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THE RELATIONSHIP BETWEEN NATURAL AND STATUTORY LAW IN ANCIENT AND MEDIEVAL CONCEPTS

ABSTRACT

The article discusses the shaping of the relation between natural and statutory law in the philosophical, political and legal concepts from the Antiquity until the Middle Ages. Firstly, the author analyzes the views of a sophist – Aristotle, and Stoics – Saint Augustine of Hippo and Saint Thomas Aquinas in order to identify on their basis the main principles concerning the matter at hand. His research permitted him to conclude that during the mentioned period the prevailing conviction was that statutory law (positive law) should not violate natural law (and sometimes simultaneously God's law) because the latter was perceived as a higher legal order. Statutory law that conflicted with the higher law was usually considered invalid and – as such – not creating the obligation of obedience. It was also considered unjust. For Christian thinkers God himself was the creator of principles of justice; therefore that law which came directly from him was put at the top of the legal structure. Natural law was seen as mirroring this law of God. In turn, statutory law was supposed to reflect the rules of natural law.

Keywords: Nature, natural law, statutory law, positive law, validity of law

In an already lengthy history of the development of philosophical, political, and legal concepts spanning from antiquity to modern times, natural-law doctrines have been widely represented. It could be said that for well over a millennium they accounted for the majority of theories pertaining to law, politics, and society, or at least many of the authors employed the terms 'law of nature' or 'natural law' in order to explain the tenets of their beliefs. Until approximately the eighteenth century, or the age of Enlightenment, natural-law concepts even formed the dominant discourse on political and legal matters, which nevertheless cannot be unequivocally assessed, as it has always lacked homogeneity, and instead encompassed a variety of ideas, quite often divergent in nature.¹ During the modern period the development of natural law was undoubtedly aided by the growing popularity of liberal ideology, which readily invoked (at least in the initial stages of its formation) the terms 'natural law' or 'natural state' to justify the need for liberty and freedom of action. Conservatism, which emerged in the late eighteenth century accompanied by traditionalism and ultramontaniam, looked to natural law – typically understood as divine law – guided by different ideological motives and political objectives. The aforementioned currents of thought made an unquestionable contribution to the further development of natural law. Not until the advent and advancement of legal positivism in the twentieth century, followed by normativism and several other legal and political doctrines (such as, *inter alia*, psychologism and functionalism) did the era of natural-law theory's 'reign' over the history of legal thought draw to a close. However, by no means was natural law pushed into oblivion. Indeed, the last two centuries have also given birth to its prominent (though not as numerous) representatives. To indicate a few one needs to look no further than John Michel Finnis, Lon Luvois Fuller, Gustav Radbruch, or Murray Newton Rothbard.² After WWII, tied to the atrocities of totalitarian systems, a partial renaissance in natural law doctrines, or at least an increased interest in the matter, may even be observed.

¹ See among other publications: D. Boucher, P. Kelly (eds.), *Myśliciele polityczni. Od Sokratesa do współczesności*, transl. by A. Dąbrowska, T. Sieczkowski, Kraków 2008 (*Politika*); B. Brown, *Natural Law Reader*, New York 1990; J. Hervada, *Natural Right and Natural Law. A Critical Introduction*, Pamplona 1987 (*Person and Law*); J.M. Kelly, *Historia zachodniej teorii prawa*, transl. by D. Pietrzyk-Reeves et al., Kraków 2006; M.A. Krapiec, *Człowiek i prawo naturalne*, Lublin 1960; W. Maihofer (ed.), *Naturrecht oder Rechtspositivismus?*, Bad Homburg 1962; J. Oniszczyk, *Filozofia i teoria prawa*, Warszawa 2008 (*Studia Prawnicze*); H.A. Rommen, *The Natural Law. A Study in Legal and Social History and Philosophy*, New York 1979 (*European Political Thought*); L. Strauss, *Prawo naturalne w świetle historii*, transl. by T. Górski, Warszawa 1969; M. Szyszkowska, *Europejska filozofia prawa*, Warszawa 1995 (*Podręczniki Prawnicze*); R. Tokarczyk, *Filozofia prawa*, Lublin 2004; R. Tuck, *Natural Law Theories. Their Origin and Development*, Cambridge 1980; Z. Ziemiński, *O pojmowaniu pozytywizmu oraz prawa natury*, Poznań 1993; M. Zmierzczak (ed.), *Prawo natury w doktrynach polityczno-prawnych Europy*, Poznań 2006 (*Prawo – UAM w Poznaniu*, 160).

² See J. Stelmach, 'Filozofia prawa' in B. Szlachta (ed.), *Słownik społeczny*, Kraków 2004, p. 346 ff.; J. Stelmach, R. Sarkowicz, *Filozofia prawa XIX i XX wieku*, Kraków 1998, p. 61 ff.; L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2000, p. 291 ff.; J. Zajadło, *Formuła Radbrucha. Filozofia prawa na granicy pozytywizmu prawniczego i prawa natury*, Gdańsk 2001, p. 34 ff.

My intention, however, is not to present the history of natural-law theory in general, interesting and complicated as it certainly is. Such a task would be unfeasible given the constraints of a single, rather short article. What is more, I also shall not engage in complicated deliberations in order to make a distinction between 'law of nature' and 'natural law,' but will instead adopt the somewhat simplistic assumption that they may be used interchangeably, although they are not entirely synonymous. The aim I set myself is to deliver a concise examination of what I believe is the important issue of the relationship between natural law (often understood as divine law or law stemming from it) and law enacted by men (predominantly by state authorities), i.e. positive law – based on selected natural-law doctrines from ancient times until the age of Enlightenment, while focusing in particular on the concepts of those considered natural law's classical thinkers.³ Only these doctrines take on this undoubtedly difficult-to-grasp problem of theoretical, but also practical significance. Understandably, the authors of theories of law that are not rooted in natural law, particularly the ones that reject the existence of such law, were not or are not obligated to ascertain the relationship between these two types of law.

For natural-law proponents the relationship between natural and positive law is elevated to a position of fundamental importance as it concerns the very essence of law, its hierarchy, assumptions, and objectives. Their reflections on the subject largely come down to the issue of law's dualism, which raises the question of the subordination and superiority of one legal system over the other or their equality. Not surprisingly, as a principle, natural-law theory assigns the law of nature to a higher order. The acceptance of said assumption generates the need for or even necessitates adherence to it by man-made law. In any case, the latter should reflect natural law. Numerous authors of natural-law doctrines therefore pose the question of whether statutory law that does not comply with natural law, especially one that contradicts it, has binding force. In advance of further analysis it should be noted that answers to this question have varied, with the predominant view denying the observance of positive law.⁴ The issue of the binding force of statutory law in opposition to natural law involves at least one more important problem, contained in the question of whether subjects, citizens, or society can confront an authority that enacts and applies law contrary to law of a higher order. Accordingly, do they have the right to resist such authority, and if so, in what form (active, passive, or other)?⁵

³ R. Tokarczyk, *Klasyki praw natury*, Lublin 1988, *passim*. See also B. Szlachta, 'Natura ludzka jako podstawa norm prawa naturalnego. Rzecz o różnych koncepcjach prawa naturalnego' in idem, *Szkice z historii myśli politycznej*, Kraków 2014, p. 7 ff.

⁴ See foot-note no. 1, and also A.P. d'Entrèves, *Natural Law. An Introduction to Legal Philosophy*, London 1957, p. 23 ff (*Hutchinson's University Library. Philosophy*); F.H. Eterovich, *Approaches to Natural Law, from Plato to Kant*, New York 1972, p. 13 f (*An Exposition-University Book*); C.G. Haines, *The Revival of Natural Law Concepts*, Cambridge 1930, p. 25 ff (*Harvard Studies in Jurisprudence*, 4); M. Szyszkowska, *Teoria prawa natury XX wieku w Polsce*, Warszawa 1982, p. 13 ff; eadem (ed.), *Powrót do prawa ponadustawowego*, Warszawa 1999, p. 36 ff.

⁵ A.P. Manohan, *From Personal Duties towards Personal Rights. Late Medieval and Early Modern Political Thought, 1300-1600*, Montreal 1994, p. 45 ff (*McGill-Queen's Studies in the History of Ideas*, 17); E. Peters, 'Theories of Deposition of Rulers' in J.R. Strayer (ed.), *Dictionary of the Middle Ages*, Vol. 4, New York 1989, p. 146 f.

The first ideas regarding the duality of law were conceived in Greece, several hundred years before the birth of Christ. The earliest reflections on the subject date back to the turn of the eighth to the seventh century BC and can be grouped into two categories. One refers to the mythological sphere of the gods of law, while the other is closer to the human law that actually functions in society.⁶ Both types of reflections on the law in ancient Greece were linked together and centered on legal theory's fundamental issues, which today still remain valid, namely, what law is, who creates it, what its scope is, and why it is binding, etc. In the chronological development of Hellenistic thought the answers to these questions have been distilled into three terms: *themis*, *dike*, and *nomos*. The first of them refers to the mythological mother goddess Themis, who was the embodiment of order, custom, and justice. The word 'themis' very likely expressed the earliest Greek understanding of the term 'legal norm,' which essentially comes down to divine will, carrying a powerful religious sanction. The word 'dike,' is derived from the name of Themis's daughter. Dike's duties were not as broad and more mundane than those of her mother and predominantly included seeing to the fairness of specific interpersonal relations. Greek mythology characterized Dike as the guardian of rights passed down by Zeus, performing legislative, accusatory, and punitive functions for violations of the law.

Around the eighth century in the Hellenes, *themis* was assigned the meaning of divine will, while *dike* was primarily associated with the resolution of ongoing disputes. Although neither of the laws was believed to have come from a mortal legislator, *dike* seemed somewhat more earthly (despite its divine provenience), owing to a less significant religious justification. An entirely separate notion of human law (*nomos*), independent of divine law, or at least characterized by a certain degree of autonomy, emerged in Greece only in the seventh century, introduced in the works of Hesiod. Already at that time the first attempts at codification were made, one of them by the distinguished Athenian lawyer Solon. In his preliminary assumptions he limited the plurality of gods of law to one, i.e. to Dike, whose norms, however, he placed not in the world of ideas, but rather among the people, tying them to the rules governing the *polis* (city-state). Solon was among the first thinkers to notice the possibility of conflict among *themis* and *dike*, and *nomos*. He viewed the contradiction among these different kinds of law as obvious and inevitable. Nevertheless, he tried to mitigate the consequences of a potential conflict between *dike* and *nomos* by explaining human law as the incarnation of divine law's spirit.⁷ During the time of Hesiod the problem of the relationship between human law and the law of nature, still viewed quite primitively as simply the rule of might found in the animal kingdom, arose for the first time.⁸ This law was juxtaposed

⁶ About myths of the Greeks see for example J. Parandowski, *Mitologia. Wierzenia i podania Greków i Rzymian*, Warszawa 1960; R. Graves, *Mity greckie*, transl. by H. Krzeczowski, Warszawa 1974 (*Rodowody Cywilizacji*); M. Pietrzykowski, *Mitologia starożytnej Grecji*, Warszawa 1978 (*Mitologie Świata*).

⁷ Solon, 'Sprawozdanie z działalności' in W. Steffen (ed.), *Antologia liryki greckiej*, Wrocław 1955, p. 46 f (BN II 92). See also idem, *Dichtungen. Sämtliche Fragmente, griechisch und deutsch*, ed. and transl. by E. Preime, München 1940, p. 25 ff.

⁸ Hezjod, *Prace i dni*, ed. and transl. by W. Steffen, Wrocław 1952, *passim* (BN II 71).

with the divine law of justice, handed down by Zeus and binding with regard to people. Natural law was therefore considered inferior not only to *themis* and *dike*, but also to *nomos*.

The relationship between natural law and human law in the initial period in which political and legal doctrines were formed was subsequently shaped by the sophists. Thinkers such as Hippias, Protagoras, Thrasymachus, and others based their reflections concerning the subject on the sensualistic, relativistic, practicalistic, and anthropocentric assumptions of their philosophy. Natural law, conceived of as cosmic law, was replaced by natural law understood as a set of norms governing human conduct. In the typical sophist perception of the law, natural law was positioned – though sometimes inconsistently – against statutory law, thought to be a type of convention.⁹ Among the originators of this philosophical current were the proponents of both the former and latter type of law. Statutory law was especially championed by Protagoras and Thrasymachus, which is not to say that they did not engage the issue of natural law. Without going into a detailed analysis of the matter, it should be noted that the sophists' view of natural law was founded upon the belief held by Protagoras that man is the measure of all things (*homo menzura*). This subjective rule was nonetheless adjusted by the rule of *civitas menzura*, whereby the final say about the essence and expression of justice belongs to the state.¹⁰ In order to ensure justice the state lays down the law, which should be observed by the citizens as it emanates from the authorities. Notwithstanding the duty of obedience, the law may still be criticized. Protagoras argued that statutory law and the law of nature do not necessarily have to stand in opposition. Indeed, law that comes from the state in its essence a conventional expression of the natural human inclinations towards the law.¹¹

According to Thrasymachus, on the other hand, the duty of obedience to statutory law, and consequently its superiority, stem from its enactment by a stronger party, i.e. state authorities. The legal norms of the law are not intended to address the stronger but rather the weaker, i.e. the ruled. The advantage of the stronger over the weaker party was seen as the essence of the law. Thrasymachus perceived statutory law as sanctioning this advantage in accordance with the rules of nature, which express an obvious inequality among men and other living beings. Therefore, natural law's norms serve as prototypes for the norms put in place by the state. In this sense there is no contradiction

⁹ J. Gajda, *Sofiści*, Warszawa 1989, *passim* (*Mysli i Ludzie*); G.B. Kerferd, *The Sophistic Movement*, Cambridge 1981, p. 76 f; R. Legutko, *Sokrates. Filozofia męża sprawiedliwego*, Poznań 2013, p. 111 ff; C. Mielczarski, *Sofiści i polityka. Antyczne źródła liberalizmu europejskiego*, Warszawa 2010, p. 57 ff (*Wykłady z Filozofii*); K. Kumaniecki, *Historia kultury starożytnej Grecji i Rzymu*, Warszawa 1969, p. 140 ff; W. Tatarkiewicz, *Historia filozofii*, Vol. 1: *Filozofia starożytna i średniowieczna*, Warszawa 1968, p. 134 ff.

¹⁰ *Platona Protagoras*, ed. and transl. by W. Witwicki, Lwów 1923, p. 67.

¹¹ A. Menzel, 'Protagoras, der älteste Theoretiker der Demokratie', *Zeitschrift für Politik*, Vol. 3 (1910), p. 224 ff. See also W. Wróblewski, *Pojęcie arete w II połowie V wieku p.n.e. Protagoras – Gorgiasz – Demokryt*, Toruń 1979, p. 24 f (*Rozprawy – UMK w Toruniu*); idem, 'Sofiści' in H. Podbielski (ed.), *Literatura Grecji starożytnej*, Vol. 2: *Proza historyczna, krasomówstwo, filozofia i nauka, literatura chrześcijańska*, Lublin 2005, p. 66 ff (*Źródła i Monografie – Towarzystwo Naukowe KUL*, 255).

between the two types of law.¹² Yet, the sophists viewed natural and statutory laws as springing from different sources of authority. The former was believed to derive from human nature, typically thought of as the psychophysical fiber of man. Meanwhile, statutory law of course originated from state authorities. It should then come as no surprise that the sophists drew a clear distinction between the two types of law, sometimes even setting them against each other. For instance, Archelaus pointed to the discrepancies between that which is fair by nature and that which is fair by statute. Hippias, by contrast, regarded the law of nature and statutory law to be two distinct 'lifestyles'.¹³ He did not, however, believe them to necessarily remain at odds. The characteristic variability of the norms comprising statutory law was supposed to present an opportunity for its adjustment to the intrinsically stable law of nature. Hippias placed natural law above the law put forth by the state, although he considered the latter important, as well.

A similar idea was espoused by the sophist Kallikles, featured in Plato's dialogues who conceived of natural law as the law of the strong, and statutory law as the law of the weak. While the former was based on the strength of powerful individuals, the binding force of the latter was derived from a broad consensus of the weak.¹⁴ Yet natural law and statutory law had one quality in common, namely physical force, i.e. the compelled enforcement that guarantees the implementation of norms belonging to both types of law. The law of nature and statutory law are nevertheless separated by an irreconcilable contradiction. Be that as it may, Kallikles did not call for a rebellion against the law of the state in order to enforce the supreme law of nature.¹⁵ The supremacy of the latter was also expounded by Antiphon. He believed that the fundamental law of nature rests in the imperative to preserve one's own life, which he saw as an expression of equality among men and other beings. On these grounds he accepted the possibility of disobedience – but only within reason – to statutory law that violates the designated law of nature.¹⁶

Aristotle played a significant role in ancient disputes on the law. As is well known, his contribution to the development of philosophy, not only that of his own time period, cannot be overestimated. Aristotle rejected the existing concept of cosmic law in favor of legal norms that govern the actions of rational beings, i.e. men, considered the only law. His concept of natural law was based on the theological idea of

¹² H. Welzel, *Theory of the Greece*, Oxford 1956, p. 37 f; idem, *Naturrecht und materielle Gerechtigkeit*, Göttingen 1962, p. 12 f (*Jurisprudenz in Einzeldarstellungen*, 4); E. Wolf, *Griechisches Rechtsdenken*, Vol. 1: *Vorsokratiker und frühe Dichter*, Frankfurt a. M. 1950, p. 39 f.

¹³ *Platona Hippiasz Mniejszy, Hippiasz Większy, Ijon*, ed. and transl. by W. Witwicki, Lwów 1921, p. 20. See also H. Diels, *Die Fragmente der Vorsokratiker, griechisch und deutsch*, Berlin 1935, p. 26 ff; A. Verdross-Drossberg, *Grundlinien der antiken Rechts- und Staatsphilosophie*, Wien 1948, p. 43 (*Rechts- und Staatswissenschaften*, 1).

¹⁴ *Platona Gorgiasz*, ed. and transl. by W. Witwicki, Lwów 1922, p. 31 ff.

¹⁵ A. Menzel, *Kallikles. Eine Studie zur Geschichte der Lehre vom Recht und Stärkeren*, Wien–Leipzig 1922, p. 18.

¹⁶ R. Tokarczyk, *Klasycy...*, p. 33. See also A. Krokiewicz, *Zarys filozofii greckiej. Od Talesa do Platona*, Warszawa 1971, p. 269.

the universe. The relationship between the nature of humans as political animals and their natural objectives was the starting point for his analysis. From this nature, comprised of body and soul, he deduced both the principles of natural law and the norms of statutory law. One must remember that according to Aristotle people by their nature, which is not devoid of selfishness, strive towards a 'collective coexistence,' first by establishing a family, then a commune, and finally a state.¹⁷ Men strive to form a state in order to secure their personal well-being and happiness. The fulfillment of these objectives should be aided not only by the state itself, but also by the law it enacts. It is therefore safe to assume that statutory law was conceptualized by the Greek philosopher as a dictate of reason, not unlike natural law, which *nota bene* he did not define. Both laws served as a means to an end that was, first and foremost, to ensure happiness. Aristotle believed that all laws (as means) and all interests (as ends) are of two kinds: those closely and those loosely bound to the needs of human nature. The former included natural laws and interests, meanwhile the later – statutory laws and interests protected thereunder.

The two types of law differ in scope. Natural law governs the conduct of all men, while statutory law applies only to the relations between the free, equal, and eligible. Furthermore, the laws' essence also differs. Thus, natural law is specific, and statutory law – general.¹⁸ The first type of law serves a particular person in their pursuit of happiness, in accordance with their nature, which is able to tell good from evil, and justice from injustice. Statutory law is comprised of abstract norms addressed to a specified circle of individuals, namely 'the better and the stronger.' It is therefore possible to accept the assumption that natural law is more far-reaching than statutory law. This does not, however, put an end to the differences between the two laws.¹⁹ According to the Stagirite, the law of nature is not a product of the legislator's own accord or initiative, but is instead created by itself. Contrary to statutory law, it lacks written form, because its commands are rooted in the rational nature of man. Unlike the law that comes from the state, natural law is eternal, permanent, and universal. The difference between this law and statutory law is also evident when it comes to their binding force. Since every law directs human beings towards the kind of interests that they are naturally inclined to, because they bring them happiness, the law contains an obligation rather than an imperative to abide by it. Furthermore, Aristotle believed that the interests proposed by natural law 'draw' people closer to the interests set forth by statutory law.

¹⁷ Arystoteles, *Polityka z dodaniem Pseudo-Arystotelesowskiej Ekonomiki*, transl. by L. Piotrowicz, Warszawa 1964, p. 1253a, 1255a (*Biblioteka Klasyków Filozofii*). About Aristotle see for example T. Banaszczyk, *Studia z Arystotelesowskiej teorii społeczno-politycznej*, Katowice 1985 (*Prace Naukowe UŚ w Katowicach*, 705); M. Hamburger, *Morals and Law. The Growth of Aristotle's Legal Theory*, New Haven 1951; M.A. Krapiec, *Struktura bytu. Charakterystyczne elementy systemu Arystotelesa i Tomasza z Akwinu*, Lublin 1963 (*Rozprawy Wydziału Filozoficznego – Towarzystwo Naukowe KUL*, 14); F. Wiplinger, *Ethik und Politik bei Aristoteles*, Darmstadt 1972.

¹⁸ Arystoteles, *Etyka nikomachejska*, transl. by D. Gromska, Warszawa 1956, p. 1180a (*Biblioteka Klasyków Filozofii*).

¹⁹ Idem, *Polityka...*, p. 1333a. See also L. Strauss, *Prawo naturalne...*, p. 174 ff.

Any law's binding force is measured by compliance with its commands and prohibitions, i.e. the precepts of justice. This assumption led to the assertion that non-compliance with the norms of either natural or statutory law is amenable to specific sanctions. With regard to the first law, it is the deprivation of happiness, as the most important human interest. In the case of statutory law, specified offences (not necessarily infringing on fundamental interests) are met with appropriate punishment imposed by the state. Hence, the severity of natural law seems greater than the severity of statutory law. In terms of the relationship between the two types of law in Aristotle's conceptualization, the law that derives from the state should, but does not have to, be a reflection of natural law.²⁰ He nevertheless did not believe the latter to be an ideal system of norms, nor did he explicitly assume its superiority over statutory law. The Greek philosopher maintained that the law enacted by the state, which applied only to some social groups, positively fulfilled its purpose, i.e. protected a system based on slavery consistent with the natural order of things. I shall only add that Plato, known to be Aristotle's master, clearly did not give any consideration to the dualism between natural and statutory law. He conceived of law as reasonability epitomized by statutes, which should be drafted by wise men (the ruling elite) and should accord with justice.

After the sophists and Aristotle, the stoics, who developed their concepts over a long historical period between the fourth century BC and the start of the Common Era, substantially contributed to the natural law doctrines of ancient Greece. From the second century onward, stoicism inspired the legal practice of Roman jurists, finding its reflection in the fundamental codification of Justinian, dating back to the sixth century (*Corpus Iuris Civilis*). For these reasons, the stoics were unable to work out a uniform and concise philosophy of the law, including the discussed issue of the relationship between natural and statutory law.²¹ However, this school of thought's substantial body of theoretical work provides a basis to make several important observations essential in assessing the achievements of the stoics with respect to law. Beginning with Zeno of Citium's doctrine and concluding with the emperor Justinian the Great's codification, there was a slow shift regarding the subject of philosophers' interest from issues concerning the nature of the universe (*logos* and *kosmopolis*) towards matters pertaining primarily to human nature. Thus, at the beginning of the Common Era, natural law issues relating predominantly to man already dominated discussions among the stoics of the so-called younger school of stoicism (especially owing to Cicero and Marcus Aurelius).

In order to understand the stoics' ideas of the law, it is imperative to look at one of the basic terms of the philosophy they formulated, namely the word 'pneuma,' which stands for a form of structuring matter. *Pneuma* was supposed to resemble an elusive

²⁰ Arystoteles, *Polityka...*, p. 1336a. See also idem, *Etyka...*, p. 1183a.

²¹ See W. Tatarkiewicz, *Historia filozofii*, Vol. 1, p. 172 ff; K. Algra et al. (eds.), *The Cambridge History of Hellenistic Philosophy*, Cambridge 1999, p. 34 ff; B. Inwood (ed.), *The Cambridge Companion to the Stoics*, Cambridge 2003, p. 12 f (*Cambridge Companions to Philosophy, Religion and Culture*); W. Koriatowski, 'Myśl późnych stoików', *Życie i Myśl*, No. 11/12 (1967), p. 32 ff; Diogenes Laertius, *Żywoty i poglądy słynnych filozofów*, transl. by I. Krońska et al., Warszawa 1968, p. 409; M. Pohlenz, *Die Stoa. Geschichte einer geistigen Bewegung*, Zürich 1948, p. 21 ff.

breath of warm air. In this nature of the universe the laws of nature were in effect, shaping the cycle of transformations of its components (i.e. *fatum*, *logos*, reason, God, and others). Whereas when it comes to people themselves natural laws operated as a form of divine laws of nature, with which they shared such qualities as providential character, reasonability, and fatalism. The stoics perceived natural laws to be a manifestation of the laws of nature that existed solely within man. Consequently, they took the compatibility of natural laws with the commands of the law of nature for granted. In addition, they advocated the same kind of compatibility with respect to the relationship between natural and statutory law, finding no rational grounds for conflict. Simultaneously, they made the assumption that statutory law is positioned below natural law. They did not, however, question the validity of the law that comes from the state if it accorded with the commands of natural law. Chrysop explained the superiority of this law, calling it *the king of all things, divine and human, the judge of good and evil, justice and injustice, the highest ruler of creatures, social by nature*. The stoics (Seneca among them) believed that statutory law came after natural law because it did not exist in the pre-social state of nature.²² Meanwhile, the lofty ideals of equality, dignity, and fraternity among men, which are, so to speak, sanctioned by natural law, were supposed to have already been conceived in that state. They therefore drew the conclusion that statutory law should conform to the aforementioned ideals, which means conforming to natural law as that which precedes it.

Seneca as well as Cicero held that a norm of statutory law that opposes natural law does not deserve respect, or even the right to be referred to as law. In compliance with the stoic doctrine, statutory law should be no more than a reification of natural law limited in time, territory, and subject. The two types of law do however differ with regard to sources, scope, binding force, and sanctions. This issue has already been partially discussed while characterizing the premises of stoicism. At this point I would also like to add that the founders of this philosophical current considered the written form to be statutory law's characteristic feature, specific to it only. Furthermore, they derived the knowledge of natural law from the rational abilities of man, who alone should be able to read the commands of this law. Cicero treated the precepts of natural justice as a manifestation of a 'common consensus' (*consensus omnium*) regarding the essential content of those commands or prohibitions.²³ He thus adopted a subjective criterion for understanding the content of the principles of natural law. With respect to the sanctions for breaches of both types of law, the stoics believed that with natural law the

²² Seneca, 'O gniewie' in idem, *Pisma filozoficzne*, transl. by L. Joachimowicz, Vol. 1, Warszawa 1965, p. 47; idem, *Listy moralne do Lucyliusza*, transl. by W. Kornatowski, Warszawa 1961, p. 103 ff (*Biblioteka Klasyków Filozofii*). See also R. Tokarczyk, *Klasyki...*, p. 63; L. Joachimowicz, *Sceptycyzm grecki. Wybrane zagadnienia*, Warszawa 1972, p. 248 f (*Myśli i Ludzie, 1. Filozofia Starożytna i Średniowieczna*).

²³ Cicero, 'Zagadnienia najwyższego dobra i zła' in idem, *Pisma filozoficzne*, Vol. 3, transl. by W. Kornatowski, Warszawa 1961, p. IV 20, 25; V 12, 34. See H. Waśkiewicz, "De legibus" Cicerona – pierwszy w dziejach myśli europejskiej system filozoficzno-prawny, *Roczniki Filozoficzne KUL*, Vol. 3, No. 2 (1960), p. 45 f; W. Kornatowski, 'Doktryna polityczna Cyncerona jako doktryna czasów przełomowych', *Życie i Myśl*, Vol. 3/4, 5/6 (1965), p. 67 ff.

punishment was 'dealt out' by the nature of the universe itself, whereas in the case of statutory law – by the arbitrary will of the state legislator. The most important command for both types of law should be to *live in agreement with nature, reason, and virtue*. It is worth noting that the Roman jurists who looked to the stoic concept of all things introduced the notion of the nature of things (*rerum natura*), from which they drew the legal principles adequate for specific legal relations (*ratio naturalis*).

The doctrine of St. Augustine belongs partially among the ancient, and to a certain extent, the Middle-Age conceptualizations of the relationship between natural and statutory law. Unlike the concepts of some of the Greek thinkers discussed, the philosophy of the Bishop of Hippo – modeled on the idealistic views of Plato – had strong religious foundations in the form of the Christian faith and theology. St. Augustine's in-depth analysis of natural law is contained in his main work *De Civitate Dei* (413-427).²⁴ In this treatise he famously introduced a distinction between states, dividing them into two opposing types – the perfect 'divine state' (*civitas dei*) and the degenerate 'diabolical state' (*civitas diaboli*). A derivative of the latter type, the 'earthly state' (*civitas terrena*), nevertheless possessed some elements of the divine state's order. In the ideas of the Christian thinker, the term 'order' meant the 'internal harmony' of the universe, based on the principle of supremacy of that which is divine as a fundamental norm of the existence and functioning of all creatures. With order construed in this manner, St. Augustine identified the notion of law in general. Simultaneously, however, he offered more in-depth reflections on the law. Just like the stoics, he differentiated between three kinds of law, namely eternal law (*lex aeterna, lex dei, lex divina*), natural law (*lex naturalis*), and temporal or statutory law (*lex temporalis*).²⁵

The aforementioned three-way partition of the law was based on the exact same assumption as the idea of order, i.e. the principle of hierarchy. From this principle stemmed the supremacy of divine law over other types of law, due to the unique permanency and universality that characterized it. The Christian philosopher defined this law as simply *divine reason and God's will*. The 'participation' of eternal law in the rational nature of man (in his or her conscience, soul, and heart) was believed to manifest itself in the form of natural law. Apart from being rational, the law was also ascribed moral

²⁴ Augustyn, *Państwo Boże*, transl. by W. Kubicki, Vol. 1-2, Warszawa 1977. The literature about him is very comprehensive. See among other publications G. Bonner, *St. Augustine of Hippo. Life and Controversies*, Norwich 1986; G. Bardy, *Święty Augustyn. Człowiek i dzieło*, transl. by Z. Kobylańska, Warszawa 1956; H.A. Deane, *The Political and Social Ideas of St. Augustine*, New York 1963; É. Gilson, *Wprowadzenie do nauki świętego Augustyna*, transl. by Z. Jakimiak, Warszawa 1953; W. Kornatowski, *Spółeczno-polityczna myśl św. Augustyna*, Warszawa 1965; O. Schilling, *Die Staats- und Soziallehre des hl. Augustinus*, Freiburg 1910.

²⁵ See also Augustyn, *Dialogi filozoficzne*, transl. by A. Świderkówna et al., Kraków 1999 (*Filozofia i Religia*): 'O porządku' (p. 151 ff); 'O wolnej woli' (p. 493 ff), 'O naturze dobra' (p. 829 ff). Also idem, 'O kazaniu Pana na Górze' in idem, *O kazaniu Pana na Górze, Do Symplicjana o różnych problemach, Problemy ewangeliczne*, transl. by S. Ryznar, J. Sulowski, Warszawa 1991, p. 21 f (*Pisma Starożytności*); idem, *O Trójcy Świętej*, transl. by M. Stokowska, Poznań 1963, p. 67 ff (*Pisma Ojców Kościoła w Polskim Tłumaczeniu*, 25); idem, *Objaśnienia psalmów*, transl. J. Sulowski, Vol. 2, Warszawa 1986, p. 37 f.

value and named accordingly as intimate law (*lex intima*). Despite the lack of conflict between divine and natural law – which would contradict the principle of clear subordination of the latter to the former – the two types of law were not identical. The difference between them came down to eternal law manifesting itself in human nature as objective order, and natural law being its mere subjective expression. It may be assumed that the fundamental dictates of natural law have been imprinted on human nature by God. According to the Bishop of Hippo they then, as a rule, translate into moral norms and precepts of justice. Therefore even the greatest wrongdoers are not deprived of them. By means of natural law, eternal law should be a permanent and absolute source of temporal law. This leads to the conclusion that statutory laws that oppose natural law, and therefore by implication also divine law, are by their very nature unjust and do not command obedience. St. Augustine found the direct confirmation of this thesis in Christianity. He believed that God himself carved the path for temporal law (via *lex divina*) dictating its underlying assumptions to Moses on Mount Sinai. The need to lay down man-made law stems from the human inclination towards sin, evil, and injustice.

Through temporal law, divine and natural law gain the support and authority of secular rule. The main function of the law that comes from the state – as the Bishop of Hippo maintained – is to safeguard peace (*pax*) and order (*ordo*) in interpersonal relations. It does not, however, have to explicitly repeat the moral contents found in eternal and natural law, which, of course, is not to say that it may contradict them. What is more, it should not be limited merely to duplicating the commands and prohibitions they contain, for each of the laws has a different purpose to fulfill.²⁶ Thus divine law concerns the eternal, extraterrestrial life of man. Meanwhile natural law aims at assisting humans in achieving their individual goals, which constitute the reification of divine law's objectives. The objective of human law, on the other hand, is expressed through the protection of the aforementioned *pax* and *ordo*. There is one more difference between these two types of law and temporal law. The observance of eternal and natural law is generally of voluntary character, although men should certainly feel the need and obligation to respect the norms of these laws. Compliance with temporal law, in contrast, entails the possible application of state coercion.

Without a doubt, among the classical thinkers of natural law, and concurrently, the most distinguished thinkers in history, there is St. Thomas Aquinas. Even today, his philosophy constitutes one of the most important pillars of Catholic doctrine, partially resting on the adapted concepts of Aristotle. Aquinas' contribution to the development of issues concerning the relationship between natural and statutory law is impossible to overestimate and appears to surpass even the output of St. Augustine and other earlier philosophers concerned with this subject.²⁷ It should be noted that just like the Bishop

²⁶ See foot-note no. 25 and also S. Mystkowski, *Idea prawa naturalnego w starożytności i u scholastyków (studium prawno-etyczne)*, Warszawa 1928, p. 26 f; A.R. Vidley, W.A. Whitehouse, *Natural Law. A Christian Re-consideration*, London 1946, p. 43 f; E. Keller, 'O katolickiej teorii prawa natury', *Eu-bemer*, No. 3 (1964), p. 37 f.

²⁷ About Aquinas see for example É. Gilson, *Tomizm. Wprowadzenie do filozofii św. Tomasza z Akwinu*, transl. by J. Rybałt, Warszawa 1998; J. Grzybowski, *Miecz i pastorał. Filozoficzny uniwersalizm sporu*

of Hippo, St. Thomas Aquinas adopted the idea of the triad of law based on the rule of hierarchy, distinguishing between eternal (divine), natural, and human law. With regard to the relationship between the first two types of law it was straightforward and apparent to the Italian medieval thinker. Natural law was simply considered a reflection of eternal law, i.e. the law of the highest order, in the human mind, occurring at the same intellectual level at which a given person's cognitive abilities are shaped. In other words, natural law is *eternal law existing within us through participation*. Due to the essence of natural law indicated above, it may be characterized as devoid of independent existence. In fact it functions exclusively as a determination, made by reason, between good and evil according to divine law. Therefore, there is no conflict between natural and eternal law, on the contrary – natural law is by its very nature consistent with eternal law.

Aquinas believed that human law (*lex humana*), placed at the bottom of the hierarchy in the triad of law, should therefore accord with natural law, and thus also divine law. It is enacted by the state (with the exception of customary law) and divided into several categories (e.g. private and public law, and written and unwritten law). The scope of human law extends to include 'positive divine law' (*lex divina*), whose norms were contained in the Holy Scripture for Christians, and e.g. the Koran for Muslims, constituting an important source of support for the law laid down by state authorities. In advance of further analysis of St. Thomas's ideas it should be noted that he treated the law as an important instrument in the functioning of the state, which should be a 'perfect community' (*communitas perfecta*), and together with the Church should create conditions for gaining salvation in addition to facilitating adequate financial sustainability.

While reflecting on the issue of the relationship between statutory and natural law the Italian philosopher tended to assert that the first *derives from* the second. Such an approach signified the existence of a certain cognitive process in which reason participates, acting in conformity with human nature (i.e. the essence of humanity) and according to individual intellectual properties, which allow one to act in obedience to one's conscience (*synderesis*). The criterion applied to assess said actions was the principle of justice, understood by St. Thomas in various ways, but always indicating the obligation to do good that stems from natural law. In the event that human law fails to meet the standards of justice, then – being unjust – it is not in fact a law at all. Notwithstanding, it commands obedience, but only when the 'common good' demands it. But how should this duty be evaluated if the law laid down by the authorities is the creation of a specific group of people who legislate guided by their own reason, thus acting subjectively? While searching for the answer Aquinas indicated the need to heed the voice of

o charakter władzy. Tomasz z Akwinu i Dante Alighieri, Kęty 2006 (*Fundamenta*, 46); A. Kenny, *Tomasz z Akwinu*, transl. by R. Piotrowski, Warszawa 1999 (*Dawni Mistrzowie*); M. Łuszczzyńska, *Ubi ratio, ibi ius. Doktryna prawna świętego Tomasza z Akwinu*, Lublin 2013; Cz. Martyniak, *Obiektywna podstawa prawa według św. Tomasza z Akwinu*, Lublin 1949 (*Rozprawy Wydziału Nauk Społecznych – Towarzystwo Naukowe KUL*, 6); A. Riklin, *Die beste politische Ordnung nach Thomas von Aquin*, St. Gallen 1991 (*Beiträge und Berichte – Institut für Politikwissenschaft, Hochschule St. Gallen*, 167); J.A. Weisheipl, *Tomasz z Akwinu, Życie, myśl i dzieło*, transl. by Cz. Wesołowski, Poznań 1985.

conscience even if it contradicts conventional wisdom. This kind of behavior, however, poses the danger of arbitrary interpretation of the law's binding force. With this in mind the philosopher postulated that the laws an individual holds unfair should not bind him or her in their 'conscience,' but nevertheless be respected in the name of the common good.²⁸ Yet, in no case may they violate the commandments of God. Otherwise, any obligation to observe unjust law is no longer deemed to stand. Although St. Thomas Aquinas presumed that human law derives its binding force from natural law, he nonetheless made one notable exception to this rule, namely that natural law is not the source of those among the norms of statutory law that 'specify' natural law (e.g. provisions setting forth particular penalties for given offenses). In this regard there is no agreement between human and natural law of which to speak, because the latter simply does not govern these types of issues. What is more, total compliance between statutory law and natural law is hampered by yet another obstacle. The former of the laws regulates that which is variable, while the latter regulates that which is permanent. Aquinas maintained that natural law can also undergo transformations through 'additions' that enrich its foundations, and even by way of 'abrogating' some of its principles, however limited solely to the so-called secondary precepts (*secunda principia*) in the exclusive form of Papal dispensations.²⁹ A brief analysis of the philosopher's ideas leads to the conclusion that the relationship between statutory law and natural law should not be spoken of in terms of compliance between the former and natural law, as much as a lack of any contradiction.

Also worth mentioning at this point are the concepts of another distinguished medieval thinker – Marsilius of Padua – who nevertheless is not considered a classical natural-law theorist, as he did not concern himself with the subject to a larger degree. However, he contributed interesting and original ideas to the contemporary discourse on the law. Marsilius by and large rejected the typical perception of medieval Christianity (not only of the views of St. Thomas Aquinas but also nominalists such as John Duns Scotus and William of Ockham) regarding the normative character of natural law expressed in its absolute binding force.³⁰ Furthermore, he also rejected the rule of supremacy. He saw this law more as an idea, a demand and a pattern of behavior, albeit valid and thus worthy of following. By no means does the failure to comply with the law bring about any legal consequences, unlike in statutory law, which should be – this was a *novum* in medieval thought – based on sanctioning coercive measures and put in

²⁸ See Tomasz z Akwinu, *Suma teologiczna*, transl. by P. Belch, Vol. 1-35, Londyn 1962-1998.

²⁹ See especially M. Łuszczzyńska, *Ubi ratio, ibi ius...*, p. 101 ff; M. Sadowski, *Godność człowieka i dobro wspólne w papieskim nauczaniu społecznym (1878-2005)*, Wrocław 2010, p. 87 ff (*Prace Naukowe Wydziału Prawa, Administracji i Ekonomii UW*; *Habilitacje*, 2).

³⁰ See Marsyliusz z Padwy, *Obrońca pokoju*, transl. by W. Seńko, Kęty 2006, *passim* (*Biblioteka Europejska*). About his ideology see J. Baszkiewicz, *Mysł polityczna wieków średnich*, Warszawa 1972, p. 76 ff; C. Nederman, *Community and Consent. The Secular Political Theory of Marsiglio of Padua's "Defensor Pacis"*, London 1995, p. 26 ff; J. Quillet, *La Philosophie politique de Marsile de Padoue*, Paris 1970, p. 27 ff; A. Wójtowicz, *Model władzy państwowej Marsyliusza z Padwy*, Katowice 1977, p. 22 ff (*Prace Naukowe UŚ w Katowicach*, 187).

specific form. The ideas on statutory law espoused by Marsilius may be considered to have paved the way for the doctrine of legal positivism, which developed around the mid-nineteenth century.

Together with the advent of modern times that commenced in Europe during the Renaissance, extending through the final part of the fifteenth century and the subsequent centuries, the religious considerations and justification for natural law in the still developing natural-law doctrines receded into the background. Between the sixteenth and the seventeenth centuries the concepts of this law gradually took on a distinctly secular character, however at least some authors continued to invoke a divine factor – sometimes identified with nature – as the driving force of all things, including the state and law. Nonetheless, behind the notion of the creator of this reality more and more often stood man, as a single individual or as a society, with needs and endeavors which were considered natural and clear. Although people did not yet attempt to equate themselves with God or negate His existence, or even claim perfection, they nevertheless in many modern doctrines became increasingly independent and autonomous, and thus more responsible for themselves. Several modern thinkers (e.g. de Groot, Spinoza, Hobbes, Locke, and Rousseau) expressed the conviction that every man is vested with a natural right to liberty, freedom of action, feeling of safety, and private property.

The gradual drifting away of medieval values led to a change in the purpose of natural-law doctrines. They ceased to serve as a theoretical foundation and a manner of interpretation based firstly on slavery, and later on the feudalism of the hierarchical *status quo* in the social and political arena, but rather rationalized – for instance in the treatises of the founders of the bourgeois school of natural law in the seventeenth century – the changes in those spheres, which took place mainly due to burgeoning capitalist relations.³¹ The early stages of this social system, which of course progressed fastest in Western Europe, fell during the period when absolute monarchy was being development in that part of our continent (the sixteenth to eighteenth century). This fact is not without influence with regard to the matter discussed herein, as the proponents of the absolute system attached much importance to its legal considerations. Thus they widely accepted statutory law as a foundation of absolute rule. Even in an early phase of its development (i.e. the sixteenth century), one of the main theoreticians of absolutism, Jean Bodin, believed that the authority to enact and abrogate the law is the highest expression of sovereign power.³² It is worth noting that he defined the law as the rightful command of a sovereign, i.e. the monarch. Simultaneously, he assumed that statutory law could not be, or at least should not be contrary to natural (divine) law. Ultimately, it comes from the sovereign, who by his very nature clearly does not pass unjust laws, although such an eventuality is not entirely impossible. Therefore, it may be ascertained that in the period of absolute monarchy the role of statutory law, both

³¹ See J.M. Kelly, *Historia...*, p. 181 ff; H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, transl. by S. Amsterdamski, Warszawa 1995, p. 336 f; M. Borucka-Arctowa, *Prawo natury jako ideologia antyfeudalna*, Warszawa 1957, p. 43 ff.

³² J. Bodin, *Sześć ksiąg o rzeczypospolitej*, transl. by Z. Izdebski et al., Warszawa 1958, p. 227, 256, 264.

in theory and in practice, rose tremendously in comparison to prior historical periods. It thus comes as no surprise that, as a rule, the concepts of thinkers who served this political system pushed the issue of natural law, which undeniably lies outside an absolute ruler's scope of influence, into the background. Nevertheless, the political and legal doctrines that predominantly represented the interests of the bourgeoisie of Western Europe, which was not a part of the political elite and which, in the period of absolutism, grew in economic power and strived to justify a divergent model of government in order to gain equal rights for itself as a social stratum, painted a different picture.

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