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Determining Ius According to Thomas Aquinas: a Realistic Model for Juridical Decisions

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ABSTRACT
The Thomistic reflection on *ius* presents itself as an interesting example of realistic reflection, since in it the legal system finds in judgment its fulcrum and judgment proves to be regulated by a criterion that is not primarily the application of the law but the achievement of justice. Achieving justice is carried out, however, through dialectics, according to an essentially realistic kind of objectivity, as shown by the Thomistic definitions of *ius* as *ipsa res iusta* and of the *medium iustitiae* as *medium rei*.

KEYWORDS
Law, justice, realism, ius, judiciary, Aquinas

1. *The new role of jurisdiction in the contemporary juridical universe and the problem of the criterion of judgment in determining what is just*

One of the most significant phenomena in the transformations underway in the contemporary juridical universe is the centrality that jurisdiction has taken on in States of constitutional law and in the global juridical space[1]. This is not a matter merely of its decisive role in shaping a just legal system and in applying the laws, a matter which, however, has already been highlighted by the various exponents of juridical hermeneutics[2]. Neither is it simply a matter of the new institutional role carried out by the judiciary, invested with the task of "substituting" for the legislator, a role exercised in the spaces left empty by an incomplete, contradictory, or even inexistent legislation. This role reached imposing dimensions above all in the post-war social welfare State[3]. The increased cogency of superior sources, such as the Constitution and international and supranational treatises, centred on safeguarding fundamental rights, makes the situation even more complex, creating a pluralistic and polycentric layout, on account of which,

[1] Cf. Malleson 1999; Ferrarese 2002, pp. 187 ff.; Bork 2003; Allard and Garapon 2005; Cassese 2009.
[2] Cf. Esser 1972; Zaccaria 1996. For other precedents in the post-war philosophy of law of the thesis of the primacy of judgment in administering justice, cf. Bastit 2006, especially p. 144.
[3] Cf. Cappelletti 1984.

even if there were laws and these were clear and could be easily applied, oftentimes it would not be sufficient merely to refer to them in resolving the hard cases of our times[4]. In this situation, then, the judge takes on weight and importance, since he is now obliged to base himself to a much greater degree on principles and on values than on the rules, and thus finds himself restored to his classic role of procurator of justice[5], no longer being able to be considered a mere spokesman for the law[6].

But at this point, a grave problem emerges. Once the role of positive law has been re-dimensioned, how can the judges' discretion be oriented, and how can their whims be limited? And no less an issue, how can a just decision be guaranteed? Perhaps there are other parameters to be observed? Are there other limits to the creativity of the courts? It thus becomes necessary to answer the question regarding the criterion of judgment.

It immediately becomes evident, regarding this issue, that, to avoid the difficulties just mentioned, if this criterion cannot be subjective, neither can it be the abstract objectivity of the law. We must thus ascertain whether there exists another type of objectivity.

The Thomistic reflection on *ius* offers in this regard some interesting indications. It presents itself, in fact, as a particularly privileged observatory, since in it, too, the legal system finds in judgment its fulcrum and judgment proves to be regulated by a criterion that is not primarily the application of the law but the achievement of justice.

Achieving justice is carried out, however, in this case according to an essentially realistic kind of objectivity[7], as shown by the definitions of *ius* as *ipsa res iusta* and of the *medium iustitiae* as *medium rei*, and as will emerge in the following pages from the study of the thought that underlies them.

In this essay, what will be firstly sought is to specify the conception of judicially-oriented law promoted by Thomas Aquinas; then, an examination of the peculiar solution proposed by Aquinas to the problem of the measure in judicial decisions will follow. So it will be possible to understand better, in its realistic objectivity, recognizable through dialectics, the meaning and role of justice in the Thomistic doctrine of *ius*.

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[4] Cf. Garapon 1996.

[5] The reference is to the known Aristotelian representation of the judge as "living justice" (*Nicomachean Ethics*, V, 1132 a 20 ff.).

[6] The reference is to the known Montesquian representation of the judge as "the mouthpiece of the law" (*Esprit de loix*, XI, 6).

[7] On realism in the Thomistic legal thought, De Bertolis (2000, pp. 33-34) gives particular attention.

2. *Ius as ipsa res iusta according to the Thomistic conception*

Let us begin then with an initial consideration. The Thomistic reflection on *ius* proves particularly interesting because for Aquinas as well, judgment, in determining what is just, carries out a leading role and carries it out precisely as an expression of justice, so that, through judgment, what is just is determined correctly not only on the basis of the application of the law, but, perhaps in an even greater measure, on the basis of the ways in which it is applied[8]. This is due, above all, precisely to the role that the first of the moral virtues[9] plays here, and thus to the close relationship that the Dominican master establishes between *iustitia, ius* and *iudicium*, since what Thomas calls *ius* is nothing other than *obiectum iustitiae*[10] and *iudicium* is *actus iustitiae*[11].

To understand, then, how Thomas conceives the determining of *ius* it is firstly necessary to keep in mind that *quaestio* 57 *de iure* appears in the *Summa Theologiae* at the beginning of the part in the *Secunda secundae* dedicated to the virtue of justice[12]. This is a placement made to some degree necessary by the fact that, since justice, as for that matter every *habitus*[13], is specified by its own formal object, its respective treatment could not but begin with the defining of this object, which is *ius sive iustum*[14].

To be able to adequately define it, yet, Thomas had to be able to distinguish its main meaning from those secondary to or derived from it. Like the *nomen medicinae,* in fact, so too *ius* is an analogous term, which possesses multiple meanings. Aquinas lists them with precision: "the term *ius* was initially given to the just thing in itself [*ad significandum ipsam rem iustam*]; subsequently it was

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[8] See, in particular, in this regard, *Summa Theol.*, II-II, q. 60, a. 5 and ad 2, with the excellent comment by Villey 1987, pp. 57-74. We note that in this present essay the Thomistic texts are cited, always by referring to the *editio optima* (cf. http://www.corpusthomisticum.org/reoptedi.html) and without mentioning each time the name of the Author, with the customary abbreviations.

[9] Cf. *Summa Theol.*, I-II, q. 66, a. 4.

[10] Cf. *Summa Theol.*, II-II, q. 57, a. 1.

[11] Cf. *Summa Theol.*, II-II, q. 60, a. 1.

[12] We are referring to the part of the *Secunda Secundae* that goes from q. 57 to q. 122 and about which – Thomas writes in the proemio - "quadruplex consideratio occurrit: prima est de iustitia; secunda de partibus eius; tertia de dono ad hoc pertinente; quarta de praeceptis ad iustitiam pertinentibus". See in this regard Ambrosetti 1974, pp. 1-20.

[13] Cf. *Summa Theol.*, I-II, q. 54, a. 2.

[14] Regarding this endiad, it is necessary to recall how it presupposes the identification established both in the commentary to the *Nichomacean Ethics*, where it is said that the jurists "idem nominant […] ius quod Aristotiles iustum" (*Sententia Ethic.*, V, l. 12, vv. 15-16), and in the passage of the *Etymologiae* di Isidoro (Lib. V, cap. 3; PL 82, 199) referred to in the *Sed contra* of article 1 of this *quaestio*: "ius dictum est quia est iustum" (*Summa Theol.*, II-II, q. 57, a. 1, s. c.).

extended to the art through which one knows what is just; then it came to indicate the place where justice is done, as when one says that someone appears *in iure*; and finally it was named *ius* also that which is established by he by whose office is responsible for rendering justice, even when what he decides is unjust"[15].

We can easily understand that it is with the enucleation of the first meaning, the main one, that we have the acceptation on the basis of which *ius* is qualified as *obiectum iustitiae*[16]. The *ipsa res iusta* is truly nothing other than the *iustum*, which for Thomas constitutes the object of the acts of justice[17], and which is precisely identical to the *ius*[18].

The acceptation of *ius* as *ipsa res iusta* remains, however, still somewhat mysterious and vague, telling us only that it involves "something objective"[19] and being able to refer equally to a thing, an action or a performance of a work[20]. Its meaning can, moreover, be specified precisely by considering the implications of the fact that, as we have just seen, it proves to coincide with the *obiectum iustitiae*.

Justice, in fact, is in turn defined as "the habit through which – with constant and perpetual will – one's own right [*ius suum*] is attributed to one"[21] Now, - Thomas writes a little further on – "it is said to be own of each person that which is due to him according to a proportional equivalence [*quod ei secundum proportionis aequalitatem debetur*]"[22] One deduces that the *ius*, the *ipsa res iusta*, is that which is each individual's "own", not inasmuch as it is already possessed, but inasmuch as it is due him by others. With one important clarification: *secundum proportionis aequalitatem*. Aquinas also defines it thusly: "that is said to be just in our activity what is proportional to the other according to a certain equality [*quod*

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[15] "[…] etiam hoc nomen ius primo impositum est ad significandum ipsam rem iustam; postmodum autem derivatum est ad artem qua cognoscitur quid sit iustum; et ulterius ad significandum locum in quo ius redditur, sicut dicitur aliquis comparere in iure; et ulterius dicitur etiam ius quod redditur ab eo ad cuius officium pertinet iustitiam facere, licet etiam id quod decernit sit iniquum" (*Summa Theol.*, II-II, q. 57, a. 1, ad 1).

[16] Cf. *Summa Theol.*, II-II, q. 57, a. 1.

[17] Cf. *Ibid.*: "Sic igitur iustum dicitur aliquid, quasi habens rectitudinem iustitiae, ad quod terminatur actio iustitiae".

[18] Cf. *Ibid.:* "Et hoc quidem est ius".

[19] So it is for Giuseppe Graneris: "qualcosa di oggettivo e non soggettivo" (Graneris 1961, p. 78); so it is also for Ambrosetti: "qualcosa di reale e di obiettivo" (Ambrosetti 1974, p. 7). For a widespread treatment, see in any case Darbellay 1963, pp. 59-77.

[20] Cf. Delos 1932, p. 231, n. 1; Darbellay 1962, p. 68; Ambrosetti 1974, p. 7 (all of which refer to the *Summa Theol.*, II-II, q. 61, a. 3). See also Finnis 1996, p. 223: "per "cosa", come si chiarisce dal contesto, egli [l'Aquinate] intende atti, oggetti e rapporti in quanto oggetto di relazioni di giustizia".

[21] "[…] iustitia est habitus secundum quem aliquis constanti et perpetua voluntate ius suum unicuique tribuit" (*Summa Theol.*, II-II, q. 58, a. 1).

[22] "Hoc autem dicitur esse suum uniuscuiusque personae quod ei secundum proportionis aequalitatem debetur" (*Summa Theol.*, II-II, q. 58, a. 11).

respondet secundum aliquam aequalitatem alteri]"[23]; or thus: "*ius*, or *iustum*, is a work adequate to the other according to a certain equality [*aliquod opus adaequatum alteri secundum aliquem aequalitatis modum*]"[24].

It must not, however, be understood in the sense of a *facultas*, the subjective power or right of each person over that which is due them, nor does it seem that this could be considered even as one of the secondary meanings of *ius*, like some scholars[25] retain on the basis of an interpretation with a fairly long lineage[26]. While it cannot be denied that occasionally Thomas has used the term *ius* in this sense[27], he not only fails to mention it in his "official"[28] list, but in all likelihood did so on purpose. It has been authoritatively recalled, in fact, that he could not have confused *ius* with the faculty to exercise it[29], nor the limitation of a power with the power itself[30].

But if it is not subjective right, neither is *ius* the *lex*, as is sustained by an even more ancient and venerable line of interpretation[31]. Indeed, *lex* is something other than *ius* proper. Responding to a specific question on this point[32], Thomas states this clearly: "*lex non est ipsum ius, proprie loquendo, sed aliqualis ratio iuris*"[33]. *Aliqualis ratio iuris*: many translations have been proposed[34], but we may

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[23] "[…] illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri" (*Summa Theol.*, II-II, q. 57, a. 1).

[24] "[…] ius, sive iustum, est aliquod opus adaequatum alteri secundum aliquem aequalitatis modum" (*Summa Theol.*, II-II, q. 57, a. 2).

[25] Cf., to quote the most representative ones: Hering 1939, pp. 295-297; Thomas 1956 (*Introducción* by T. Urdánoz), pp. 187 ss., 196 ss.; Lamas 1991, pp. 317 ff.; Finnis 1998, pp. 132 ff.

[26] Cf. F. De Vitoria, *Comentarios a la Secunda Secundae de Sancto Tomás*, q. 62, n. 5; F. Suarez, *De legibus*, l. I, c. 2, n. 5. See, on this point, Folgado 1960.

[27] Hering 1939 has identified fourteen Thomistic passages in which *ius* appears as subjective right. This makes sense, as Tierney has observed, because "the canonists often used the word *ius* to mean a subjective right, and when Aquinas discussed the same or similar issues […] he unreflectively borrowed their language" (Tierney 2002, pp. 416-417).

[28] Cf., *supra*, n. **15.**

[29] Cf. Lachance 1933, p. 401.

[30] Cf. Villey 1969, p. 149.

[31] See on this matter, regarding the tradition that originates with the biblical exegesis of the Fathers of the Church, Villey 1976, pp. 19-50. For more specific reference to the second Spanish Scholastic age, cf. Folgado 1960, I, p. 22.

[32] Cf. *Summa Theol.*, II-II, q. 57, a. 1, arg. 2.

[33] *Summa Theol.*, II-II, q. 57, a. 1, ad 2. It is hardly the case to recall how in the literature on the Thomistic juridical doctrine the relation between *ius and lex* has been understood in many ways: it goes from opposition (cf. Villey 1973, especially p. 28) to complementarity (cf. Tierney 2001, p. 26), to identification, by metonimia (cf. Kalinowski 1973, pp. 64, 70, 72) or, with specific reference to the expressions *lex naturalis* and *ius naturale*, to equivalence (cf. De Bertolis 2000, p. 71 and n. 105).

[34] We limit ourselves here to mention the translations of the main national editions of the *Summa*: "la règle du droit" (Thomas Aquinas 1932, p. 14); "la norma remota del diritto"

note that they are all linked by the idea that in this passage, *ratio* denotes the *lex* as a measure of the *ius*. *Lex*, therefore, is not the *ius*, but the measure, the principle, in reference to which the *ius* is determined by justice.

The *lex*, however, both the *lex naturalis* and the *lex positiva*, constitutes only that which one might call the "extrinsic measure" of the *ius*[35], a measure, for that matter, common to the objects of all the moral virtues. In addition to it, there is an intrinsic measure, exclusive to the *ius* inasmuch as it is an *obiectum iustitiae*. Precisely as *obiectum iustitiae*, in fact, the *ius* is characterised by a specific *rectitudo* proper to it, which arises *per comparationem ad alium*, and not, as occurs with the other virtues, only in relation to the moral dispositions of the acting subject. "This is why", Aquinas argues, "the object of justice, which is called *iustum*, is determined in itself [*determinatur secundum se*] in a special way with regard to the other virtues. And *ius* is, precisely, this"[36].

The *ius* is therefore determined as *aequalitas* according to a twofold measure, that is, both in relation to the *lex*, and in relation to the interests of others, or more completely, it is termed *aequalitas* with respect to what is due by *lex* to others. And so it is that *ius* attributes its "own" to each one, realising in this way, as we have seen[37], the *opus* typical of justice.

One may therefore conclude that the *ius* is determined in the manner in which justice determines it, according to its own peculiar modes of action. There remains, moreover, still to understand how exactly this determination is made, that is, more concretely said, how its relation with its two measures is articulated. Well, we can doubtless find a great help in our search by considering that the specifying act of the virtue of justice is *iudicium*[38]. In fact, it is through *iudicium* that justice determines the *ius sive iustum*[39]. To this now, we must therefore turn our attention.

(Thomas Aquinas 1984, p. 32; Thomas Aquinas 1996, p. 446); "die Ursache des Rechts" (Thomas Aquinas 1987, p. 5); "cierta razón del derecho" (Thomas Aquinas 1956, p. 233; Thomas Aquinas 1990, p. 471); "an expression of right" (Thomas Aquinas 1947); "a design for a right" (Thomas Aquinas 1975, p. 7); "nějaký výraz práva" (Thomas Aquinas 1937-1940).

[35] Cf., in this sense, *Summa Theol.*, I-II, q. 90, *proemium*. G. Letelier Widow stresses suitably the need to discover the "extrinsic" character and not "external" of the Thomistic *lex* (Letelier Widow 2010-2011, pp. 212-215).

[36] "Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obiectum, quod vocatur iustum. Et hoc quidem est ius" (*Summa Theol.*, II-II, q. 57, a. 1).

[37] Cf., *supra*, **n. 24**.

[38] Cf. *Summa Theol.*, II-II, q. 60, a. 1.

[39] *Ibid*.

3. *The judicial determination of the ipsa res iusta as medium iustitiae*

To *iudicium* Thomas dedicates the six articles of *quaestio* 60 of the *Secunda secundae*.

In the first article, *Utrum iudicium sit actus iustitiae*, he affirms that the determination of the *ius* occurs in judgment. Judgment, in fact, writes Aquinas, "properly indicates the action of a judge as such. A judge, moreover, is such inasmuch as he is *ius dicens*. Now, as we have seen, *ius* is the object of justice. Therefore judgment, according to its first definition, implies the defining or determining [*definitionem vel determinationem*] of the *ius sive iustum*. The fact, however, that one defines correctly what regards virtuous ations depends properly on the habit of the virtue, so he who is chaste evaluates correctly what regards chastity. Therefore, judgment, which implies the upright determination of what is just [*rectam determinationem eius quod est iustum*], belongs properly to justice [*proprie pertinet ad iustitiam*]"[40].

Judgment is therefore the act that says, defines, or determines, the *ius sive iustum*. One can well understand then that from the consideration of the factors that have seemed to us relevant to the meaning of *ius*, one can deduce the primary requisites of judgment. We may list them in the following terms: judgment must be an act of justice[41], judgment must determine that which is each person's own (or that which is due each person)[42], judgment must be emanated in accordance with the *lex*[43], judgment must re-establish equality in relations with others[44]. It is only when judgment is described in this manner that it states, defines, or determines the *ius*.

If all this can be recognised without difficulty, other specifications are necessary, however, regarding the role of justice in the determination of the *ius* that takes place in judgment.

On this matter, it is necessary above all to highlight an important implication underlying the affirmation that "judgment belongs, properly speaking, to justice"[45]. Given that judgment, as we have described it, is first of all the act of the judge, it is necessary straightaway to specify that it is not merely reducible to this act, but must be understood, more generally, as the act of the just man,

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[40] "[…] iudicium proprie nominat actum iudicis inquantum est iudex. Iudex autem dicitur quasi ius dicens. Ius autem est obiectum iustitiae, ut supra habitum est. Et ideo iudicium importat, secundum primam nominis impositionem, definitionem vel determinationem iusti sive iuris. Quod autem aliquis bene definiat aliquid in operibus virtuosis proprie procedit ex habitu virtutis: sicut castus recte determinat ea quae pertinent ad castitatem. Et ideo iudicium, quod importat rectam determinationem eius quod est iustum, proprie pertinet ad iustitiam" (*Ibid.*).

[41] Cf. *Ibid.*

[42] Cf. *Summa Theol.*, II-II, q. 67, a. 4.

[43] Cf. *Summa Theol.*, II-II, q. 60, a. 5.

[44] Cf. *Summa Theol.*, II-II, q. 63, a. 4.

[45] Cf., *supra*, n. **40.**

whoever he may be[46]. The judgment of the judge constitutes only the main analogous instance of it.

Judgment, in addition, takes other meanings in the Thomistic text: "the term *iudicium,* which in its first meaning designated the correct determination of what is just [*rectam determinationem iustorum*], was later employed to denote the correct determination in any field [*rectam determinationem in quibuscumque rebus*], both on in speculative contexts and in practical contexts"[47]. Here, what comes into relief, in addition to the judgment of the judge and of the just man, is the reference to an even wider meaning of the term, common to various types of intellectual operations, but above all what emerges is the note that identifies it with precision: the *recta determinatio*. The *rectitudo* of the *determinatio*, in fact, does not in itself imply justice, but only the congruousness in identifying the action proper to each object, in the speculative context as well as the practical realm[48].

The problem, therefore, that Thomas poses, given that it is not only a question of justice, is to ascertain whether, as the *argumenta* which introduce the article suggest[49], there come together, in the formation of the different types of judgment, other *habitus*, in particular prudence, charity, and the other moral virtues. And anticipating this eventuality, Aquinas asks, moreover, whether there is a contribution they make to that specific judgment that consists in determining the *ius*, and, if so, what virtue would have pre-eminence.

In the answers, the Dominican master develops and clarifies his own thought. In the first and third, he affirms that there is not only the judgment of the just man, but there are as many judgments, albeit in a wider sense [*extenso tamen nomine iudicii*][50], as there are moral virtues: "thus, in the things regarding justice judgment proceeds from justice; in the same way, in the things regarding fortitude, it proceeds from fortitude"[51]. Nevertheless, the judgment of the just man maintains its own specificity, at least inasmuch as – since justice regulates relationships with others – it is mainly identified with the judgment of the superior who in such relationships serves as an arbitrator [*qui utrumque valeat arguere*][52].

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[46] Cf. *Summa Theol.*, II-II, q. 60, a. 1, ad 2 e 4.

[47] "[…] nomen iudicii, quod secundum primam impositionem significat rectam determinationem iustorum, ampliatum est ad significandum rectam determinationem in quibuscumque rebus, tam in speculativis quam in practicis" (*ivi*, ad 1).

[48] See in this regard the distinction between "three senses of *quod est rectum*" proposed by Pattaro 2010, pp. 689-691.

[49] Cf. *Summa Theol.*, II-II, q. 60, a. 1, argg. 1, 2 e 3.

[50] Cf. *Ivi*, ad 3.

[51] "Et sic in his quae ad iustitiam pertinent iudicium procedit ex iustitia: sicut et in his quae ad fortitudinem pertinent ex fortitudine" (*ivi*, ad 1).

[52] Cf. *Ivi*, ad 3.

Among the types of judgments considered, there is then the judgment of the spiritual man, inspired by charity, in regard to which we read in the second answer the following parallel: "The spiritual man receives from the habit of charity the inclination to judge uprightly of everything according to the divine laws, observing which he pronounces his judgment through the gift of wisdom; the just man pronounces his judgment according to the human laws through the virtue of prudence"[53].

More articulate is the discourse on prudence, which is invoked in this passage and had already been widely discussed in the first reply. The first reply stated that the upright judgment presupposes two factors: the *dispositio iudicantis*, on which depends the inclination to judge rightly, and the *virtus proferens iudicium*, the faculty empowered to directly articulate the judgment. If, therefore, under the first aspect, at least *in his quae ad iustitiam pertinent*, the judgment proceeds from justice, under the second, the judgment is an act of reason and thus requires the exercise of prudence[54].

Now, we know that the specific task of prudence is to determine rationally within the moral virtues the *medium virtutis*[55]. But we also know that in the case of justice the *medium* is the *aequale* in relationships with others[56]. As writes Thomas, "the happy medium of justice [*medium iustitiae*] consists in a certain equality of proportion [*in quadam proportionis aequalitate*] of an external reality with an external person"[57]. We must therefore conclude that the specific duty of the prudence proper to the judge or the just man is to determine rationally the *aequalitas* in what is due to each one. And *aequalitas* is, as we have seen[58], an essential and indispensable attribute of the *ius*, its formal constitutive element.

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[53] "[…] homo spiritualis ex habitu caritatis habet inclinationem ad recte iudicandum de omnibus secundum regulas divinas, ex quibus iudicium per donum sapientiae pronuntiat: sicut iustus per virtutem prudentiae pronuntiat iudicium ex regulis iuris" (*ivi*, ad 2).

[54] Cf. *Ivi*, at 1: "[…] ad iudicium duo requiruntur rectum. Quorum unum est ipsa virtus proferens iudicium. Et sic iudicium est actus rationis: dicere enim vel definire aliquid rationis est. Aliud autem est dispositio iudicantis, ex qua habet idoneitatem ad recte iudicandum. Et sic in his quae ad iustitiam pertinent iudicium procedit ex iustitia […]. Sic ergo iudicium est quidam actus iustitiae sicut inclinantis ad recte iudicandum: prudentiae autem sicut iudicium proferentis. Unde et synesis, ad prudentiam pertinens, dicitur "bene iudicativa"". On the rational nature of jurisprudence, see, in particular: *Super III Sent.*, d. 33, q. 2, a. 4, qc. 4; *Summa Theol.*, I-II, q. 56, a. 2, ad 3; *ivi*, II-II, q. 47, aa. 1 and ff.; *Sententia Ethic.*, VI, l. 4.

[55] Cf. *Super III Sent.*, d. 33, q. 2, a. 3; *Summa Theol.*, I-II, q. 66, a. 3, ad 3; *ivi*, II-II, q. 47, a. 7.

[56] See, in this regard, the *lectiones* 4-10 of of the Thomistic commentary to book five of the *Nicomachean Ethics*, as well as: *Super IV Sent.*, d. 14, q. 1, a. 1, qc. 4, ad 4; *ivi*, d. 15, q. 1, a. 1, qc. 2; *Summa Theol.*, II-II, q. 58, a. 10; *ivi*, q. 61, aa. 2-3; *ivi*, q. 81, a. 5, ad 3; *ivi*, a. 6, ad 1; *ivi*, III, q. 85, a. 3, ad 2; *De malo*, q. 13, a. 1.

[57] "[…] medium iustitiae consistit in quadam proportionis aequalitate rei exterioris ad personam exteriorem" (*Summa Theol.*, II-II, q. 58, a. 10).

[58] Cf., *supra*, nn. **22-24.**

The *ius* is therefore realised in judgment by justice as its efficient principle, but specified by prudence from the point of view of formal causality, i.e. – we could more succinctly say – It is "determined" in judgment as willed by justice and known by prudence. And since, as we have seen[59], the prudential *determinatio* is the work of reason[60], it is then properly also as a rational expression of prudence that the judgment, restoring the *aequalitas* in relationships, determines the *ius*[61].

This result, however, creates a problem. We have to ask ourselves: how does the objectivity of prudential reason manifest itself in Thomistic juridical language? Which epistemic forms does it take in the judicial search for the happy medium? What scientific measures does it adopt? What in substance is its specific *rectitudo*? Thomas does not offer us much more than his references to the "equality of proportion", i.e. to the criteria of distributive justice and geometric proportionality, but we can nevertheless find some further information on this point in his doctrine of *medietas*, and in doing so, we make further headway in this last leg of our journey[62].

4. *The determination of the medium iustitiae as medium rei in the via media*

In the wake of his Master, Albert the Great[63], Thomas believes that, unlike other moral virtues, in the case of justice the *medium virtutis* is not only *medium rationis*

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[59] Cf., *supra*, n. **54**.

[60] Particularly significant in this regard is the introduction of the famous passage that ends with the definition of the *lex* as *aliqualis ratio iuris*: "[…] illius operis iusti quod ratio determinat quaedam ratio praeexistit in mente, quasi quaedam prudentiae regula. Et hoc si in scriptum redigatur, vocatur lex" (*Summa Theol.*, II-II, q. 57, a. 1, ad 2). One should also note that here the decisive action of prudence in judging is manifest also in the application of the *lex*. It is in relation to the latter aspect that, referring to the process of positivisation of natural *lex* described in *Summa Theol.*, I-II, 95, 2, Massini Correas highlights another connotation of *determinatio*: "en la prudencia se trata no sólo de una mera *conclusión*, sino también de una *determinación*, precisión o especificación de lo correcto, adecuado o debido en una situación concreta" (Massini Correas, p. 18). For other meanings taken on by the term *determinatio* in the lexicon of the Late Medieval university institutions, cf. Weijers 1987, pp. 348-355, 404-407.

[61] Cf. Thomas 1956 (*Introducción* by T. Urdánoz), pp. 311-312. More generally, on the interaction between prudence and the moral virtues, see Ramirez 1978, pp. 187-188.

[62] The "equality of proportion of an external reality with an outside person" (see, *supra*, n. **57**) which takes place in the judgment implies that geometric proportionality which shapes distributive justice (cf. *Summa Theol.*, II-II, q. 61, a. 2). We limit ourselves here to refer to this, and not also to commutative justice, certainly not to deny the importance of the latter, but because only the former is required in every kind of judgment, even when the judgment relates to swaps or trades (see *Summa Theol.*, II-II, q. 63, a. 4).

[63] Cf. Albertus Magnus, *De bono. Quaestio IV (addita)*, a. 7; Id., *Super Ethica commentum et quaestiones libri quinque priores,* V, l. 5; *ivi*, l. 8. Some references to the Albertine doctrine of *medium rei* are found in Tarabochia Canavero 1986, pp. 123-126 and 129, n. 49.

but coincides with the *medium rei*[64]. And the *medium rei* is precisely what can be discovered judicially only through a careful comparison of the respective juridical positions of the parties. The judges themselves are presented as *medii vel mediatores* in this sense, "as if they reach what is the medium in that they lead to what is just", i.e. on the grounds that they establish "what is equal between the parties [*quod est inter partes aequale*], where the equal is the middle [*medium*] between the more and the less"[65].

However, an important clarification is necessary at this point. On the one hand, as the *medium rei*, the *medium iustitiae* cannot regard only the claims of the parties, addressing rather their effective right; on the other hand, the claim of each party is not at all insignificant in finding the *medium iustitiae*, since it is always beginning from that claim that what is right can be recognized.

This is a fundamental implication of the Thomistic perspective, and it shows its difference from all the theories that conceive of what is just as a mere enforcement of laws. This difference is in fact strictly linked to the role that the parties play in determining the *ius* and to the consequences that derive from it also on the epistemological level.

Indeed, although on the topic there exist in the treatise *de iustitia* of the *Summa Theologiae* some particularly significant articles[66], to find the most interesting indications from the epistemological point of view, we have to abandon the terrain of reflection on the *ius* and consider the theological and philosophical contexts that serve as a backdrop for a peculiar branch of the doctrine of *medietas,* which surfaced through the technical use of the phrase *via media*. We read what perhaps is the most effective description of it in the passage of the *Contra impugnantes Dei cultum et religionem* where Aquinas invokes the Boethian controversy against the opposing heresies of Nestorius and Eutyches. There he proposes: "because, as Boethius writes in the book *De duabus naturis*, the

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[64] Cf. *Super III Sent.*, d. 33, q. 1, a. 3, qc. 2; *Summa Theol.*, I-II, q. 64, a. 2; *ivi*, II-II, q. 58, a. 10; *ivi*, q. 61, a. 2, ad 1; *De virtutibus,* q. 1, a. 13, ad 7; *Quodlibet* VI, q. 5, a. 4; *Sententia Ethic.*, V, l. 1, vv. 35-38.

[65] *Sententia Ethic.*, V, l. 6, vv. 152-153, 157-158. But consider the whole sentence that contains the passages mentioned: "[…] quia iustum est medium inter damnum et lucrum, inde est quod, quando homines dubitant de hoc, refugiunt ad iudicem, quod idem est ac si refugerent ad id quod est iustum; nam iudex debet esse quasi quoddam iustum animatum, ut scilicet mens eius totaliter a iustitia possideatur. Illi autem qui refugiunt ad iudicem videntur quaerere medium inter partes quae litigant, et inde est quod iudices vocant medios vel mediatores, ac si ipsi attingant medium in hoc quod perducunt ad id quod est iustum. Sic ergo patet quod iustum de quo nunc loquimur est quoddam medium, quia iudex qui determinat hoc iustum medius est, in quantum scilicet constituit id quod est aequale inter partes, aequale autem medium est inter plus et minus, ut supra dictum est" (*ivi,* vv. 143-159).

[66] Cf. *Summa Theol.*, II-II, q. 67, a. 3; *ivi*, q. 68, a. 2. It should be noted, among other things, how in these articles, even in an era when the inquisitorial procedure was widely being used, above all in the ecclesiastical jurisdictions, Thomas shows his preference for an accusatory-type legal system. See on this point: Laingui 1994, especially pp. 37-38.

way of faith 'is the intermediate between two heresies [*via fidei inter duas haereses media est*] in the same way as the virtues lie in the middle (between two vices) [*sicut virtutes medium locum tenent*], virtue consisting of the happy medium [*omnis enim virtus in medio rerum decore locata consistit*]', and since, if an action is fulfilled either this side or that side of what it should be, it strays from the virtue, let us try to understand about the themes we are discussing what lies this side or that side of the truth, so that we can judge all this erroneous, and the middle way as the truth of faith"[67].

Two operations are accomplished in this passage: first, the identification of *via media* as the way of truth between two errors; secondly, the assimilation of the *via media* with the Aristotelian doctrine of the *medium virtutis*[68]. The *medium virtutis* thus must be found in the same way in which the *via media* between two errors is found.

To understand well this thesis, we must consider that, normally, the expression *via media* designates a doctrine elaborated by combining two opposing opinions[69]. The *via media*, therefore, corresponds to a type of solution frequently found in scholastic disputes, where, as Villey noted, "la détermination du Maître a moins pour rôle de *réfuter* l'une des deux thèses antagonistes que de les *concilier*, les coordonner"[70]. It is necessary at once to alert the reader that this is not always the path Thomas follows, and that indubitably in his writings the *via media* does not always correspond to the way of truth. But, as results from studies by Philipp W. Rosemann[71], we can say that, when he considers it, for the most part Thomas

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[67] *Contra impugnantes*, c. 4, § 6, vv. 335-343: "Quia vero, ut Boetius dicit in Lib. *de duabus naturis*, via fidei "inter duas haereses media est, sicut virtutes medium locum tenent: omnis enim virtus in medio rerum decore locata consistit": si quid enim vel ultra vel infra quam oportuerit fiat, a virtute disceditur; ideo videamus quid circa praedicta sit ultra vel infra quam rei veritas habeat: ut hoc totum reputemus errorem, mediam autem viam fidei veritatem". A similar reference to Boethius is found in the *Summa Theol.*, I-II, q. 64, a. 4 arg. 3. The quoted text is the treatise *Liber de persona et duabus naturis contra Nestorium et Euthychen*, par. 7 (P.L. 64, col. 1352C).

[68] Cf. Aristotle, *Nicomachean Ethics*, II, 1106 to 26 ff.

[69] The original meaning of the *via media* was therefore methodological, and only later it took on a ecclesiological-political connotation, when the phrase was used, in the first half of the 14th century, in the polemical context of the dispute regarding the two powers. See, in this regard, Pacaut 1958.

[70] Villey 1987, p. 70. Enlightening in this regard are also the observations of M.-D. Chenu: "La risposta agli argomenti che, nella seconda parte dell'alternativa, talvolta in ambedue, non concordano colla posizione assunta, si presenta il più delle volte sotto forma di una distinzione. È raro che la posizione avversaria venga respinta del tutto; piuttosto si circoscrive la parte di verità sulla quale faceva leva; si distingue l'aspetto, il punto di vista che essa riusciva a cogliere felicemente ("haec ratio procedit de…"); si colloca, in qualche modo, la sua verità particolare in un complesso che le assicura cittadinanza, senza respingerla" (Chenu 1953, p. 81).

[71] Cf. Rosemann 1994; Rosemann 1996, spec. pp. 40-45.

prefers it[72]. Why? Because for Thomas, there exists a "relation privilégiée" between the truth and that which is in the middle[73].

The strength of this relation depends above all on the fact that the *medium* gathers in itself all that is true in the extremes, casting off their respective excesses. Aquinas affirms this in several places[74], even giving the impression, noted by Rosemann, that he retains that "la vérité et l'erreur comme, pour ainsi dire, commensurables"[75]. The scholar observes, in fact, that the truth seems situated, if we look at the expressions of the Dominican master, in the middle point of a continuum at whose extremes are located two contrary propositions, neither of which can be sustained[76]. In the *via media* one should notice that "chacun des deux solutions opposées correspond à un aspect particuler du probleme et que, pour obtenir une perspective total, plus large, il convient de les fusionner"[77].

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[72] Rosemann has found, according to research conducted with the aid of the *Index* of P. Busa, that of the seventeen times in which the expression occurs in the Thomistic corpus in its technical meaning at a distance of no more than one word, in fourteen cases it refers to a doctrine sustained by Aquinas ("*Secundum aliquid*, cit., p. 115). For the passages in which the *via media* is preferred, see: *Super II Sent*., d. 9, q. 1, a. 2, ad 3; *Super III Sent*., d. 36, q. 1, a. 6; *Super IV Sent*., d. 7, q. 3, a. 1, qc. 3; *ivi*, d. 43, q. 1, a. 5, qc. 3; C*ontra Gentiles*, IV, c. 7, n. 25; *Summa Theologiae*, I, q. 84, a. 6; *De ver*., q. 6, a. 2; *ivi*, q. 11, a. 1; *ivi*, q. 24, a. 12; *De malo*, q. 5, a. 3; *De virtutibus*, q. 1, a. 8; *Super Decretale*, n. 1; *Contra impugnantes*, c. 4, § 6; *Sentencia De sensu*, I, l. 10, n. 10.

[73] Cf. Rosemann 1996, p. 40.

[74] Cf. *Contra Gentiles*, III, c. 108, n. 7: "[…] verum medium est inter duos errores, quorum unus est secundum plus, alter secundum minus"; *Summa Theo*l., II-II, q. 109, a. 1, ad 3: "[…] verum secundum suam rationem importat quandam aequalitatem. Aequale autem est medium inter maius et minus"; *ivi*, a. 4, arg. 2: "[…] veritatis medium non est propinquius uni extremo quam alteri, quia veritas, cum sit aequalitas quaedam, in medio punctuali consistit"; *De virtutibus*, q. 1, a. 13: "Inter affirmationes ergo et negationes oppositas accipitur medium virtutum intellectualium speculativarum, quod est verum"; *Contra impugnantes*, cap. 2, § 3: "Est enim errantium consuetudo, ut quia in medio veritatis non possunt consistere, unum errorem declinantes, in contrarium dilabantur"; *Sententia Ethic*., II, l. 9, n. 8: "[…] medius est ille, qui dicitur verus, et medietas dicitur veritas"; *ivi*, IV, l. 15, n. 7: "[…] ille qui verum dicit, medium tenet, quia significat rem secundum quod est; veritas enim in aequalitate consistit quae est medium inter magnum et parvum"; *Super Hebraeos*, c. 13, l. 2: "[…] cum enim veritas consistat in medio, cuius est unitas, et ideo uni vero multa falsa opponi possunt, sicut uni medio multa extrema […]".

[75] Rosemann 1996, p. 44. This is how he explains it: "En effet, loin d'être des opposés irréconciliables, elles se trouvent d'après le saint docteur sur une même échelle, où elles ont une mesure commune. Tomber dans l'erreur, dès lors, n'est pas défendre une position qui soit sans aucun rapport avec la vérité; c'est plutôt aller au-delà ou rester en deçà d'elle. Aucun erreur ne peut être si grande qu'elle tue tous les germes de vérité en elle. C'est pouquoi la vérité peut surgir au milieu de l'erreur" (*Ibid*.).

[76] Cf. *Ivi*, p. 30.

[77] *Ivi*, pp. 43-44.

It would, however, constitute a grave misunderstanding if, as may occur for the *medium iustitiae*[78], the *via media* were to be understood in purely mathematical or arithmetic terms, modeled on a truth that appears, as Rosemann writes, "en un certain sens quantifiable"[79]. Such an interpretation would be contradicted if nothing else by the comparison with *medium virtutis* invoked in the cited passage[80]: just as, in fact, the *medium virtutis* has a qualitative rather than quantitative meaning, the same must be said of the *medium veritatis*. It is useful, rather, to advance the hypothesis that the images and the lexicon of geometry and mathematics take on in this kind of cases an essentially metaphorical value[81]. The real characteristics of the relationships involved are instead primarily of the qualitative type. The *medium virtutis* is such because it stands for what is good between two evils. And the *medium veritatis* is such because it corresponds to what there is of truth between two falsehoods. Therefore, it is in this sense that the *via media* should be considered as the way of truth between two errors.[82]

On the other hand, if the doctrine of the *medium virtutis* helps us to grasp the true nature of the *via media*, the latter, in turn, demonstrating its usefulness on

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[78]We refer here to the case of commutative justice whose *medium* is determined precisely by recourse to arithmetical proportionality. Cf., in this regard, *Summa Theol.*, II-II, q. 61, a. 2, and ad 2.

[79] Rosemann 1994, p. 109.

[80] Cf., *supra*, n. **67**.

[81] This, too, is an Aristotelian thesis (cf. *Nichomachean Ethics,* II, 5, 1106 to 26 – 6, 1107 to 9) that Thomas has in several places taken over and made more precise (see, for example, *Super III Sent.*, d. 9, q. 1, a. 1, qc. 3 ad 3; *Contra Gentiles*, III, c. 134, n. 7. ibid., par. 136, no. 12; *Summa Theol.*, I-II, q. 64, a. 1, and ad 2; *ivi*, II-II, q. 147, a. 1, ad 2; *De malo*, q. 14, a. 1, ad 6; *ivi*, q. 15, a. 1, ad 9; *Sententia Ethic.*, II, l. 2, vv. 134-136; *ivi*, l. 6, vv. 63 ff.). Livio Melina notes in this regard: "La sottolineatura più diffusa è quella che ricollega il criterio del *medium virtutis* alla *ratio recta*: il criterio che permette di stabilire la medietà non è meccanico o quantitativo, ma implica una valutazione razionale propriamente morale" (Melina 1987, p. 109). See in this sense also Elders 1978, especially p. 369.

[82] We must bear in mind in this regard that Thomas, in his commentary on the Aristotelian *Ethics*, considers *typo*, or *figuraliter*, argument as the most appropriate way of proceeding to the expositive method of moral science: "[…] oportet ostendere veritatem figuraliter, idest verisimiliter, et hoc est procedere ex propriis principiis huius scientiae. Nam scientia moralis est de actibus voluntariis: voluntatis autem motivum est, non solum bonum, sed apparens bonum" (*Sententia Ethic.*, I, l. 3, n. 4); "[…] omnis sermo qui est de operabilibus, sicut est iste, debet tradi typo, idest exemplariter, vel similitudinarie, et non secundum certitudinem" (*ivi,* II, l. 2, n. 4); in particular, we read: "[…] dictum est de virtutibus in communi et earum genus typo, id est figuraliter, manifestatum est, dum dictum est quod sunt medietates, quod pertinet ad genus propinquum, et quod sunt habitus, quod pertinet ad genus remotum" (*ivi*, III, l. 13, n. 12); "[…] intendendum est tractare de iustitia secundum eamdem artem, secundum quam tractatum est de praedictis virtutibus, scilicet figuraliter et aliis huiusmodi modis" (*ivi*, V, l. 1, n. 3). On the use of Thomistic similes, analogies, and metaphors, see Chenu, *Introduzione*, cit., pp. 145-147.

the epistemological level, shows us what it means to find the *medium virtutis*, at least when it coincides with *medium iustitiae*.

In this regard we must first note that if the *via media* combines in itself what is true in two opposing but equally unsatisfactory solutions to a problem, reaching it means to recognize the truth that might be present, albeit only in part, *secundum aliquid*, in the two theses to be rejected. "*Utrumque vere opinatum fuit … et secundum verum est aliquid utrumque*"[83] and "*Utraque enim pars obiectionum vera est … secundum aliquid*"[84] are the two Thomistic utterances on which Chenu has drawn the reader's attention[85] for the first time and which were faithfully reproduced in subsequent studies of Villey[86] and Rosemann[87]. But even a quick consultation of the *Index Thomisticus* highlights how widely spread in the production of Aquinas is the use of similar expressions. Within a maximum distance of 10 words, only examining correlations between the lemma *veritas* and the lemma *uterque*, there are eleven instances where they are associated with this meaning[88], while the co-occurences of the inflected forms of *verus* and *uterque* appear with this meaning forty-five times in forty-two places[89]. So we have a total of at least fifty-six contexts, distributed in fifty-one texts[90], which show in what

[83] *Summa Theol.*, II-II, q. 1, a. 2.
[84] *Summa Theol.*, III, q. 64, a. 3, ad 1.
[85] Chenu 1953, p. 166.
[86] Villey 1987, p. 70.
[87] Rosemann 1996, p. 30.
[88] Cf. *Super II Sent.*, d. 15, q. 3, a. 1; *ivi*, a. 3; *ivi*, d. 38, q. 1, a. 5; *Super III Sent.*, d. 25, q. 2, a. 2, qc. 3; *Super IV Sent.*, d. 45, q. 2, a. 4, qc. 1; *Summa Theol.*, I, q. 43, a. 8; *ivi*, I-II, q. 71, a. 5; *De malo*, q. 2, a. 1; *In I Phys.*, l. 11, n. 12; *In Meteor.*, I, c. 1, n. 7; *Catena in Mc.*, c. 14, l. 4.
[89] Cf. *Super I Sent.*, d. 4, q. 1, a. 3, ad 4; *ivi*, d. 16, q. 1, a. 4; *ivi*, d. 28, q. 2, a. 3, expos.; *ivi*, d. 33, q. 1, a. 2; *ivi*, d. 37, q. 4, a. 2; *Super II Sent.*, d. 1, q. 1, a. 3; *ivi*, d. 25, q. 1, a. 5, expos.; *ivi*, d. 27, q. 1, a. 3; *ivi*, d. 32, q. 2, a. 3, expos.; *ivi*, d. 42, q. 1, a. 5, expos.; *Super III Sent.*, d. 7, q. 2, a. 2; *Super IV Sent.*, d. 19, q. 2, a. 2, qc. 2; *Summa Theologiae*, I-II, q. 100, a. 10; *ivi*, II-II, q. 1, a. 2 (2 times); *ivi.*, III, q. 35, a. 5; *ivi*, q. 64, a. 3, ad 1; *De veritate*, q. 10, a. 12 (2 times); *ivi.* q. 22, a. 8, ad arg.; *ivi*, q. 22, a. 14; *ivi*, q. 24, a. 12; *De spiritualibus. creaturis,* a. 8, ad 10; *ivi*, a. 10; *De malo*, q. 2, a. 1; *Quodlibet VIII*, q. 5, a. 2; *In Phys.*, I, l. 11, n. 12; *ivi*, l. 13 n. 5; *Sententia Politic.*, III, l. 3, n. 8; *Sententia Ethic.*, IX, l. 8, n. 8; *In De generatione*, I, l. 6, n. 7; *Super De Trinitate*, II, q. 4, a. 1, ad 4; *In Jeremiam*, c. 29, l. 3; *Super Threnos*, c. 5, pr.; *Catena in Mc.*, c. 5, l. 3; *Catena in Lc.*, c. 24, l. 4; *Catena in Io.*, c. 4, l. 1; *Super Io.*, c. 2, l. 1; *ivi*, c. 4, l. 2; *ivi*, c. 6, l. 1; *ivi*, c. 14, l. 2; *ivi*, c. 20, l. 2 (2 times); *Super Rom.*, c. 10, l. 3; *Primae redactiones Summae contra Gentiles*, III.
[90]The total number of contexts is obtained by summing the passages that use the two correlations, the total number of texts is taken from the sum of the places of the correlations, subtracting the duplications (*Summa Theologiae*, II-II, q. 1, a. 2; *De veritate*, q. 10, a. 12; *De malo*, q. 2, a. 1; *In I Phys.*, l. 11, n. 12; *Super Iov.*, c. 20, l. 2). Inevitably, we don't consider the other, more numerous, possible lemmatic combinations which would allow us to find in the Thomistic corpus the adoption of the proceedings in question. This sampling is therefore a purely illustrative and non-exhaustive list, since, for the purposes of our research, it is enough

ways Thomas concretely practiced and sometimes even theorized the technique that grounds the *via media*.

Now, precisely on account of the parallelism that is identified in passage shown above[91] between the domain of theology and that of ethics, the same approach can be applied in the field of moral virtues, in particular that of justice.

This transposition, however, can be implemented in a non-artificial or fallacious manner[92] for the same reason that, according to Rosemann, justified the transfer of the ethical principle of the happy medium from the practical level to the level of theory in the above passage, where Aquinas quoted Boethius: "elle s'explique par le fait que pour les penseurs chrétiens de la patristique et du moyen âge, le savoir intellectuel, d'une part, et la vie morale et spirituelle, d'autre part, n'étaient pas encore nettement compartimentés, comme c'est souvent le cas aujourd'hui"[93].

More precisely, we should say that this mutual influence between *medium virtutis and via media* is a particular manifestation of the doctrine of the convertibility of the transcendentals. Precisely because "*verum et bonum convertuntur*"[94], we can follow the *via media* also as the way of *virtus* and of *ius*, indeed, to be more specific, also as the way of that *virtus iustitiae* which, together with prudence, presides over the determination of the *ius*.

Indeed, the *via media* is not so much suited to determining the *medium virtutis* generally, as it seems particularly suited to the object of this research, the determination of the *medium iustitiae*. Even in the case of the *via media*, in fact, the *medium* found is not only the *medium rationis*, it is also the *medium rei*. Thanks to the model of the *via media*, therefore, we can better understand what it means on the epistemological level that the *medium rei* which is the object of justice does not refer only to claims of the parties, but more radically to what is just in them: how to individuate the *via media* is equivalent to detecting what there is of truth in the theses of the disputants, similarly finding the *medium iustitiae* coincides with ascertaining what is just in the claims of the parties. "[…] *iudex inter accusatorem et eum qui constituitur medius constituitur ad examen iustitiae*", we read in the treatise *de iustitia* of the *Summa*[95]. The determination of

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to know that, as demonstrated by the citations listed in the previous two notes, this method was used by Aquinas throughout his Scholastic career.

[91] Cf., *supra*, **n. 67.**

[92]The reference is of course to the so-called "naturalistic fallacy" violating "Hume's law". In this regard, however, see D'Agostino 1996, pp. 75-87.

[93] Rosemann 1994, p. 109.

[94] Cf. *Super I Sent.*, d. 19, q. 5, a. 1, ad 3; *ivi*, d. 46, q. 1, a. 2, arg. 1; *Summa Theol.*, I, q. 59, a. 2, ad 3; *ivi*, I-II, q. 29, a. 5, arg. 1, and ad 1; *ivi*, II-II, q. 109, a. 2, arg. 1 and ad 1; *De virtutibus*, q. 1, a. 7, s.c. 2; *Super Heb. [rep. Vulgate]*, c. 11, l. 1. See also, Aertsen 1996, especially pp. 284-289.

[95] *Summa Theologiae*, II-II, q. 68, a. 2. While there are no explicit statements about it, one can assume that this is the sense of the passages in which Thomas conditions the activity of judging

what is just in the claims of the parties then connotes, under a qualitative measure, the geometric proportionality, according to which one determines prudentially the right of each one.

5. *Conclusion*

There are now a couple of problems that can help us to verify the consistency of the results achieved. We have to ask ourselves: how can prudence recognize the *medium iustitiae*, and thus what is just in the claims of the parties? And how can one find the *medium iustitiae* when in the claims of the parties there is no justice?

To answer we must not do anything but recall two important methodological implications of the Thomistic discourse. As far as it corresponds to the *medium iustitiae*, what is just in the claims of the parties is dialectically recognized as such in relation to common legal principles and rules. But even if what is just is not found by any means in the claims of the parties, or it only can be found in the requests of one of the parties alone, we must still refer to them in order to pick out – in these principles and rules – the common measure, which makes it possible to establish the juridical outlook and the entitlements of each, the *medium iustitiae*, that is[96].

The critical confrontation with the claims of the parties thus proves decisive in determining the *ius*, which will not therefore be only the application of the *lex*, being also commensurate to the specific circumstances of the case.

But if in this respect the philosophical reflection of Aquinas on *ius* simply seems to anticipate the most sophisticated acquisitions of contemporary doctrine, in the reference to justice we can seize the indication of an alternative foundation, which is moreover able to correspond to the deepest needs of today's debate on the criterion of judgment.

Based on this foundation, the determination of the *ius* which takes place in judgment appears steered by a qualitative factor, which operates both through the directives of the *lex*, both natural as well as positive, and through comparisons between the juridical positions of the parties. This foundation, moreover, also imprints upon the determination of the *ius* an important realistic connotation, since the *medium iustitiae* identifies with the *medium rei* and so the *ius* becomes the *ipsa res iusta*. Justice therefore plays in this perspective a decisive

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by the hearing of the parties: "[…] *in his quae pertinent ad iustitiam requiritur ulterius iudicium alicuius superioris, qui utrumque valeat arguere, et ponere manum suam in ambobus*" (*Summa Theol.*, II-II, q. 60, a. 1, ad 3); "[…] *in iudiciis nullus potest iudicare nisi audiat rationes utriusque partis*" (*In Metaphysic.*, III, l. 1, n. 5); "[…] *cum enim duo homines ad invicem contendunt, iudicem possunt habere qui utriusque dicta examinet… oportet quod in iudice sit altior sapientia quae sit quasi regula ad quam examinentur dicta utriusque partis*" (*Super Iob*, c. 9).

[96] I refer, for a discussion of these issues, to Ancona 2008-9 and Ancona 2012, pp. 41-56.

discriminatory role, as appropriate as it is unfortunately unknown, apart from rare exceptions, to the jurists and legal theorists of our time[97].

The realistic connotation of the Thomistic discourse on justice and *ius*, however, emerges also on the methodological level: the Dominican master in fact shows us the way by which to "prudentially" proceed to the determination of the *ius* according to the distributive measure of justice. It is the way of dialectics[98]: dialectics is the way that leads to the discovery of rules and principles that are common to the parties, and dialectics is also the way that, starting from these principles and rules, leads to the identification and confirmation of the *medium iustitiae*. But above all dialectics is the *via media,* which, when used in the field of the *ius*, determines the *medium iustitiae* as *medium rei*, that is as a solution that ascertains what is just in the claims of the parties. It is particularly suitable, especially in complex and pluralistic societies like ours, for judging according to an objective criterion of justice in attributing to each his own right.

[97]See, in particular, among the latest doctrines: Hofmann 2000; Gentile 2008; D'Agostino 2011; Castellano 2011. There cannot, vice versa, be grouped with these doctrines the constitutionalist theories, which, when they speak of justice, normally link it to values that are widely shared and constitutionalized, rather than to the entitlements of human nature. Cf., in this sense, Zagrebelsky 1992, especially pp. 123 ff.

[98]On the dialectical forms of judicial reasoning according to the Thomistic reflection, cf. especially Villey 1987, pp. 71, 164.

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