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THE GOODNESS OF RIGHTS AND THE JURIDICAL DOMAIN OF THE GOOD

Essays in Thomistic Juridical Realism

PONTIFICIA UNIVERSITÀ DELLA SANTA CROCE
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Part III
THE JURIDICAL DOMAIN OF THE COMMON GOOD

ABBREVIATIONS

CSD	Catholic Social Doctrine
De veritate	Thomas Aquinas, *Quaestiones Disputatae de Veritate*
De caritate	Thomas Aquinas, *Quaestiones Disputatae de Caritate*
In Meta.	Thomas Aquinas, *Commentary on Aristotle's Metaphysics*
ITC	International Theological Commission
NLNR	John Finnis, *Natural Law and Natural Rights*
Sent. Eth.	Thomas Aquinas, *Sententia Libri Ethicorum*
S. Th.	Thomas Aquinas, *Summa Theologiae*

A NOTE FROM THE AUTHOR, ACKNOWLEDGEMENTS, AND CREDITS

Each of the essays in this book represents a contribution for an answer to what I consider to be a central question of legal philosophy, at the highest level of analysis; namely, to the question of the possible or necessary intersections of the concept of *ius* (the juridical phenomenon, in the broadest sense) and the concept of good. This question can be split into at least two complementary queries. First, why and to what extent should the juridical phenomenon, in all its instantiations, necessarily be something good, and what are the conditions for identifying concrete laws or appeals to rights as something less than good, or as something downright immoral and unjust? Second, what are the conditions for establishing that a domain of *ius* may or should be predicated of the various levels of the good?

These essays attempt to bring into dialogue what I consider to be the focal meaning of the concept of *ius*—namely, *rights* understood as *rei*-centric *juridical goods*—and other foundational accounts of the essence of the juridical phenomenon presented by scholars in the field of legal philosophy, Catholic social teaching, or canon law. The part of that dialogue that concerns the topic of natural law is the object of my book *Natural Law and Thomistic Juridical Realism: Prospects for a Dialogue with Contemporary Legal Theory* (Washington, D.C.: The Catholic University of America Press, forthcoming in 2022). In a sense, the arguments of these two books interact with one another on a number of levels, and each book may be considered to constitute a "companion" to the other.

My initial intention for this book was to test the arguments that explain the basic features of the juridical phenomenon in terms of juridical goods against the theses of authors who envision this phenomenon according to more or less divergent argumentative coordinates. However, while writing these essays, I was increasingly under

the impression that the concept of *ius* described in terms of *rei*-centric juridical goods may contribute, in various ways, to a better understanding of the connected juridical phenomena—such as positive law and rights understood in the subjective sense—but also to a better conceptualization of the good and of the common good.

Since most of these essays have been previously published in academic journals, and since they cover quite different fields of analysis, I decided to maintain, as far as this was possible, the form in which the essays were originally published. Given the fact that in almost each of the essays I tried to describe what I intend to accomplish by presenting the account of the "juridical good" as the focal meaning of the term *ius*—I was aware that this proposal may turn out to be quite innovative for readers and scholars in the field of legal philosophy—these essays inevitably contain some similarities in this regard. Regardless of the similarities, each essay represents a stage in a gradual elaboration of the *rei*-centric goods-based concept of *ius*.

In addition, since it is reasonable to expect that, given the variety of the doctrinal contexts of the essays, some readers might be more interested in one (or more than one) particular argument among the four thematic parts of the book, I decided to keep certain sequences of arguments that are essential to the analysis in a single essay in their original form, regardless of the fact that they also appear in a similar form in another thematic part of the book. More specifically, this observation concerns especially the sections on the differences between what I call "juridical justice" and the other, supra-juridical, types of justice, as well as the sections on the Thomistic account of the common good.

* * *

The questions regarding the goodness of rights and the juridical domain of goodness have been travelling with me for some time now. I brought these questions (at the time, still unanswered and in a very intuitive, underdeveloped form) as a part of my academic-cultural "baggage" from the completed juristic formation in the Faculty of Law of the University of Rijeka, my hometown in Croatia, to the period of my priestly formation in the Diocesan Missionary Seminary "Redemptoris Mater" in the Diocese of Poreč and Pula, Croatia. It was there that,

in 2008, I first read John Finnis's *Natural Law and Natural Rights* and Russell Hittinger's *The First Grace: Rediscovering the Natural Law in a Post-Christian World*. These two books were a crucial influence and it was through them that I began to discover the vast bibliography on the issues pertinent to the aforementioned legal-philosophical questions, although at that time (of my priestly formation) it was beyond my imagination that I would ever have the opportunity to research and write about the topics explored in these books. This opportunity, however, presented itself during the time of my licentiate and doctorate program at the Faculty of Canon Law, Pontifical University of the Holy Cross, where I now work as a professor.

I wish to express my gratitude to all the institutions mentioned in the previous paragraph, as well as to all the persons who participate in any way in the life of these institutions. In particular, I wish to thank professor Carlos José Errázuriz for his continuous support and insightful comments which were an important point of reference at the time when these essays were written. Through him and his writings, I had the opportunity to become acquainted with—and personally meet, in September 2019—the late Javier Hervada and his juristic work; these essays owe much to Hervada's opus, certainly more than is reflected in the footnotes that point to his texts.

* * *

My gratitude also goes to the academic journals in which most of these essays have been previously published. Each publication was a remarkable experience in scholarly dialogue and collaboration. Essays in chapters 1, 3, and 12 are previously unpublished and were written specifically for this book. When preparing this collection for publication, I introduced some minor interventions in the essays that were originally published in scholarly journals. In this sense, the following details of the original publication of the chapters in this book refer to the previous versions of these essays.

The essay in chapter 2 is written and accepted for future publication (due in September 2021) in *Acta Philosophica* 30, no. 2 (2021).

The essay in chapter 4 was published on the occasion of the 40th anniversary of John Finnis's *Natural Law and Natural Rights* in the journal *Persona y Derecho* 83, no. 2 (2020): 521-552.

The essay in chapter 5 was published in the *Collected Papers of Zagreb Law Faculty* 70, no. 4 (2020): 539-563.

The essay in Chapter 6 was first published in Croatian in *Collected Papers of the Faculty of Law of the University of Rijeka* 40, no. 3 (2019): 1011-1029. It was subsequently published in its English translation in *Revus: Journal for Constitutional Theory and Philosophy of Law* 43 (2021).

The essay in chapter 7 is being published as a part of the scholarly project dedicated to the evaluation of the contributions of the late Javier Hervada to juridical philosophy in the journal *Persona y Derecho* 86-87 (2021).

The essay in chapter 8 was published in the journal *Ius Ecclesiae* 32, no. 2 (2020): 525-548.

The essay in chapter 9 was previously published in the journal *Ius Canonicum* 59, no. 118 (2019): 697-730.

The essay in chapter 10 was previously published in the journal *Nova et Vetera* (English Edition) 18, no. 3 (2020): 909-944.

The essay in chapter 11 was previously published in the journal *Ius Canonicum* 60, no. 120 (2020): 647-693.

FOREWORD

This second book by Petar Popović is closely linked to his other book that is based on the research for his doctoral dissertation, and which, although written before this book, will be published next year: *Natural Law and Thomistic Juridical Realism: Prospects for a Dialogue with Contemporary Legal Theory* (Washington, D.C.: The Catholic University of America Press, forthcoming in 2022).

This book represents a collection of essays in which Popović continues to develop a line of research that builds upon his previous legal-philosophical efforts. Both this book and *Natural Law and Thomistic Juridical Realism* are thus contextualized in a similar theoretical framework. On the one hand, the author adheres to Thomistic juridical realism—especially as this current in legal philosophy is presented to contemporary public in the works of Michel Villey and Javier Hervada—according to which the juridical reality is essentially understood in the perspective of the just thing itself or the juridical good. On the other hand, Popović seeks to interrelate the basic arguments of Thomistic juridical realism with recent or contemporary philosophers of law, whose accounts of the phenomena of juridicity, law, and rights are particularly relevant for today's legal culture and legal theory (authors such as Hans Kelsen, H. L. A. Hart, Ronald Dworkin, Joseph Raz, John Rawls, John Finnis, etc.).

These, roughly speaking, two "blocs" of legal theory are then brought into dialogue in Popović's work. In his view, the Thomistic tradition of juridical philosophy and theory has something important to contribute to the contemporary legal context. At the same time, recent legal-philosophical efforts to grasp the essence of the juridical phenomenon deserve to be thoroughly researched for theoretical and practical purposes. Popović seeks to establish a conversation between these quite different contexts of juridical argumentation convinced that both parties to the dialogue may benefit from its progress and from its possible conclusions. As Thomistic realism is dialogically reintroduced in contemporary legal philosophy—thereby transcending

the optic according to which this approach would be only of historical interest—today's scholars in the field of legal-philosophical issues may discover in this approach a horizon of thought that appreciates all that is valuable in their methodologies and in their results. At the same time, contemporary legal philosophers are provided with an opportunity to become more acquainted with a tradition whose vitality and relevance is successfully presented in this book.

In order to set the best possible framework for such a dialogue, Popović seeks to be as faithful as possible to the nuances of the arguments of each individual author presented in this book. He accomplishes this by taking into consideration all the relevant sources, including especially the direct dialogues between the authors themselves, as well as the secondary literature. This line of analysis is certainly constructive; it establishes a field of research wherein all that is valid may be accommodated and explored, while, at the same time, each possible limit of a theory may be duly noted in a tone and style that transcends an inherently polemical viewpoint.

Another valuable characteristic of Popović's juridical-philosophical work may be found in his persistent focus on the "intersections"—he frequently uses this term—between different concepts, whose points of contact are found to be mutually illuminative. Thus, in his first book he analyzes the intersection between the natural law and the meaning of *ius* as the just thing itself or the juridical good. In this book, he explores the intersection between the concept of right (understood as the just thing itself) and the concept of good.

The focus on these intersections sheds light on certain aspects that usually remain obscured, such as the specifically juridical status of natural law (that is connected to—but also discrete from—its moral status), as well as the conceptualization of the right (*ius*) as the juridical good.

Popović sometimes uses the Latin word *ius* to denote the essence of the juridical phenomenon; he does not hesitate to refer to this phenomenon by using the English term *right*, while providing the latter term with its realistic meaning, instead of operating with this term only in its ordinary, subjectivist sense. I personally believe that this is a rather adequate terminological option, since it illuminates an objective domain that is decisive for grasping the true essence of rights, and without which the idea of right as the just thing itself (and as the juridical good) risks to remain detached from the ordinary juridical vocabulary.

Besides the study of these central issues, the author dedicates his attention also to other foundational topics of juridical philosophy, such as the questions regarding the law and the common good. However, when exploring these topics, the meaning of right as the juridical good remains the decisive hermeneutical key for grasping both the juridicity and the goodness of the law and of the common good.

The concluding section of the book focuses on the social teaching of the Catholic Church regarding human rights, and on the essence of the juridical phenomenon in canon law. Although the scope of his research is thereby significantly broadened, the author always remains faithful to the realistic notion of right, while he presents the importance of this notion for conceptualizing human rights as natural juridical goods, as well as for establishing a way to harmonize the various positions on the essence of *ius* in the Church.

Stylistically speaking, these essays are very thorough and dense; it is possible to recognize the influence of both Thomas Aquinas and the analytical legal philosophy (the latter represents a common denominator for many authors mentioned in this book). Always avoiding inadequate simplifications, the author elaborates on the subjects of his analysis in all their complexity. At the same time, it is possible to appreciate the logical flow of his arguments, which is particularly well-ordered and clear.

By way of conclusion, it is with gladness that I welcome this significant, original, and profound step towards achieving the theoretical and practical juridical results of the fruitful encounter between the tradition of Thomistic juridical realism and present-day theories of law and rights.

Carlos José Errázuriz

PART I

THE GOODNESS OF "IUS": UNDERSTANDING RIGHTS AS JURIDICAL GOODS

Chapter 1

THE FOCAL MEANING OF THE CONCEPT OF "IUS"

Plural Focal Meanings of *Ius* and Aquinas's Concept of the Juridical Good

The term *ius*, according to its relevant historical and doctrinal instantiations and translations,[1] usually denotes a juridical phenomenon of primary, almost paradigmatic significance for jurisprudence and legal culture in general. This term denotes a domain of the human relational reality whose peculiar relevance becomes intelligible from a viewpoint that is specifically *juridical*. Thus, to understand this viewpoint and this human relational reality—in other words, to understand what it means to say that something, some *thing* or an aspect of reality, is juridical—it is necessary to comprehend the focal meaning of *ius* and the constitutive criteria set by this meaning for establishing what *things*, and *how exactly*, may be said to be juridical.

Among plural meanings of the term *ius*, it may be said that at least three denotations have been historically and conceptually identified as *the* focal meaning of this term. Accordingly, each of these denotations points to a different set of essential constitutive criteria for *juridicity*, that is, for the viewpoint from which, broadly speaking, a thing or an aspect of reality may be conceptually understood to be juridical.

According to one possible focal meaning, *ius* may be understood to denote *lex*, the law—i.e., the social-factual sources that contain instances of human positive law, such as constitutional norms, legal norms

[1] "Law" or "right," "diritto" (Italian), "droit" (French), "derecho" (Spanish), "Recht" (German), etc.

of international treaties, state laws in the strict sense of the term, customs, judicial decisions that interpret or create the law, as well as judicial, administrative, or executive acts or decisions that develop or apply the law in a political community, etc. From this viewpoint, *juridical* would be synonymous with *legal*; a thing, act, sphere of conduct, or any state of affairs would be relevant for the juridical domain once it is brought into the focus of positive law as its object. In addition, the adjective *juridical*—denoting the domain of *juridicity*—would refer only to those objects or realities that are determined precisely as such-and-such by positive legal norms.

Another frequent focal meaning of *ius* is that of a *right* understood *in a subjective sense*, namely, as a domain of faculties and powers over certain aspects of the human relational reality that one person, a beneficiary or a subject somehow in control of this domain, is entitled to with respect to a certain duty or with regard to a more or less determinate behavioral pattern of another person (or a set of other persons, or *erga omnes*). Sometimes it is thought that this focal meaning of *ius* is a mere reflection or a simple conceptual transposition of the juridically relevant prescriptive content provided by the previous focal meaning, *the law*. According to this reading, the focal meaning of *ius* as a set subjective rights would thus be understood to denote only a subjectivized reformulation—from the point of view of the subject who is a beneficiary of (or otherwise in control of) a determinate duty—of the content of relevant legal norms, in other words, to denote only *legal rights*.[2]

Alternatively, the term *ius* is understood to denote a group of subjective rights that is broader than purely legal rights, such as, for example, a set of *moral rights*. This latter group is, then, sometimes thought of as a subjectivized expression of pre-juridical objective norms, such as the moral principles that point to aspects of the basic human good.[3]

[2] See Hans Kelsen, *Introduction to the Problems of Legal Theory*, trans. B. Litschewski Paulson and S. L. Paulson (Oxford: Clarendon Press, 1992), 37-46; Hans Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 2005), 125-145; Hans Kelsen, *General Theory of Law & State* (New Brunswick: Transaction Publishers, 2006), 77-87.

[3] See John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 205-210; John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 132-138.

Still, even according to this reading of moral rights (i.e., as subjective faculties or powers anchored in objective moral norms), these rights do not have a specifically juridical status prior to their positivization as legal rights. They do not immediately pertain to *ius* by virtue of their sheer pre-positive normative existence. At best, moral rights amount to pre-juridical standards for legal rights. In other words, moral rights would be describable in terms of the subjective "moral *ius*" which, already at the terminological level of analysis, bespeaks a conceptual tension between the moral and juridical domains.

Now, if we ask Thomas Aquinas which of these two readings of the concept of *ius* represents its focal meaning, his answer would be: neither.

In a crucial passage where Aquinas explores the essential meaning of *ius* as the object of the operative (or action-based) principle of justice,[4] an explicit treatment of the subjective meaning of rights is completely absent. On the other hand, in the same textual locus he explicitly affirms that the concept of law (*lex*)—explored in a discrete section of *Summa Theologiae* (*Prima Secundae*, qq. 90-108), according to a framework of hierarchically interconnected plural legal orders, including eternal, natural, and positive law—is "not the same as *right* [*non est ipsum ius*]"; rather, the law is something like a foundational *ratio* of *ius*, an intelligible informing normative standard for the determination of *ius*: *aliqualis ratio iuris*.[5]

In this dense textual locus of paradigmatic importance for his understanding of *ius*, Aquinas explains that the original signification or the primary meaning (*primo impositum est ad significandum*) of this term is rather that of the just thing itself, *ipsa res iusta*. It seems that this is the point in which Aquinas's metaphysical realism and juridical realism intersect to highlight the crucial *rei*-centric feature of the juridical domain: the starting point of juridicity

[4] See *S. Th.* II-II, q. 57, a. 1. For the English translation of the texts from Aquinas's *Summa Theologiae*, I will be using Thomas Aquinas, *Summa Theologiae: First Complete American Edition in Three Volumes*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers, 1947-1948).

[5] "*Et ideo lex non est ipsum ius, proprie loquendo, sed aliqualis ratio iuris*." *S. Th.* II-II, q. 57, a. 1, ad 2.

is, broadly speaking, in the things (*res*) themselves. Aquinas essentially understands juridicity from the viewpoint of a primary reference to things, realities, acts, or states of affairs *themselves*.[6]

What are the differential criteria that establish the relevance of things or aspects of reality (*res*) for the juridical domain? What constitutes a thing as *ius*? According to Aquinas, a *res* is viewed as *ius* in the context of its being an object of a specific relational orderedness between plural persons regarding a certain *res*. *Ius* is, so to speak, the thing (*res*) itself viewed as the focal point of a specific type of relationship between plural persons.

This relational perspective that is constitutive of *ius* is provided by the operative principle of justice. It is precisely justice that establishes the relatedness—or the specific other-directedness[7]—between plural persons according to the order of *giving to each that which is his own right* (*ius suum cuique tribuendi*).[8] Now, the orderedness pertaining to the operative principle of justice, in Aquinas's view, "regards a certain special aspect of the good [*respiciat quondam rationem boni specialem*]."[9] We can call this the *goodness of justice*—i.e., the goodness pertaining to the orderedness of giving to each his own just thing or *ius*. The very thing, aspect of reality, act, or state of affairs may be said to pertain, as such, to an aspect of goodness insofar as it is constituted as *ius*. Aquinas refers to this *res* as the good (*bonum*) under the aspect (*sub*

[6] See also other Aquinas's references to *things* (material objects, aspects of reality, acts, or states of affairs) *themselves* as the primary fabric of *ius*: "Since justice is directed to others, it is not about the entire matter of moral virtue, but only about external actions and things [*circa exteriors actiones et res*], under a certain aspect of the object, in so far as one man is related to another through them" (*S. Th.* II-II, q. 58, a. 8); "The matter of justice is external operation, in so far as an operation [*exterior operatio… ipsa*] or the thing [*res*] used in that operation is duly proportionate to another person, wherefore the mean of justice consists in a certain proportion of equality between the external thing [*rei exterioris*] and the external person" (*S. Th.* II-II, q. 58, a. 10); "The matter of justice is an external operation in so far as either it [*operatio exterior...ipsa*] or the thing we use by it [*res qua per eam utitur*] is made proportionate to some other person to whom we are related by justice" (*S. Th.* II-II, q. 58, a. 11).

[7] Aquinas describes justice as the orderedness of the human person in his relations with others ("*iustitiae proprium est [...] ut ordinet hominem in his quae sunt ad alterum*"). See *S. Th.* II-II, q. 57, a. 1. See also *S. Th.* II-II, q. 58, a. 2.

[8] See *S. Th.* II-II, q. 58, a. 1.

[9] *S. Th.* II-II, q. 79, a. 1.

rationem) of that which must be operatively rendered to another, be it an individual or a community, as his (or their) right.[10] In synthesis, *ius* denotes a thing (*res*) that may be conceived of as a *juridical good*, paradigmatically understood as that which belongs to another person as the titleholder of *ius*.

Each of the essays in this collection captures the essence of *ius* as *juridical good* from a different perspective that becomes intelligible either (1) in a dialogue with the line of argument of a specific legal philosopher whose focal meaning of *ius* differs from Aquinas's, or (2) in relation to a set of issues in search of a sound criterion of juridicity, such as the issues related to the concept of the common good, or to the concept of rights in the Catholic social doctrine and in canon law. This dialogical method of presenting the focal meaning of *ius* according to Thomistic juridical realism is particularly suitable for a better understanding of this meaning in the context of contemporary juridical culture, in which, for a number of reasons, jurists are not accustomed to thinking about issues pertaining to *ius* in Aquinas's terms. On the other hand, as I will show in this book, the contemporary way of thinking about juridicity contains quite a lot, often implicit, intersecting points with Aquinas's conception of *ius*.

However, this book is not an exercise in what John Finnis referred to as "wanting to put the clock back."[11] The main thesis of the book is that many issues pertaining to a foundational level of analysis of the concept of *ius* and juridicity in the field of legal philosophy, theory, and practice are simply more successfully captured if we begin to understand them in terms of the *rei*-centric (or thing-based) juridical goods that belong to other individual or group persons.

The perspective of Thomistic juridical realism, both in Aquinas's time and in our own, does not ignore the importance of the law or the valuable reference to the concept of subjective rights as these are explored in contemporary legal theory. In this collection of essays, I argue that many significant contributions of contemporary legal philosophy and theory may prove to be compatible with (as well as revelatory for) aspects Aquinas's focal meaning of *ius*. By testing the idea of *ius* as *rei*-centric juridical good against the arguments of con-

[10] *S. Th.* II-II, q. 79, a. 1.

[11] Finnis, *Natural Law and Natural Rights*, 209.

temporary theories of law and rights, this idea is itself updated and, hopefully, perfected. At the same time, certain foundational arguments of contemporary legal philosophy (whether from a positivistic or a natural-law perspective) on the essence of the juridical phenomenon may be found to epitomize only fragments of the idea of *ius* as juridical good, fragments that may themselves profit from taking this idea into consideration.

Aquinas's focal meaning of *ius*, based on the realm of *thingness* in the perspective of the *good* of *another person*, is essentially compatible with arguments regarding the juridical phenomena of law and subjective rights. However, for a correct understanding of this focal meaning it is crucial to assimilate its nature as the primary meaning of *ius* or as the paradigmatic juridical phenomenon for the constitution of the juridical domain.

In the perspective of Thomistic juridical realism, instances of law and subjective rights represent the juridical phenomena that are dependent on the understanding of *ius* as the thing-based juridical good of other persons. The reader is already familiar with Aquinas's claim that law represents a certain *ratio* of *ius*,[12] a foundational intelligible framework that constitutes a rational normative basis for juridical goods. A law, be it natural or positive, may be a title of right. Next, *ius* (right or juridical good) may be reformulated according to the structure of a subjective right—i.e., envisioned from the perspective of the beneficiary of juridical goodness or the subject somehow in control of demanding its attainment. This is why the framework of *ius* as juridical good is wholly intelligible to legal philosophers who take as their starting point the law or the concept of subjective rights. In a juridical-realistic conception of law and subjective rights, however, the *lex* and the subjective meanings of *ius* are never mistaken for the primary focal meaning, which is always essentially conducive to things (*res*) as juridical goods.

Thomistic juridical realism is thus an approach to the juridical phenomenon that builds upon the focus on the phenomena of law and subjective rights by taking into serious consideration aspects that were often relegated to a background role in juridical culture, but merit to be awarded a more prominent role; namely, the *things themselves*

[12] *S. Th.* II-II, q. 57, a. 1, ad 2.