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## JUST LAW – WHAT LAW AND WHOSE LAW? DIVAGATIONS ON THE SUBJECT OF JUSTNESS OF LAW IN THE LEGAL THOUGHT OF MIDDLE AGES

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### ABSTRACT

The purpose of this article is to investigate relations between two terms: *ius* and *iustitia*. According to the authors, the relation is not only in the etymology of both words, but also, and primarily so, in their essence. This is a result of the use and development of the ancient concept of common good – *bonum commune*. Construction of common good was especially noticeable in the works of Isidore of Seville, Saint Thomas of Aquin, and John of Salisbury. Common good when it constitutes the goal of law, becomes a criterion which distinguishes just law from an unjustifiable act which does not deserve the name of law.

This elaboration deals with the reconstruction of conception justice in the Middle Ages and problems connecting with that – power, legislation, distinction between private good and common good, etc.

**KEY WORDS:** conception justice, common good, natural law, *epikeia*.

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Law understood as *ius* is immediately correlated to the idea of *iustitia*.<sup>1</sup> The relation is not only in the etymology of both words, but also, and primarily so, in their essence. When analyzing broadly understood legal thought of Middle Ages, through resorting to a certain generalization, one can arrive at the conclusion that it was based on the concept of common good. It should be pointed out here that the concept of common good had been conceived earlier. It was known to the ancients, and was

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1 St. Augustini, *De civitate Dei*, XIX, 21.

brought into focus in the writings of Plato and Aristotle.<sup>2</sup> The novelty is in the eschatological perception of the *bonnum commune*. Such a construction of common good was especially noticeable in the works of Isidore of Seville, Saint Thomas of Aquin, and Jonh of Salisbury (with the exception that the author of Policraticus applied the term “public good”).<sup>3</sup>

Common good when it constitutes the goal of law, becomes a criterion which distinguishes just law from an unjustifiable act which does not deserve the name of law.<sup>4</sup> As Thomas of Aquin writes “The goal of law is common good. (...) Thus laws need to be suited to the common good and to serve its purpose.”<sup>5</sup>

It is the mind that sets bonum commune as the goal.<sup>6</sup> Due to the intellect and the constant development of an individual the realization of the goal is feasible.<sup>7</sup> The category of common good includes both the legislator and the addressees of legal acts. In the medieval doctrines a man is a pilgrim who roams the contemporary world only to arrive at the heavenly homeland.<sup>8</sup> Therefore the key aim of law, achieved through the idea of common good, is to create such conditions that each Christian can reach salvation – the ultimate goal. In its essence *iustitia humana* is based on constant striving towards *iustitia Dei* a perfect form of justice,

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- 2 H. Promieńska, *Dobro wspólne, dobro indywidualne i dobro moralne* [in:] *Dobro wspólne*, D. Probuca (ed.), Kraków 2010, p. 16. M. Piechowiak, *Konstytucyjna zasada dobra wspólnego – w poszukiwaniu kontekstu interpretacji* [in:] *Dobro wspólne. Problemy konstytucyjnoprawne i aksjologiczne*, W.J. Wołpiuk (ed.), Warszawa 2008, p. 137.
  - 3 Confer: L.J. Elders, *St. Thomas Aquinas Commentary of the Nicomachea Ethics* [in:] L.J. Elders, H. Hedwig, *Lex et Libertas. Freedom et Law according to St. Thomas Aquinas*, Città del Vaticano 1987, s. 9–46. John of Salisbury, *Policraticus*, 4, 2.
  - 4 St. Isidore of Seville [Isidorus Hispalensis], *Etymologiae*, 5, 21; John of Salisbury, *Policraticus*, 3, 1.
  - 5 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 96, a. 1, resp.
  - 6 J. Velez-Saenz, *The doctrine of common good of civil society in the works of St. Thomas Aquinas*, Notre Dame, Indiana 1951, p. 27–29; J.M. Ramirez, *Doctrina S. Thomae Aquinatis de bono communi immanenti totus universitatis creaturarum*, “Doctor Communis” 1963, no 16, p. 41–45.
  - 7 M. Maciejewski, *Kwestia dualizmu prawa w jurnaturalizmie od starożytności do oświecenia* [in:] *Nam hoc natura aequum est... Księga jubileuszowa ku czci Profesora Janusza Justyńskiego w siedemdziesięciolecie urodzin*, A. Madeja, H. Olszewski (ed.), Toruń 2012, p. 53
  - 8 St. Augustini, *De civitate Dei*, XV, 6.

which St. Augustine understood as the presence of natural-law norms embedded in the intelligent soul of a man.<sup>9</sup> At the same time the sheer presence of the natural law order in human nature does not make a man righteous, it can only teach him about what is good, just and rightful.<sup>10</sup> It is the leader of a political community who is entrusted with the task of signposting the path leading to eternal life. It is the highest ruling authority that is legitimate in enacting acts of law created on the fundament of natural law.<sup>11</sup>

Natural law is equally encoded in each human being.<sup>12</sup> When *ius naturalis* is being decoded the norms of it are differently interpreted. The power of logical mind is specific to each individual.<sup>13</sup> As each member of a political community arrives at a different understanding of natural law the need arises for the ruling authority to create uniform legal norms that would be binding in the country. This brings stability, order and societal peace. Consequently, the power of the ruling authority increases and the country's international image improves. Therefore practical reasons and the common good require that the letter of the law be established, and thus also its accordance or lack of it with acts of natural law, not by each individual separately but by the leader of a community.<sup>14</sup>

The genesis of law has been traced by medieval thinkers (with the exception of Marsilius of Padua) to the evangelistic tradition, the quintessence of it is expressed in the words from The Epistle of Paul the Apostle to the Romans "For there is no power but of God."<sup>15</sup> The stand that Saul of Tarsus represents is supported by arguments derived from

<sup>9</sup> St. Augustini, *De perfectione iustitiae hominis*, 9, 20; Cf. *Ibidem*, 8, 18. *Idem*, *De civitate Dei*, XIX, 4.

<sup>10</sup> T. Szczech, *Państwo i prawo w doktrynie św. Augustyna, Marcina Lutra i Jana Kalwina*, Łódź 2006, p. 83–84.

<sup>11</sup> Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 105, a. 2, resp; I–II, q. 95, a. 4, resp.

<sup>12</sup> St. Irenaeus, *Adversus omnes haereses*, 4, 13.

<sup>13</sup> [Origenes], *Origenis commentariorum in epistolam S. Pauli ad Romanos. Libri decem*, 3. 6; John of Salisbury, *Policraticus*, 5, 9 and 6, 21.

<sup>14</sup> Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 95, a. 4, resp. Differently Marsilius [of Padua], *Defensor Pacis*, I, 12, 7.

<sup>15</sup> Sancti Thomae de Aquino, *Suber Epistolam S. Pauli Apostoli ad Romanos*, 1021. St. Augustini, *De Civitate Dei*, V, 19. J.M. Kelly, *Historia zachodniej teorii prawa*, Kraków 2006, p. 145; H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Kraków 1995, p. 339.

the Old Testament: "Through me kings have their power, and rulers give right decisions. Through me chiefs have authority, and the noble ones are judging in righteousness" and from the New Testament: "You would have no power at all over me if it was not given to you by God."<sup>16</sup>

It should be pointed out here that derivation of any power, especially the ruling one from God is not synonymous with receiving God-like prerogatives. The power that comes from God is abstract in this meaning. The rule formed by St. Paul neither refers to a specific person, a chosen family, nor to a political system. It is about the sheer essence of power. If one receives authority by God's will, he will unavoidably comply with it, therefore he will walk the path towards salvation following divine signposts. Thus a ruler does not create natural laws, he rather discovers them.<sup>17</sup> The ruling power, due to the fact that it has been vested by the Creator of earthly *ordo*, cultivates God's intention in the area of social order.<sup>18</sup> In consequence, rulers are not responsible to their subjects but for them (as they rule in their interest).<sup>19</sup>

Actions of the legislator aim to verbalize the norms of natural law, thus they cannot be free. Natural law is decoded with the mind, which is fed with experience of actions and their consequences, which are analyzed.<sup>20</sup> Therefore in the case of an act of law that induces people's actions or refrainment from actions there can be no arbitrariness.<sup>21</sup> Enacted laws, if they aspire to be fair, must not contradict *ius naturalis*.<sup>22</sup> The result is an immediate dependence between *ius* and *iustitia*.

Natural law provides the basis and the point of reference for human law and is rooted in eternal law established by God. The essence of natural law is expressed in the injunction made by Thomas of Aquin: good

16 *The Book of Proverbs*, 8, 15–16; John 19: 11 [Transl. Basic English Bible]; Cf. Sancti Thomae de Aquino, *Summa Theologiae*, II–II, q. 96, a. 4 resp; *Suber Epistolam S. Pauli Apostoli ad Romanos*, 1018.

17 St. Isidore of Seville [Isidorus Hispalensis], *Etymologiae*, 9, 3.

18 E.H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theory*, Princeton 1957, p. 143–192.

19 J.M. Kelly, *op. cit.*, p. 117.

20 B. Szlachta, "Książeczka Męża Stanu." *Elementy doktryny politycznej Jana z Salisburii* [in:] *Mysł polityczna od historii do współczesności. Księga dedykowana Profesorowi Markowi Waldenbergowi*, B. Stoczevska, M. Jaskólski (ed.), Kraków 2000, p. 451–452

21 St. Augustini, *De civitate Dei*, IV, 4.

22 Cf. C.J. Nederman, *Marsyliusz z Padwy* [in:] *Mysliciele polityczni. Od Sokratesa do współczesności*, D. Boucher, P. Kelly (ed.), Kraków 2003, p. 178.

should be pursued and evil avoided (*Bonum est faciendum et prosequendum, et malum vitandum*).<sup>23</sup> From that primary rule all other detailed norms are derived i.e. the right to live, to intellectual development, to procreate, the law of respect of property. As more detailed rules are being introduced a chain of natural-law norms is created, which equipped with sanctions, becomes legislation.

Therefore *ius humana* realizes the idea of common good.<sup>24</sup> The common good is not exclusive in its political sense to the society of one country, it includes all thinking creatures, who were created at the image of God, it reflects the divine order. The assumption reveals universal values of the Middle Ages. Medieval thinkers – as a rule – made a clear distinction between private good and common good and following Aristotle they assumed the superiority of the later one over a well being of individuals who make a society.<sup>25</sup> A part must always be subordinate to the whole, as the whole is more perfect than a part.<sup>26</sup>

Where moral order prevails the possibility of a conflict between the well being of an individual and that of the whole does not arise. A society of such type is either short lasting or seeming. The unity of common good and the well being of an individual should be considered from a teleological point of view. The discrepancies between the common good and the well being of an individual are not of quantitative, but rather qualitative in nature. One can talk about the unity of those two only when the ultimate goal is the criterion. These two types of good should never be put in opposition in the social-political dimension of life as they do not exclude one another. Good *sensu largo* makes *sui generis* a closed cycle: common good is a source of the well being of an individual, simultaneously, well-beings of individuals merge into common good. The well being of an individual finds its realization in intellectual, moral and creative development, through which a man fulfills his humanity, realizes himself as a thinking entity. An individual who strives to develop himself, thus developing his well-being, contributes – consciously or unconsciously – to the common good. The well being of an individual when defined in such a way can only be achieved in com-

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23 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 94, a. 2, resp.

24 *Ibidem*, I–II, q. 90, a.3, resp.

25 John of Salisbury, *Metalogicon*, 2, 1.

26 Sancti Thomae de Aquino, *Summa Theologiae*, II–II q. 64; I–II, q. 113, a. 9, ad. 2.

munity: “He who strives for common good, strives for his own good,” wrote Thomas of Aquin.<sup>27</sup>

Positive law, which regulates relations between citizens of a country, refers, first and foremost, to the virtue of righteousness.<sup>28</sup> “And for this reason human law commands to do right deeds only. And if it commands to fulfill other virtues, it only does so – as the Philosopher teaches – to the extent to which they are connected with righteousness.”<sup>29</sup>

In addition to law understood as rational decisions of political authority pertaining to public life *lex humana* also exists as law created by agreements made by people in the sphere of everyday life. Here the same rule is employed: if resolutions of a contract are contradicting natural law, human will cannot change it.<sup>30</sup>

In legal doctrines of Middle Ages the conflict between enacted law and natural law, as a rule, yielded the same result: the first one was refused any moral value, and consequently lost its binding power.<sup>31</sup> Positive law, which conflicts with morality, i.e. with natural law, is not a law but rather its abuse, which is not binding in one’s conscience. Does then a law which conflicts with broadly understood common good and becomes an “act of injustice” release citizens from following its provisions? The answer to the question is by no means unambiguous and depends on the weight of violation of natural law.

A man is allowed not to conform with vile law only, i.e. such a law which by violating natural law norms treads God’s commandments and thus evades God’s will.<sup>32</sup> One is released from following these acts of law that contradict natural laws and thus are against common good and human interest in his conscience only.<sup>33</sup> In the practice of social-political life one must obey them. The situation in which *lex humana* is not binding in the conscience only in order to avoid indignation takes place when breaching the law results in greater evil to social life (e.g. riots) than

<sup>27</sup> *Ibidem*, I–II, q. 47, a. 10, ad. 2.

<sup>28</sup> St. Augustini, *De civitate Dei*, XIX, 4.

<sup>29</sup> Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 100, a.2, resp.

<sup>30</sup> *Ibidem*, II–II q. 57, a 2, ad. 2.

<sup>31</sup> Lactantius, *Divinae institutiones*, 6, 8; St. Augustini, *De libero arbitrio*, 1, 3, 6.

<sup>32</sup> Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 96 a. 4 resp. [Origenes], *Origenis commentariorum in epistolam S. Pauli ad Romanos. Libri decem*, 3. 6

<sup>33</sup> L. Dubel, *Koncepcja władzy publicznej w ujęciu Jana z Salisbury* [in:] *Idee jako źródło instytucji politycznych i prawnych*, L. Dubel (ed.), Lublin 2003, p. 115.

compliance with it. Compliance with such lawless acts is connected with the realization of common good in the practice of social life. In a specific situation those who do not comply with unjust law may suffer revenge or repressions from the political authority.<sup>34</sup>

Law is “an art of bringing order into human life.”<sup>35</sup> A man, as a matter of fact, can do without enacted laws as following his mind he acts virtuously therefore he does good.<sup>36</sup> Society consists of people who – as Thomas writes – are well established in virtue, as well as those who are far from ethical perfection. Some hear the call of natural law clearly, others not so well. There are also such people who have committed a number of bad deeds and as a result have become deaf and put their conscience to sleep. Therefore the need for *ius humanum*, which fulfills mainly educational function.<sup>37</sup> Human nature is only partly capable of virtue, to fully develop the capability education is needed.<sup>38</sup> The will of good people directs the mind to probe *lex humanae* and in consequence *lex naturalis*. The learning process results in the adjustment of human behavior to legal norms. For this group of people who pursue good law serves as signposts which confirm the justness of their decisions.<sup>39</sup> Because *voluntas bonum consonat legi* they are not forcefully controlled but led by law.

The majority of the population consists of individuals whose behavior requires correction if law and order are to be preserved in a country. A country, in order to function well, must aim to realize the main goal which is the common good. As well being of each individual does not always coincide with the common aim of society, law must create mechanisms that will motivate individuals. For this reason sanction is an indispensable element of the letter of the law.<sup>40</sup> The less lawless will be discouraged from committing unlawful deeds by sheer visualization of the punishment. The hardened will be corrected by the enforcement of the sanction.<sup>41</sup>

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34 John of Salisbury *Policraticus*, 6, 24; *Ibidem*, 6, 26. Sancti Thomae de Aquino, *De regimine principum*, 7.3.

35 Sancti Thomae de Aquino, *Summa Theologiae*, II–II, q. 104, a. 4 resp.

36 St. Isidore of Seville [Isidorus Hispalensis], *Sententiae*, 3, 51.

37 K. Chojnicka, *Nauczanie społeczne Kościoła od Leona XIII do Piusa XII*, Kraków 1993, p. 22–23.

38 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 95, a. 1, resp.

39 *Ibidem*, I–II, q. 90, a.1.

40 St. Augustini, *De vera religione*, VI, 11.

41 Cf. T. Szczech, *op. cit.*, s. 84–85.

This way with time citizens gain virtue and become good citizens not by force but by will. Enacted law neither forbids each and every bad deed, nor does it command to do good.<sup>42</sup> It only does so when the deed is of substantial weight. “It only forbids heavy offences, from which majority of human beings can refrain. Especially those that are harmful to others. Were they not forbidden, society could not exist.”<sup>43</sup>

There are two reasons for such a practice. One of them is the fear of excessive casuistry. The other one is explained by Thomas of Aquin as follows: “Human law helps people attain virtue: not immediately but gradually. It does not immediately burden the multitude of imperfect people with that which is practiced by the virtuous: namely to refrain from all evil. Otherwise imperfect people who do not possess the necessary strength to carry such a burden could fall into even greater evil, as the *Book of Proverbs* says: “Who rubs the nose too hard will cause bleeding.”<sup>44</sup>

Enacted law consists of injunctions and obligations, both serve the purpose of regulating actions of members of a given society. As human law does not forbid all deeds that are against natural law (leaving them in the sphere of moral norms), likewise it does not command all “deeds of virtue.” The legislator deliberately leaves a margin for human behaviors (usually connected with private lives of individuals) that do not directly influence public order. Consequently, natural law norms that do not focus sufficiently on the aspect of common good can be omitted in the shaping a legal system of a given society.

The subject which is legitimate to create law may as well alter it, repeal it or give dispensation from it. In accordance with the virtue of justice, dispensation from obeying the letter of the law is an exception. Dispensation must remain in accordance with the spirit of the law and must not be against the common good.<sup>45</sup>

“No human being,” St. Thomas writes, “is as wise as to predict all individual cases. Therefore he is unable to express with his words that which serves the purpose.”<sup>46</sup>

<sup>42</sup> *Lex humana non omina potest prohibere quae prohibet lex naturale.* Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 96, a. 2, ad. 3.

<sup>43</sup> *Ibidem*, I–II, q. 96, a. 2, resp.

<sup>44</sup> *Ibidem*, I–II, q. 96, a. 2, ad. 2.

<sup>45</sup> *Ibidem*, I–II, q. 97, a. 4

<sup>46</sup> *Ibidem*, I–II, q. 96, a.6, ad. 3.



A just act is an action or refrainment from it which complies with both the spirit of the law and the letter of the law.<sup>47</sup> In changeable, unpredictable, and often complicated situations of sociopolitical nature situations may occur when a strict and literal understanding of law results in utter injustice. Then an action that in its core complies with natural law will contradict the aim set forth by law and rationality. Such a situation is not a result of legislator's bad will or a mistake, it is a consequence of the complexity of human nature and unexpected situations that life abounds in.

The legislator taking into consideration the dangers of excessive casuistry regulates with legal norms typical situations. Exceptionally rare cases, single events and unpredictable coincidences require individual consideration of their compliance with law. *Epikeia*, which is a virtue of super-justice, succors those unusual situations that cannot be regulated by casuistry. “*Epikeia* has the task of introducing moderation into the obedience by the letter of the law.”<sup>48</sup>

*Epikeia* – which has been most broadly discussed by St Thomas of Aquin – authorizes actions which are in accordance with the spirit of the law but against the letter of the law, only when obedience by the letter of the law would result in injustice or would be against common good. Its task is to complete and correct the lack of justice. As *epikeia* is oriented towards the realization of the idea of the common good in the practice of law it directly eliminates harmful results of literal understanding of law. The diagnosis of atypical situation and implementation of adequate means which counteract the harm to the common good is possible when one is skilled in the virtue of discernment.<sup>49</sup>

Thomas of Aquin illustrates the above thesis with the following example: as a rule it is a rightful thing to return an object which has been deposited, however, such an act will be against the spirit of the law and the sense of justice when “a mad man demands his sword, which he has deposited, to be returned as he wants to fight against his motherland. In such cases abiding the law would be a wrong thing to do.”<sup>50</sup>

“Dispensation from obedience to a law” can be granted by the subject who makes law, that is – in St. Thomas’ words – “the authority.”<sup>51</sup>

47 St. Augustini, *De libero arbitrio*, I, 6, 15.

48 Sancti Thomae de Aquino, *Summa Theologiae* II–II, q. 120, a. 2, ad. 3.

49 Cf. Sancti Thomae de Aquino, *De Veritate*, q. 16, a. 1–3.

50 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q.120, a. 1, res.

51 *Ibidem*, I–II, q. 97, a. 4, ad. 1.

An individual is not legitimate to decide about conditions that justify exemption from the letter of the law.<sup>52</sup> Only in an exceptional situation which could be described as an emergency or being outside of a man's control, which happens when there is no time or possibility to refer to competent organs, and the obedience by the letter of the law would yield results opposite to those assumed by the law, only then an individual's action *contra legem* is justified.

Under such circumstances one can subscribe to St. Thomas' assumption, which claims that a subject who disobeys the letter of the law "does not judge the law itself, but judges the particular case in which he can see that the letter of the law should not be obeyed."<sup>53</sup> Disobedience to the letter of the law in unusual circumstances does not make a criticism of the law, it rather is somebody's stand on the existing situation.<sup>54</sup>

Disobedience to law in its literal meaning which is violation of law *sui generis*, is fully justified. Such a situation takes place when in specific conditions or in relation to a particular person law, which in its essence serves common good, makes it impossible to achieve substantial good or generates harm and thus clearly defies the intention of the legislator. "Therefore, when a situation occurs in which abiding by such a law appears to be harmful to common good, one should not obey."<sup>55</sup>

*Epikeia* which contradicts the letter of the law remains in agreement with its spirit, with the intension of the legislator to lead the society to common good and with the idea of rationality of acts of law. This way – as Mirosław Sadowski rightly points out – "Thomas joins, somehow, the idea of *bonum commune* with justice, elevating common good above justice."<sup>56</sup>

Virtue – above all the virtue of justness – trains a man in the inclination towards ethically right actions in accordance with evangelistic message: "Be then complete in righteousness, even as your Father in heaven is complete."<sup>57</sup> Virtue, as a specific kind of *habitus*, refers to good only and in

52 St. Augustini, *De vera religione*, XXXI, 57.

53 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 96, a. 6, ad. 1.

54 St. Augustini, *De vera religione*, XXXI, 58. Sancti Thomae de Aquino, *Summa Theologiae*, II–II, q. 120, a. 1, ad. 2.

55 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 96, a. 6, resp.

56 M. Sadowski, *Godność człowieka i dobro wspólne w papieskim nauczaniu społecznym (1878–2005)*, Wrocław 2010, p. 91.

57 Matthew, 5, 48 [Transl. *Basic English Bible*].

this direction it trains individual members of society.<sup>58</sup> “Virtue is a competence on which good moral conduct is based.”<sup>59</sup> All human actions should be rational, and ethically correct decisions should be arrived at by will. Mind as a prevailing entity organizes intellectual life, moral life (acts of will) and performed (external) actions. Therefore spiritual powers, cognitive powers and the power of desire should incline towards good. For these powers to be realized in practice one needs certain abilities or skills. Discernment is a special virtue because it is related to an intuitive knowledge of fundamental norms of natural law, thus it is characterized by an ability that has not been fully brought into awareness and which discriminates between and specifies good and evil. The virtue correlates with *synderesis*, thus relating to all other virtues (to a lesser or larger degree) it shapes them.

Discernments displays close ties to the virtue of justness.<sup>60</sup> Justness therefore can be characterized as rational, which is particularly visible when shaping social relations. Justness is – drawing from the organic concept of a country as presented by John of Salisbury and St. Thomas of Aquin – an element that glues all parts into one well functioning organism.<sup>61</sup> An element that binds all the links is the aim, towards which human efforts are directed by the virtue of justness.

What sets justness apart from other virtues is the “equalization” to which someone may set up pretensions.<sup>62</sup> The model of just behavior has been encoded into human nature and can only be decoded with intellectual effort. The virtue of justness refers to “external actions, namely sharing and exchanging external objects, as well as their usage, usage of people and their works.”<sup>63</sup> In conclusion justness is a skill of granting people that which is their due by law. Therefore this virtue is a synonym to righteousness. As righteousness refers to conduct, objects and feelings the term *rectus* should be explained in the context of justness and the virtues of conduct. When considering things or human behavior (actions

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58 Sancti Thomae de Aquino, *Summa Theologiae*, I–II, q. 55, a. 3, resp; q. 56, a. 3, resp.

59 *Ibidem.*, II–II, q. 58, a. 1, resp.

60 Sancti Thomae de Aquino, *De veritate*, q. 1, a. 6, resp.

61 L. Dubel, *Idee prawne Jana z Salizbury* [in:] *W kręgu historii i współczesności polskiego prawa. Księga jubileuszowa dedykowana profesorowi Arturowi Korobowiczowi*, W. Witkowski (ed.), Lublin 2008, p. 390.

62 St. Augustini, *De libero arbitrio*, I, 13, 27.

63 Sancti Thomae de Aquino, *Summa Theologiae*, II–II, q. 61, a. 3, resp.

and refrainment from them) it is easy to define the idea of righteousness as a conduct which is in accordance with the letter of the law, however, the definition of the virtues of conduct is more complex. Righteousness then describes a person whose feeling, while it exists, is judged by the criteria of accordance with the mind.

In a complex situation it may happen that justness may not go hand in hand with the righteousness of the virtues of conduct. One can imagine a situation when a subject obliged to provide a given service will do so but with a feeling of hate towards the recipient of the service. Fulfillment of the contract's obligations in this case will remain in accordance with justness but not with social virtues.

Justness refers to the conduct *ad alterum*, more precisely to human relations, which is crucial for the functioning of any society especially on political and economical platforms. Justness does not train people in their feelings or actions directed towards themselves, it improves their conduct towards others. "Justness introduces order into human relations. It means a certain equalization, which is implied by its Latin name "iustitia" which derives from the verb "iustari" which means to "equalize." The equalization then involves others. All remaining virtues train a man in that which refers to himself."<sup>64</sup>

Justness is also characterized by freedom of choice as to the kind of conduct *ad alterum*, as well as by a "constant and eternal will" in the area of granting others their due.<sup>65</sup> "Eternal will" means an unchangeable duration of a certain attitude of the will in time. The attitude is characterized as *constans* "due to the object, when somebody always has the will to do something." It is abstract in its essence thus it is detached from individual cases. The virtue of justness requires volition from a man who wishes to "keep justice always and in everything."<sup>66</sup>

Through mental effort a man is capable of separating actions which are just and those which are *contra iustitia*. Nevertheless, a sheer knowledge in the subject of justness, its theoretical understanding, does not mean its implementation in the practice of one's functioning in a group. Being aware of what an ethical code of conduct is does not make somebody a just person. The power of intellect should not be marginalized

<sup>64</sup> Sancti Thomae de Aquino, *Summa Theologiae*, II-II, q. 57, 1, resp.

<sup>65</sup> *Ibidem*, II-II, q. 58, a. 1, resp.

<sup>66</sup> *Ibidem*, II-II, q. 58, a. 1, ad. 3.

in relation to this virtue, however, it is the power of desire that perfects a man through this virtue.<sup>67</sup> Just conduct means one's correctness in this virtue regardless of the feeling or attitude that accompanies an action or refrainment from it. The virtue of justness perfects a man only in "external actions" and in relation to objects that a man uses.<sup>68</sup>

Since justness is based on "equalization", its natural consequence is equality. The equality encompasses subjects of the same inborn dignity. Therefore justness refers exclusively to human relations; it cannot characterize the man-God relation.<sup>69</sup> By human relation one should understand the relation between a subject of justness and another man, a social group or the whole human race (as a part is included in the whole).

Justness as a virtue is directed towards good. However one should remember that common good differs from that of a single man not only in quantity but also in its essence i.e. formally. Due to the fact that justness refers to larger and smaller societies as well as to individuals we can describe justness as a general virtue and a specific virtue. It is natural of justness to belong to an individual, a group – large or small, and to the whole. Justness acquires the values of a general virtue when it refers to common good understood as the well being of the whole of a society. He can be called a virtuous citizen who possesses the quality of justness as a general virtue. Since it is directed towards the common good, the general virtue of justness becomes a virtue of a good citizen.

Therefore the good connected with each of the virtues – regardless of whether the virtue is directed towards another man or inward – can be successfully considered as the common good, towards which justice is directed. The virtue of justness focuses the brilliance of other virtues to the extent to which they direct a man towards common good, thus setting a uniform aim to all the virtues. Justness being a cardinal virtue refers to so called secondary virtues: mercy and generosity. One should inspect the realization of contracts, or the way business activities are conducted through the prism of the virtue of justness. The list of virtues connected with justness, understood as the duty of granting people their due, includes: being religious, piety, patriotism, respect, gratitude connected with acts of kindness, firmness, honesty.

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<sup>67</sup> *Ibidem*, II–II, q. 58, a. 4, resp.

<sup>68</sup> *Ibidem*, II–II, q. 57, 1, resp.

<sup>69</sup> *Ibidem*, II–II, q. 57, a. 1, ad. 3.

Justness then is a skill, owing to which a man is willing to act, and in consequence does so, in accordance with law, that is following the rules dictated by his mind.<sup>70</sup> Law, as a matter of fact, is rational in its essence.” Righteousness of the mind, penetrating the will, – as Bogdan Szlachta points out – takes on the name of truth – justice: in relation to others will may want something after initial recognition and introduction of order.<sup>71</sup> Order is crucial in the divagations on justness, because it refers to “norms preceding the virtue of justness, which condition it and in a sense “feed it with material” and set the direction for “lawful action.”<sup>72</sup>

Care for order, well-being and safety are fundamental tasks of authorities. The ruler realizes his duties on the basis of the letter of the law, which he enacts and to which he is liable. To conclude, the legal thought of the Middle Ages deals with the concept of public authority based on legal rule, which was initiated in the doctrine of St. Augustine, developed fully in the thought of John of Salisbury and of Thomas of Aquin.<sup>73</sup>

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#### STRESZCZENIE

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## PRAWO SPRAWIEDLIWE, CZYLI JAKIE I CZYJE? ROZWAŻANIA W PRZEDMIOCIE SPRAWIEDLIWOŚCI PRAWA W MYŚLI PRAWNEJ WIEKÓW ŚREDNICH

Celem artykułu jest wskazanie na ścisłą korelację pojęć *ius* i *iustitia*. Przy czym autorzy wskazują, iż owa relacja nie zawiera się jedynie w etymologii słów, ale dotyczy przede wszystkim ich istoty. Analizując bowiem szeroko rozumianą myśl prawną średniowiecza stwierdzają, że zasada się ona – co do zasady – na koncepcji dobra wspólnego. Zaznaczyć przy tym należy, iż koncepcja dobra wspólnego nie jest nowatorskim pomysłem mediewistycznym. Konstrukcja ta znana była bowiem już w starożytności, szczególnie zaakcentowana została w pismach Platona i Arystote-

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<sup>70</sup> St. Augustini, *De libero arbitrio*, I, 5, 12.

<sup>71</sup> B. Szlachta, *Wokół katolickiej myśli politycznej*, Kraków 2008, p. 16. Cf. Sancti Thomae de Aquino, *Summa Theologiae*, II–II, q. 58, a. 4, ad. 1, 2.

<sup>72</sup> B. Szlachta, *Wokół katolickiej myśli politycznej*, op. cit., p. 16.

<sup>73</sup> See L. Dubel, *Wprowadzenie* [in:] Jan z Salisbury, *Policraticus*, Lublin 2008, p. 16–17, 21.

lesa. W średniowieczu nowość polegała na ujęciu idei *bonum commune* w wymiarze eschatologicznym. Istota *iustitia humana* zasadzała się bowiem na stałym dążeniu do *iustitia Dei*, doskonałej postaci sprawiedliwości rozumianej przez św. Augustyna jako obecność w rozumnej duszy człowieka norm naturalnoprawnych. Niemniej jednak sama obecność porządku prawnonaturalnego w ludzkiej naturze nie czyniła człowieka sprawiedliwym, a jedynie pouczała go o tym co dobre, słuszne i godziwe.

Myśliciele wieków średnich zakładali, że każda jednostka ludzka w jednakowym stopniu miała zakodowane prawo naturalne. Jednakże w toku odkodowania treści *ius naturalis* dochodziło do zróżnicowania odczytu norm prawnonaturalnych. Owa subiektywizacja zrodziła konieczność wypracowania jednolitych na terenie danego państwa reguł prawa stanowionego przez podmiot rządzący w celu zapewnienia stabilności, ładu i spokoju społecznego, a co za tym idzie wzmocnienia władzy i wizerunku państwa na arenie międzynarodowej. Konstrukcja dobra wspólnego stanowiła zatem kryterium pozwalające na odróżnienie prawa sprawiedliwego od aktu niesprawiedliwości, który na miano prawa nie zasługiwał. W tym kształcie *bonum commune* miała charakter racjonalny. To dzięki intelektowi oraz stałemu doskonaleniu się jednostki (dążenie do osiągnięcia pełni cnót) możliwa była realizacja owego celu prawa. Zauważyć przy tym należy, że kategoria dobra wspólnego odnosi się zarówno do legislatora, jak i do adresatów norm prawnych.

Autorzy wskazują, że działań legislatora zmierzających do zwerbalizowania norm prawa naturalnego nie może cechować dowolność. Prawo naturalne jest odczytywane przez rozum, któremu materiału do analiz dostarcza doświadczenie czynów oraz ich skutków. Prawo stanowione pretendujące do miana sprawiedliwego nie może pozostawać w sprzeczności z *ius naturalis*. Artykuł porusza ponadto problematykę konfliktu na linii: prawo stanowione – prawo naturalne, wskazując na skutki owej antynomii.

Sprawiedliwym postępowaniem jest działanie lub zaniechanie zgodne zarówno z literą, jak i duchem prawa. Autorzy wskazują, że w zmiennych i nieprzewidywalnych, nierzadko powikłanych okolicznościach społeczno – politycznych zdarzają się sytuacje, w których postępowanie zgodne z literalnym brzemieniem aktu prawnego prowadzić może do najwyższego rodzaju niesprawiedliwości. Z tego powodu w artykule zawarte zostały rozważania w przedmiocie nie tylko cnoty sprawiedliwości, ale także idei nadprawości, czyli konstrukcji zwanej przez św. Tomasza z Akwinu *epikea*.

