversorum agere potentium*".

But, Aquinas argues, in the same person, we can see his principles of actions such as the reason, the irascible, and the concupiscible. Metaphorically, in one and the same person, there is justice insofar as the reason commands the irascible and concupiscible, and they obey reason, and therefore this principle can be called metaphorical justice (*hanc iustitiam appellat secundum metaphoram dictam*).

There are several takeaways from Aquinas' notion of metaphorical justice. First, Aquinas emphasizes the link between the virtue of justice and the capacity of citizens to govern themselves. Aquinas explains:

[A] good citizen needs to know both how to rule and how to be ruled, namely, according to the political rule over free men, not the despotic rule over slaves. And the virtue of such a citizen consists of being well disposed to both, namely, ruling well and being ruled well, and both also belong to a good man. Thus, the virtue of a good citizen insofar as he is able to rule is the same as the virtue of a good man, but insofar as a citizen is a subject, the virtue of a ruler and a good man is different from the virtue of a good citizen. For example, there are different kinds of moderation and justice in rulers and subjects. For a subject who is free and good does not possess only one kind of virtue (e.g., justice). Instead, he has two kinds of justice, one of which he can rule well, and the other of which he is a good subject. And the same is true about other virtues.²⁹

For Aquinas, to govern themselves, men need two different kinds of justice, that is, justice to rule well and justice to be a good subject.

Secondly, Aquinas emphasizes that the capacity of citizens to govern themselves is based on a mode of reasoning, which he and Aristotle call practical wisdom.

The ruler's virtue in the proper sense is practical wisdom, which directs and governs human action, but other moral virtues, which essentially consist of being governed and ruled, are common to subjects and rulers. Nonetheless, subjects share in practical wisdom to a degree, namely, to the extent that they have a true opinion about things to be done and can thereby govern themselves in their own actions according to the ruler's governance.³⁰

²⁹Id., *Sententia libri Politicorum*, lib. III, l. 3, n. 11: "*Sed tamen oportet, quod ille qui est simpliciter bonus civis, sciat et principari, et subiici, principatu scilicet non dominativo, qui est servorum, sed politico, qui est liberorum. Et haec est virtus civis, ut ad utrumque bene se habeat: et similiter boni viri sunt ambo, scilicet, et bene principari, et bene subiici. Et sic boni civis, inquantum est potens principari, est eadem virtus quae et boni viri; sed inquantum est subiectus, est alia virtus principis et boni viri, a virtute boni civis: puta altera species est temperantiae et iustitiae principis, et temperantiae et iustitiae subditorum. Subiectus enim qui est liber et bonus, non habet unam tantum virtutem, puta iustitiam; sed iustitia eius habet duas species; secundum unam quarum potest bene principari, et secundum aliam bene subiici: et ita etiam de aliis virtutibus*".

³⁰Id., *Sententia libri Politicorum*, lib. III, l. 3, n. 12: "*Nam proprie virtus principis est prudentia, quae est regitiva et gubernativa. Aliae vero virtutes morales, quarum ratio consistit in gubernari et subiici, sunt communes et subditorum et principum: sed tamen aliquid prudentiae participant subditi, ut scilicet habeant opinionem veram de agendis, per quam possint seipsos gubernare in propriis actibus*".

Thus, practical wisdom enables people to govern themselves as both ruler and legislator. As explained earlier, Aquinas believes that a good citizen needs to know both how to rule and how to be ruled as a free man, instead of slave. In other words, freemen should also be capable of carrying out the legislative function of the rulers by being capable of legislating for themselves.

3.2 *Lex and Best Form of Government*

Having reviewed the connection between justice, practical wisdom, and capacity to self-govern, let us now turn to the common misunderstanding of Aquinas' theory of mixed government. Aquinas explains the right ordering of rulers:

Two points are to be observed concerning the right ordering of rulers in a state or nation. One is that all should take some share in the government. . . The other point is to be observed in respect of the kinds of government, or the different ways in which the constitutions are established. For whereas these differ in kind, as the Philosopher states, nevertheless the first place is held by the 'kingdom,' where the power of government is vested in one; and 'aristocracy,' which signifies government by the best, where the power of government is vested in a few. Accordingly, the best form of government is in a state or kingdom, where one is given the power to preside over all, while under him are others having governing powers: and yet a government of this kind is shared by all, both because all are eligible to govern, and because the rules are chosen by all. For this is the best form of polity, being partly kingdom, since there is one at the head of all; partly aristocracy, in so far as a number of persons are set in authority; partly democracy, i.e. government by the people, in so far as the rulers can be chosen from the people, and the people have the right to choose their rulers.³¹

This passage signifies that the best form of government is ruled by the best-qualified man as the people's representative, which combines the royal and political elements. Nevertheless, the best-qualified man is responsible to the people and political body that has governing powers under the one who 'presides over all'. Moreover, the best-qualified man is also tempered by the fact that the government is shared by all, because all are eligible to govern. Shared governance means that the mixed government is based on justice and practical reasons, in which citizens can rule well and be good subjects and can collectively legislate for themselves.

Finally, the best-qualified man is also responsible to the people through the lawmaking process; as Aquinas says, "there is a form of government made up of all these and which is the best: and in this respect we have law sanctioned by the Lords and Commons".³² In this passage Aquinas uses the term *lex* instead of *ius*;

secundum gubernationem principis".

³¹ST I-II, q. 105, a. 1, co.

³²ST I-II, q. 95, a. 4, co: "*Est etiam aliquod regimen ex istis commixtum, quod est optimum, et secundum hoc sumitur lex, quam maiores natu simul cum plebibus sanxerunt*".

nevertheless, the fact that *lex* tempers the best qualified man is pointing back to the *ius* as the foundation of the mixed government. Indeed, *lex* is something other than *ius*, as Aquinas states, “law is not the same as the right, properly speaking, but an expression of justice (*lex non est ipsum ius, proprie loquendo, sed aliqualis ratio iuris*)». ³³ The term *aliqualis ratio iuris* can be interesting as the *lex* is the expression of *ius*. Nevertheless, the term *ratio* indicates that the *lex* measures the *ius*. In other words, while *lex* is different than *ius*, *lex* is the principal reference to which *ius* is determined by justice.

In his Treatise on Law, Aquinas implies that *lex* is the extrinsic measure of the *ius*. ³⁴ At the same time, *lex* is the intrinsic measure of *ius* as an *obiectum iustitiae*, as Aquinas explains, “for this reason justice has its own special proper object over and above the other virtues (*virtutibus determinum secundum se obiectum*), and this object is called the *iustum*, which is the same as *ius*. Hence it is evident that *ius* is the object of justice”. ³⁵ As explained earlier, the aim of equality (*aequalitas*) is designated as *ius*. The *ius*, therefore, is determined as *aequalitas* according to its relation to *lex* and the relationship with others, in terms of what is due by *lex* to others.

Thus, we can conclude that *ius* is determined by its relation to *lex* and what is due by *lex* to others. *Lex* is one of the pillars of Aquinas’ best constitutional government, in which the best-qualified man is tempered by making him responsible to the people through *lex*. Considering that *lex* is both an intrinsic and extrinsic measure of *ius*, it is through *lex* that the mixed government will determine the right and just (*ius sive iustum*), as *obiectum iustitiae*. Thus, *ius sive iustum* is the main criteria to measure whether the *lex* is proper to the best form of government.

4 *IUS*, THE COMMON GOOD AND CONSTITUTIONAL LIBERTY

4.1 *Ius, State, and the Common Good*

Having explained the connection between Aquinas’ theory of mixed government and *ius*, the next question is whether Aquinas favors the state’s role as the promoter of justice. As explained earlier, Aquinas posits that considering that it belongs to the law to direct men to the common good, justice in this way is called legal justice (*iustitia legalis*) as the virtue that directs all acts of virtue to the common good. The more precise question to be addressed is whether Aquinas’ theory of the state provides an authoritative role to the state in cultivating legal justice

³³ST II-II, q. 57, a. 1, ad 2.

³⁴ST I-II, q. 90. Aquinas explains that the extrinsic principle of moving to good is God, who instructs us by the means of His Law and assists us by His Grace (“*Principium autem exterius movens ad bonum est Deus, qui et nos instruit per legem, et iuvat per gratiam*”).

³⁵ST II-II, q. 57, a. 1, co.

in its citizens. We must go back to the Treatise on Law to answer this question. As mentioned earlier, Aquinas starts his Treatise on Law by stating that God is the extrinsic principle moving man to good, and he does so in two ways, insofar as he “both instructs us by means of His Law and assists us by His Grace”.³⁶ Thus, law is fundamentally a means by which God directs man to his natural and supernatural end. Then, he states that every law is ordered toward the common good. The centrality of the common good as the end of law derives from the fact that it belongs to the law to direct man toward his end. Aquinas notes that the last end of human life is happiness and beatitude (*vitae felicitas vel beatitudo*). Then he further asserts, “since every part is ordained to the whole, as imperfect to perfect; and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness (*felicitatem communem*)”.³⁷ Thus, if the law is to secure human happiness in the fullest sense, the law must be directed toward the common good.

Having explained the relationship between law and the common good, let us return to the relationship between legal justice and the common good. In his treatment of legal justice, Aquinas refers to “the law to direct to the common good (*ad legem pertinent ordinare in bonum commune*)”.³⁸ The question becomes which type of law legal justice is connected to. In defining legal justice, Aquinas states, “legal justice is a special virtue in respect of its essence, insofar as it regards the common good as its proper object. And thus, it is in the sovereign principally and by way of a mastercraft, while it is secondarily and administratively in his subjects”.³⁹ This statement indicates that legal justice primarily resides in the ruler who directs the members of the political community to the common good through law and secondarily in the citizens who are obedient to the law. Thus, Aquinas primarily refers to legal justice in its connection to human law.

The fact that human law is ordered toward justice and the common good brings us back to the question of whether Aquinas favors the state’s authoritative role in cultivating legal justice for its citizens. While Aquinas favors the state’s role as the promoter of legal justice, he believes that the state must respect the freedom of its citizens. In his commentary on Aristotle’s *Politics*, Aquinas says that while the state may order that some teach or learn geometry, the state does not dictate to geometry what conclusions it should draw about a triangle.⁴⁰ The end of human law is indeed to seek the common good, but it is predicated not on force and fear of the law but rather on one’s interior freedom.

To understand Aquinas’ understanding of human law, the common good, and

³⁶ST I-II, q. 90, Introduction.

³⁷ST I-II, q. 90, a. 20, co.

³⁸ST II-II, q. 58, a. 5, co.

³⁹ST II-II, q. 58, a. 6, co.

⁴⁰Id., *Sententia libri Politicorum*, lib. 1, l. 1, n. 30.

interior freedom, we have to visit his analysis of how the legislator should relate to the interior movement of the soul. First, Aquinas acknowledges that human beings are incapable of judging the internal movement of the soul as he states, “man is not competent to judge of inferior movements, that are hidden, but only of exterior acts which appear”.⁴¹ While human legislators cannot judge the interior movement of the soul, they are not prevented from aiming ultimately at the interior movement of their subjects. Aquinas describes this point:

An act is said to be an act of virtue in two ways. First, from the fact that a man does something virtuous; thus, the act of justice is to do what is right, and an act of fortitude is to do brave things: and in this way, the law prescribes certain acts of virtue. Secondly, an act of virtue is when a man does a virtuous thing in a way a virtuous man does it. Such an act always proceeds from virtue, and it does not come under a precept of law but is the end at which every lawgiver aims.⁴²

Here, Aquinas explains that the perfection of virtue must come through a correct interior movement of the soul instead of through reward and punishment by law. The lawmakers can command acts of virtue, but they cannot force subjects to perform acts of virtue as the virtuous man performs virtues as these acts flow from the correct interior dispositions. Thus, individuals, in their diversity, can achieve the perfect order of the common good only through the repetition good actions by means of which virtuous dispositions are formed. Thus, while the lawmakers cannot make laws concerning the interior movement of the souls, they can direct citizens, whose acts are commanded by law, to acquire the virtues. In this way, the law can indirectly reach the interior movement of the soul.

4.2 Consent, Freedom, and the Common Good

As mentioned earlier, a principle of consent emerges from the interconnection of *ius*, the common good, and the political community. Now we turn to the interconnection between *ius*, the common good, and constitutional freedom. The principle of consent signifies man’s moral freedom. To understand the relationship between man’s moral freedom and law, we must go back to the function of law. Aquinas argues that part of the function of positive law is to declare natural right (*natura rei*), but it does not establish it. Aquinas writes:

Now a thing becomes just in two ways: first by the very nature of the case, and this is called ‘natural right,’ secondly by some agreement between men, and this is called

⁴¹ST I-II, q. 91, a. 4, co.

⁴²ST I-II, q. 96, a. 3, ad 2: “*quod aliquis actus dicitur esse virtutis dupliciter. Uno modo, ex eo quod homo operatur virtuosa, sicut actus iustitiae est facere recta, et actus fortitudinis facere fortia. Et sic lex praecipit aliquos actus virtutum. Alio modo dicitur actus virtutis, quia aliquis operatur virtuosa eo modo quo virtuosus operatur. Et talis actus semper procedit a virtute, nec cadit sub praecepto legis, sed est finis ad quem legislator ducere intendit*”.

‘positive right’, as stated above. Now laws are written for the purpose of manifesting both these rights, but in different ways. For the written law does indeed contain natural right, but it does not establish it, for the latter derives its force, not from the law but from nature: whereas the written law both contains positive right and establishes it by giving it force of authority.⁴³

The primary function of positive law is to declare what is ‘just’. In its function to declare what is ‘just’, human law is a product of practical reason. As Aquinas explains, “in human affairs a thing is said to be just, from being right, according to the rule of reason”.⁴⁴ But the first rule of reason is the law of nature, and therefore, every human law must derive from the law of nature. If in any point the human law deflects from the law of nature, then it is no longer a law but a perversion of law.

While human law is the product of practical reason, Aquinas argues that it ought to be imposed on human beings according to their condition, which is imperfect in virtue. Aquinas writes:

The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the multitude of imperfect men the burdens of those who are already virtuous, that they should abstain from all evil. Otherwise, these imperfect ones, being unable to bear such precepts, would break out into yet greater evils.⁴⁵

The bottom line is that the purpose of the law is to make virtuous men. The goodness the law can achieve is the human good of the multitude of persons, the majority of whom are not perfect in virtue. Considering that every human being is part of the state, it is impossible for a man to be good unless he is well ordered to the common good. Consequently, the state’s common good cannot flourish unless the citizens are virtuous. But since the purpose of the law is to lead men gradually to become virtuous, then it is enough for the common good of the state that the citizens be virtuous insofar as they obey the command of their rulers.⁴⁶

The notion of limited virtuous acts, merely obeying the rulers, raises the question of whether the common good may be subordinated to the private good of the

⁴³ST II-II, q. 60, a. 5, co: “*Fit autem aliquid iustum dupliciter, uno modo, ex ipsa natura rei, quod dicitur ius naturale; alio modo, ex quodam conducto inter homines, quod dicitur ius positivum, ut supra habitum est. Leges autem scribuntur ad utriusque iuris declarationem, aliter tamen et aliter. Nam legis Scriptura ius quidem naturale continet, sed non instituit, non enim habet robur ex lege, sed ex natura. Ius autem positivum Scriptura legis et continet et instituit, dans ei auctoritatis robur*”.

⁴⁴ST I-II, q. 95, a. 2: “*In rebus autem humanis dicitur esse aliquid iustum ex eo quod est rectum secundum regulam rationis*”.

⁴⁵ST I-II, q. 96, a. 2, ad 2: “*Dicendum quod lex humana intendit homines inducer ad virtutem, non subito, sed gradatim. Et ideo non statim multitudini imperfectorum imponit ea quae sunt iam virtuosorum, ut scilicet ab omnibus malis abstineant. Alioquin imperfecti, huiusmodi praecepta ferre non valentes, in deteriora mala prorumperent*”.

⁴⁶ST I-II, q. 92, a. 1, ad 3.

individual as if one's private good consisted in the virtuous performance of acts of virtue. Aquinas explains that an act could be said to be an act of virtue from the fact that a man does something virtuous like the act of justice is to do what is right. In other words, an act of virtue is when a man does a virtuous thing like a virtuous man does it. Nevertheless, such an act "does not come under a percept of law but is the end at which every lawgiver aims".⁴⁷ This statement signifies the common good is not subordinated to the private good. The end of the law, which is ordered toward the common good, should not to be founded on force and fear but rather on the free advancement of the perfection of virtues directed toward the common good. The ultimate aim of law is to dispose citizens toward inward growth in virtues through their interior freedom. In sum, in the context of constitutional liberty, Thomistic constitutional theory posits that the law shall not force men to perform certain acts, even if it is a virtuous act. The perfection of liberty must come through a law that is able to reach the interior movement of the souls, not through reward or punishment. The lawgiver must aim at this freedom instead of crafting instruments of coercion.

Finally, Aquinas believes it is necessary to direct human conduct to the Divine Law. Aquinas explains that there are at least four reasons for the necessity of human conduct to be directed by a Divine Law.⁴⁸ First, it is related to the last end; considering that man is ordained to an end of eternal happiness, man needs to be directed toward a law given by God. Second, on account of the uncertainty of human judgment, to help man to know what he ought to do and what he ought to avoid, it is necessary for man to be directed to his proper acts by a Divine Law. Third, as man is not competent to judge the interior movement of the soul, human law could not sufficiently direct the interior movement of the soul, and therefore, a Divine Law must supplant human law. Fourth, because human law cannot punish all evil deeds, those evil deeds would hinder the pursuit of the common good, and therefore, the Divine Law must ensue so that no evil might be unforbidden and unpunished. In sum, the Divine Law can bring perfect order of the common good by extending to individuals in their freedom direction to their last end, by helping them in their judgment to reach the interior movement of their souls, and by punishing and forbidding all sins and evil deeds that hinder the utility of the common good. Thus, by providing aid and safeguarding human freedom, the Divine Law can bring the ultimate meaning of constitutional liberty.

⁴⁷ST I-II, q. 96, a. 4, ad 2: "*nec cadit sub praecepto legis, sed est finis ad quem legislator ducere intendit*".

⁴⁸ST I-II, q. 91, a. 4, co.

5 IUS, DE REGNO, AND THE CONSTITUTIONAL GOVERNMENT

In this final part, we will review Aquinas' constitutional theory from his Treatise on Kingship known as *De Regno*. *De Regno* is a short treatise on political rule addressed as a gift to the King of Cyprus. But *De Regno* is often overlooked by many scholars because of its obscurity.⁴⁹

In the beginning of *De Regno*, Aquinas begins to discuss the relationship between the common good and the rule of government.⁵⁰ Aquinas first explains the connection between the community of free men and the common good:

If, therefore, a multitude of free men is ordered by the ruler towards the common good of the multitude, that rulership will be right and just (*regimen rectum et iustum*), as is suitable to free men. If, on the other hand, a rulership aims, not at the common good of the multitude, but at the private good of the ruler, it will be an unjust and perverted rulership (*regimen iniustum atque perversum*).⁵¹

Nevertheless, *De Regno*'s exposition of the common good does not mean political communities are gathered together simply to live well here on earth, but their ultimate end is the beatitude of heaven (*beatitudo caelestis*). Therefore, Aquinas argues that "it pertains to the king's office to promote the good of life of the multitude in such a way as to make it suitable for the attainment of heavenly happiness".⁵² The King must learn the law of God (*lege divina*), the teaching that belongs to the office of the priests. Then, the King must have as principal concern, based on the law of God he has learned, the way by which the multitude of subjects under him may live well (*ad bene vivendum*). Here, Aquinas says there is a threefold concern for the King: first, to establish a virtuous life for his subjects, second, to preserve it once established, and third, to promote greater perfection to it.⁵³

Aquinas makes a distinction between what is needed for an individual's good

⁴⁹In recent years, however, there has been a growing interest in *De Regno* among the young generation of scholars; for instance, please see W. A. McCormick, *The Christian Structure of Politics: On the De Regno of Thomas Aquinas*, Catholic University of America Press, Washington, D.C. 2022.

⁵⁰For a more detailed analysis of Aquinas' treatment of the common good in *De Regno*, please see J. Finnis, *Public Good: The Specifically Political Common Good in Aquinas*, in R. George, «Natural Law and Moral Inquiry: Ethics, Metaphysics, and Politics in the Thought of Germain Grisez», Georgetown University Press, Washington, D.C. 1998, pp. 174-209.

⁵¹St. Thomas Aquinas, *De Regno*, in *Opuscula I. Treatises*, trans. G. B. Phelan, revised by I. Eschmann, O.P., Aquinas Institute, Green Bay, WI 2018, Book I, 1: "Si igitur liberorum multitudo a regente ad bonum commune multitudinis ordinetur, erit regimen rectum et iustum, quale convenit liberis. Si vero non ad bonum commune multitudinis, sed ad bonum privatum regentis regimen ordinetur, erit regimen iniustum atque perversum...".

⁵²Id., *De Regno*, Book II, 4: "ad regis officium pertinet ea ratione vitam multitudinis bonam procurare secundum quod congruit ad caelestem beatitudinem consequendam".

⁵³Ibid.: "ut primo quidem in subiecta multitudine bonam vitam instituat, secundo ut institutam conservet, tertio ut conservatam ad Meliora promoveat".

life and what is needed for a community's good life. For an individual person to have a good life (*bonam autem unius hominis vitam*) two things are required: first, individual persons must act in a virtuous manner (*operatio secundum virtutem*); and second, bodily goods (*corporalium bonorum*) are necessary for the virtuous life. To establish a virtuous life for the multitude, there are three things necessary: first, there must be unity of peace (*unitate pacis*), which must be secured by the rulers; second, the group of people united in the bond of peace must be directed to acting well (*ad bene agendum*) — the lack of unity of peace will hinder virtuous actions among community members as the people will fight among themselves; third, the ruler must also procure a sufficient supply of things (*industriam necessariorum*) required to live well.

Aquinas then shifts the discussion in *De Regno* from the good of life of the multitude (*bona vita multitudine constituta*) to the public good (*bonum publicum*). Aquinas explains that there are three impediments to the achievement of the public good. First, the public good must not be established for one time only, it must be perpetual. Human beings cannot abide forever because they are mortal. Even while they can live a long life, they do not always maintain the same vigor, for the life of a human being is subject to many changes, and therefore, a man is not equally suited to the performance of the same duties throughout the whole span of his life. The second impediment comes from the perversity of the human's will: either one is too lazy in doing what the commonweal requires, or one is harmful to the unity of peace by transgressing justice. Third, enemies might attack and destroy peace, and sometimes completely wipe out the city.

To counteract the impediments to the public good, Aquinas argues that a triple responsibility must be laid upon the King:

First of all, he must take care of the appointment of men to succeed or replace others in charge of the various offices. Just as in regard to corruptible things (which cannot remain the same forever) the government of God made provision that through generations one would take the place of another in order that, in this way, the integrity of the universe might be maintained, so too the good of the multitude subject to the King will be preserved through his care when he sets himself to attend to the appointment of new men to fill the place of those who drop out. In the second place, by his laws and orders, punishments and rewards, he should restrain the men subject to him from wickedness and induce them to virtuous deeds, following the example of God, Who gave His law to man and requires those who observe it with rewards, and those who transgress it with punishments. The King's third charge is to keep the multitude entrusted to him safe from the enemy, for it would be useless to prevent internal dangers if the multitude could not be defended against external dangers.⁵⁴

⁵⁴*Ibid.*: “*Primo quidem de successione hominum et substitutione illorum qui diversis officiis prae-sunt, ut sicut per divinum regimen in rebus corruptibilibus, quia semper eadem durare non possunt, provisum est ut per generationem alia in locum aliorum succedant, ut vel sic conservetur integritas*

Nevertheless, while Aquinas assigns the King the duty to promote the good life of the multitude, he never supposes that it is only limited to an earthly good because the multitude cannot attain the heavenly good by themselves. The kings must regard themselves as subject to the divine governance (*divine gubernatione*), administered by priests, which concerns not only earthly or temporal matters but also spiritual matters. For this reason, promoting the good life of the political community must be in line with the pursuit of heavenly fulfillment, so the King must also prescribe whatever things lead to heavenly fulfillment and forbid all those contraries to the attainment of the ultimate end.

At this point, one might wonder what the relationship is between *De Regno* and *ius*. Aquinas writes in *De Regno*:

It is, however, clear that the end of a multitude gathered together is to live virtuously. For men form a group to live well together, a thing which the individual man living alone could not attain. Now the good life is a virtuous life; therefore, a virtuous life is the end for which men gather together.⁵⁵

If an individual wants to gather together in the political community, this political community will give one's purpose and direction to achieve legal justice. Here, we are circling back to the discussion of legal justice addressed in the earlier part of this article: whether it is solely the government's responsibility to promote the goods of legal justice, which can be called the political community's common good. The political community includes individuals and families; while the government is responsible for assisting individuals and families to attain the common good, it does not supplant the responsibility of each individual and family to make decisions based on their own judgments. In this context, Aquinas argues that different types of prudence correspond to the respective ends of the various kinds of multitude.⁵⁶ In sum, the political community does not dictate or stipulate the choices and actions of individuals and families because those choices are private.

universi, ita per regis studium conservetur subiectae multitudinis bonum, dum sollicite curat qualiter alii in deficientium locum succedant. Secundo autem ut suis legibus et praeceptis, poenis et praemiis homines sibi subiectos ab iniquitate coerceat et ad opera virtuosa inducat, exemplum a Deo accipiens qui hominibus legem dedit, observantibus quidem mercedem, transgredientibus poenas retribuens. Tertio imminet regi cura ut multitudo sibi subiecta contra hostes tuta reddatur. Nihil enim prodesset interiora vitare pericula, si ab exterioribus defendi non posset.

⁵⁵*Ibid.*, Book II, 3: "Videtur autem ultimus finis esse multitudinis congregatae vivere secundum virtutem: ad hoc enim homines congregantur ut simul bene vivant, quod consequi non posset unusquisque singulariter vivens; bona autem vita est quae est secundum virtutem, virtuos igitur vita finis est congregationis humanae".

⁵⁶ST II-II, q. 48, a. 1, co: "Est autem quaedam multitudo adunata ad aliquod speciale negotium, sicut exercitus congregatur ad pugnandum, cuius regitiva est prudentia militaris. Quaedam vero multitudo est adunata ad totam vitam, sicut multitudo unius domus vel familiae, cuius regitiva est prudentia oeconomica; et multitudo unius civitatis vel regni, cuius quidem directiva est in principe regnativa, in subditis autem politica simpliciter dicta".

While individual choices are private, Aquinas acknowledges that it is necessary to order the pursuit of men to the common good; the political community must direct individuals because the individual inclination to the common good is diminished by original sin. The ordering, however, does not come at the expense of absorption or the obliteration of individual goods. Ordering individual goods through social cooperation, politics, and law can help people overcome their inclination to be selfish and focus too much on their own good. The bottom line is that ordering individual goods through law makes people more rational by helping to form their inclination toward the common good.

6 CONCLUSION

Aquinas' philosophical analysis of *ius* focuses primarily on relationships between the common good and legal justice. This theory enables Aquinas to provide an account of *ius* as the object of justice that addresses the need for the ordering of the common good. By tying *ius* closely to his account of the common good, it becomes clear how the goods of legal justice, which can be called the common good of the political community, is the foundation of Aquinas' theory of constitutional government. The good of legal justice is attainable through a complex interplay between the state, families, and individuals, under which each performs their specific roles and responsibilities properly. This complex interplay also involves Divine Law, which brings order to the common good by allowing individuals to make their own choices and judgments. The Divine Law can bring perfect order of the common good by extending to individuals in their freedom direction to their last end, by helping them in their judgment to reach the interior movement of their souls. Thus, Aquinas' theory that the common good as the end of the law can be accomplished through one's interior freedom makes possible the essence of constitutional liberty.

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