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THE JUST LAW AND ITS EVALUATION IN LEGAL AND POLITICAL THOUGHT AND PRACTICE IN PRE-CONSTITUTIONAL EUROPE (UP TO THE 18TH CENTURY). GENERAL REMARKS

Abstract

The question about a good, equitable and just law has been posed for centuries. It concerned the investigation of the essence of the law itself as well as the quest for a measure with which to evaluate the law, and finally, the indication of institutions to carry out such an evaluation and the determination of its possible consequences in the event of a negative outcome.

Today, in many countries, this is the domain of the judiciary, with constitutional norms being the criterion for evaluation. The adoption of such an arrangement is associated with the recognition of the supremacy of the constitution as a legal act.

Institutional forms of examining the constitutionality of statutes, as well as the compliance of the actions of the executive power with the provisions of statutes, did not develop on a larger scale until the end of the 19th century and grew out of the tradition of judicial review on the one hand, and the concept of the *Rechtsstaat* on the other. However, the road leading to the solutions adopted at that time was long, and it is worth tracing back. This article will present the main directions

of solutions starting from antiquity and ending at the end of the 18th century, when the doctrinal background for the political structures introduced from the 19th century onwards had already developed.

We describe the consequences of the Greek belief that the law is good by definition, Roman tradition that the law is the measure to solve the practical cases, the Middle Ages' dispute on the nature of the king's legislative power defined by two formulas from *Digesta*, *'princeps legibus solutus'* and *'princeps legibus alligatus est'*. Finally, we present the thought of Edward Coke, chief justice of the Westminster Courts, on the supremacy of the common law, particularly expressed in *Bohnam* case (1610), and the activity of French *parlements* (supreme courts), in the 16th–18th centuries as the roots of judicial review procedure and the *Rechtsstaat* concept.

KEYWORDS

customary law, statutes, legislative power, judicial review

SŁOWA KLUCZOWE

prawo zwyczajowe, ustawy, władza ustawodawcza, kontrola sądowa

INTRODUCTION

The question about a good, equitable and just law has been posed for centuries. It concerned both the investigation of the essence of the law itself and the identification of the constitutive features of a decent law, as well as the quest for a measure with which to evaluate the law, as well as the presentation of the boundaries that limit the legislative power, and finally the indication of individuals (or institutions) to carry out such an evaluation and the determination of its possible consequences in the event of a negative outcome.

Today, in many countries, this is the domain of the judiciary, with constitutional norms (including constitutional principles) being the criterion for evaluation. The adoption of such an arrangement is associated with the recognition of the supremacy of the constitution as a legal act. The examination of the constitu-

tionality of statutes is an element of the system standard described in the treaties founding the European Union and recalled in many EU documents.[1] In Poland, according to the Constitution, the body that should perform this type of tasks is primarily the Constitutional Tribunal, but – as part of the so-called dispersed control – they can also be carried out by common courts in the course of their day-to-day activities.

Institutional forms of examining the constitutionality of statutes, as well as the compliance of the actions of the executive power with the provisions of statutes, did not develop on a larger scale until the end of the 19th century and grew out of the tradition of judicial review on the one hand, and the concept of the *Rechtsstaat* on the other. However, the road leading to the solutions adopted at that time was long and it is worth tracing back. This article will present the main directions of solutions starting from antiquity and ending at the end of the 18th century, when the doctrinal background for the political structures introduced from the 19th century onwards had already developed.

The way of looking at the issue of evaluation of the law and the consequences of such an assessment has undergone multiple changes over the centuries. This resulted from the way the law itself was understood, and especially how its sources were perceived. At a time when customary law prevailed, the evaluation focused primarily on how it was enforced, although it was also important who 'read' customary law and whether they did that accurately enough (e.g., whether they did not alter its content). When customary law began to be supplemented on an increasing scale by statutory law, the evaluation of man-made law, usually also including the entities creating this law, gained in importance. In this way, the goals and intentions of the lawmaker (i.e., the king and possibly the bodies with whom the ruler made the law, but also – with regard to ancient times – the people who initiated the adoption of a new law) also became subject to evaluation. This inevitably meant the need to establish relatively objective criteria according to which such assessments would be made. And this was closely related to the way the functions and objectives of law were perceived. This is perfectly exemplified by ancient Greece and Rome.

[1] For instance, the European Commission's 2014 communication reads that '[d]emocracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process'. Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

ANCIENT GREECE

The Greek *polis*, in particular Athens, was characterised by the perception of the good of the community as the goal of law.[2] The relationship between *themis* and *dikē* is of fundamental importance for understanding the way the law works and its possible evaluation. The Greeks understood *themis* as a general rule presumably derived from the gods and representing a common feeling of what is right.[3] On the other hand, the word *dikē* meant the concrete application of this rule in the form of – as we would say today – a legal norm or a judiciary ruling. It is important to note that there was no hierarchical relationship of dependence between the two concepts.[4] Over time, the concept of *nomos* emerged, initially encompassing 'the abstract ideal of order, and that simply of custom observed in practice',[5] and then – already in what came to be called a 'democratic *polis*' – the law created by the ecclesia and binding on the inhabitants of Athens (or other cities where the legislative process had already developed, such as Sparta), but ensuing from the old custom and generally observed rules. This is why obeying and executing the law was considered the basic duty of a citizen. '[T]he Greeks […], although free, are not free in everything: they have a master, namely the law [...]' – this is a statement by the king of Sparta, Demaratos, often quoted by Herodotus.[6]

It follows from the above remarks that for the ancient Greeks, the law had an inherently positive content. This is probably why they exercised special care to prevent the law from being changed, or to secure such a change with strict conditions to protect it against ill-considered action. The most extreme example is the procedure used by the Locrians living in the southern parts of the Apennine Peninsula: according to Demosthenes, anyone who came up with a proposal for

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[2] This is the goal set for the law e.g., by Plato: '[..] just as we deny that laws are true laws unless they are enacted in the interest of the common weal of the whole state', *Laws*, 715b. Many authors point out that in the Greek *polis*, the law was the basic bond between citizens in a community, cf, e.g., Christian Meier, *Powstanie polityczności u Greków*, Wyd. Teologia Polityczna, Warszawa 2012, 361; Konstanty Grzybowski, *Historia doktryn politycznych i prawnych. Od państwa niewolniczego do rewolucyj burżuazyjnych*, PWN, Warszawa 1967, 43.

[3] As John W Jones wrote: '[…] so did *themis* take on the meaning of what was not so much expedient as morally incumbent upon gods and men alike. Thus, *themis* began to imply some wider principle of which it was at once the expression and application', *The Law and Legal Theory of the Greeks*, Oxford 1956, 29–30, quoted from John M Kelly, *A Short History of Western Legal Theory*, Clarendon Press, Oxford 1992, 7.

[4] As Rudolf Köstler wrote, '*Themis* is a law of the heavens, *dikē* the earthly law that imitates it', *Die homerische Rechts- und Staatsordnung*, in Erich Berneker (ed), *Zur griechischen Rechtsgeschichte*, Darmstadt 1968, 180; quoted from Kelly ibid 27.

[5] Jacqueline de Romilly, *La loi dans la pensée grecque des orgines à Aristotle*, Paris 1977, 23.

[6] Herodotus, *Histories*, 7.104, quoted from Kelly (n 3) 10.

a new law, which was then rejected, was doomed to die.[7] In other *polis*, less drastic methods were used, but in general, the legislative process was fraught with numerous rigours. In Athens, for example, a change in the law took the form of a trial: the initiator of a change had to bring a kind of charge against the existing regulations and prove, while maintaining all formal requirements, his allegations (and thus the need for change), while he had to reckon with the fact that if he violated formalities or his proposal was found by the audience to be in breach of fundamental values, he could be accused of unworthy behaviour (which undermined his civic status). Over time, however, these formal, strict requirements were eroded and in the final period of democratic Athens (4th century BCE), the legislative process became much simpler and subject to political goals.

In the Athenian community, however, it was still believed that the durability of the law was a superior value and – in view of the increasing number of laws passed by various coteries – attempts were made to consolidate respect for the old law as part of the civic education of young Athenians. A good example of such efforts is the text of the oath of the Athenian ephebes. It was inscribed on a stele after the defeat of Athens in the Battle of Chaeronea (338 BCE), but it well reflects the earlier long tradition of fostering the civic attitudes of the citizens of Athens. The oath of the ephebes includes a commitment to obey the law, but it is by no means blind obedience: 'I will obey whoever is in authority and submit to the established laws and all others which the people shall harmoniously enact. If anyone tries to overthrow the constitution or disobeys it, I will not permit him, but will come to its defence, single-handed or with the support of all'.[8] As Marek Węcowski aptly notes, an ephebe 'is obliged to critically assess the political reality. Politicians can act in a way that is unfavourable to the *polis*. They can also enact laws that are harmful to it and simply bad. In such a situation, it is the citizen, whether alone, individually or 'with the support of all', who has the sacred duty to resist them. This obligation becomes particularly strong when someone – and thus anyone, including the rulers – would try to overthrow the laws of the homeland'.[9]

A legal change of the law, i.e., recognition of the existing legal status as defective or insufficient, was possible by entrusting a specific person with the role of the lawmaker and vesting him with broad legislative powers. Such an office was to be entrusted to particularly respected and experienced individuals appointed for a fixed term of office, which was to prevent it from turning into tyranny. Such law-makers were, for example, Solon and Cleisthenes in Athens – both of whom introduced reforms that led to the creation of Athenian democracy. However,

[7] Demosthenes, *Against Timocrates*, 139.
[8] 'The Athenian Ephebic Oath', The Classical Journal, 1918, 13 (7), 499.
[9] Marek Węcowski, *Tu jest Grecja. Antyk na nasze czasy.* Wyd. Iskry, Warszawa 2023, 90–91.

this was an extraordinary solution, resorted to in crisis situations where deeper changes were required. At the same time, however, the Greeks were aware of the fact that in specific cases, the modification of the existing law is sometimes desirable and justified by philosophical reasons. For example, it is possible, based on the principle of equity, to correct the law in an individual case and, for instance, with the consent of the parties involved, to hand over the resolution of the dispute to arbitrators (instead of judges strictly bound by law).[10] According to Aristotle, this is not the creation of a separate basis for a legal decision but acting within the framework of restorative justice.[11]

In general, as can be seen, there were no procedures in ancient Greece for reconciling the law with superior values, there were no procedures for invalidating the law, and at the same time, there was no shortage of views on what the law should be like[12] and when it could be 'flexibly' applied. This was accompanied by the belief that the law is good by definition, so any attempt to change it deserves a negative assessment, or at least procedural obstacles aimed at convincing the inhabitants of the *polis* of the real need to enact a new law. This was to be controlled primarily by citizens. However, it should be kept in mind that the definition of a citizen of the Greek *polis* presumed active, direct involvement for the common good, including active, almost daily participation in various bodies of the *polis*. This was clearly expressed by Pericles in his famous Funeral Oration, praising Athenians '[…] for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless'.[13]

ANCIENT ROME

The experience of ancient Rome has yielded two approaches to the issue of legal evaluation. On the one hand, there is an attempt to transpose the thoughts of the Stoics about the eternal, harmonious order of the cosmos into the realm of law and the search for constant, immutable and universally binding principles to which every law should be subordinated, and, on the other hand, treating law as a tool for solving current problems in a natural, i.e., reasonable, way and with

[10] This is mentioned by Aristotle in *Rhetoric*, 1.13.19.

[11] Aristotle, *Nicomachean Ethics,* 5.10.5.

[12] 'Good law must necessarily mean good order', wrote Aristotle, *Politics*, 7.4.5.; 'we deny that laws are true laws unless they are enacted in the interest of the common weal of the whole state' – this, in turn, is the view quoted above from Plato, *Laws*, 715b.

[13] Thucydides, *History of the Peloponnesian War*, translated by Richard Crawley, JM Dent & Sons, London 1910, 94.

reference to the principle of equity. Cicero's treatises were an example of the first approach. In his treaty *On the Laws*, Cicero wrote that 'the beginning of right should be drawn from law. For this is a force of nature; this is the mind and reason of the prudent man; this is the rule of right and wrong. […] In fact, let us take the beginning of establishing right from the highest law, which was born before any law was written for generations in common or before a city was established at all'.[14] In another text, Cicero characterised natural law as universal and unchangeable. As he wrote, 'nor will it be one law at Rome and a different one in Athens, nor otherwise tomorrow than it is today; but one and the same Law, eternal and unchangeable, will bind all peoples and all ages […]'.[15] For Cicero, natural law understood this way was to be the decisive criterion for assessing the legal nature of the man-made law. Consequently, he believed that the mere fact that a law was passed by a popular assembly, even with the approval of the senate, did not determine whether it was a just law; for its content cannot violate these eternal, higher principles. And he concluded that in the event of such a collision, an enacted rule does not deserve to be called law: 'But if rights were established by peoples' orders […] there would be a right to rob, a right to commit adultery, a right to substitute false wills if those things were approved by the votes or resolutions of a multitude'.[16] It should be noted that for Cicero it was no less important to realise the basic purpose of laws; in his opinion, 'laws have been invented for the health of citizens, the safety of cities, and the quiet and happy life of human beings'.[17] Lawmakers should, therefore, always keep these objectives in mind.

Cicero, however, did not comment on what the formal consequences of finding that a particular decision of the legislature violates the eternal, natural rules and in whom such authority would be vested. The postulate of conformity of statutory law with the abstract formula of the law of nature was, therefore, in his case, the view of a philosopher who considers and defines the constitutive features of good law. As John M Kelly rightly notes, Cicero's views provided for the later, Christian world, a framework to which a more absolutist role for natural law could readily be fitted'.[18] This will be discussed further below. However, Cicero was also an active politician, appearing in public and engaging as a defence attorney or prosecutor in court proceedings. In his speeches delivered in these roles, he did not contest the applicable law; on the contrary, he tried to show that many rules of substantive law derive from natural law, such as the right to self-defence or the

[14] Cicero, *On the Laws*, in *The Republic and The Laws*, translated by David Fott, Cornell University Press, Ithaca and London 2014, Book I. 19, 136.
[15] Lactantius, *Divinae institutiones*, 6.8, quoted from Kelly (n 3) 58.
[16] Cicero (n 14) Book I. 43, 145.
[17] Cicero (n 14) Book II. 11, 157.
[18] Kelly (n 3) 59–60.

prohibition of cheating or harming others, which further strengthens the need to observe them. In his famous speech, 'Pro Cluentio', he even presents the view that the good of the state, which depends on the enforcement of laws, can sometimes justify accepting their dubious content: even if one were to admit that the formal distinction made by the law, between the status of a senator and persons of lower rank, is bad, 'it is a far greater shame, in a state which rests upon law, to depart from law'.[19]

In republican Rome (and at the beginning of the Principate), however, the above-mentioned second approach was also possible, which could lead – in the event of a negative assessment of a specific norm – to a formal correction of the existing law. A good example of such a situation is the case of Verres (in which, by the way, Cicero played an important role). However, the discussion of this case should be preceded by two comments. First of all, it is necessary to recall the famous definition of the law *ius est ars boni et aequi* and recall – as Marek Kuryłowicz writes – that '*ars* was understood by the Romans [...] as a practical skill, as a kind of technique of applying law'.[20] Therefore, it was not a question of seeking a general definition of what is good or right but of resolving a specific case based on these categories. Ernst Levy explains that '"natural" was to them not only what followed from physical qualities of men and things, but also what, within the framework of that system, seemed to square with the normal and reasonable order of human interests and, for this reason, not in need of further evidence'.[21] The decency of the law was, therefore, to be determined by the practice of its application. This is related to a second preliminary remark. In the Roman state, until the middle of the 2nd century CE, praetors played a fundamental role in the application of law. The office of praetor was established in 367 BCE and was second only to the office of a consul. The praetor, like all the officials in republican Rome, was elected for a term of one year. His special powers included ensuring the application of law by the Romans. This involved granting legal protection, i.e., determining whether the party submitting a petition to the praetor was entitled to an action in a specific case. The praetor did not decide the case himself, but his admission of the claim meant that the dispute was formally established and allowed the case to be referred to a private judge.[22] An essential part of the praetor's practice was an edict issued upon assumption of office, setting out how he would apply the law during his term. Usually, he repeated the provisions

[19] Cicero, The Speech in Defence of Aulus Cluentus Habitus, LIII, in *The Speeches of Cicero*, translated by HG Hodge. Harvard University Press, Cambridge, MA 1927, 379.
[20] Marek Kuryłowicz, *Prawo rzymskie. Historia, tradycja, współczesność*, UMCS, Lublin 2003, 36.
[21] Ernst Levy, *Natural Law in Roman Thought*, Studia et Documenta Historiae Iuris, 1949, 7.
[22] Cf Jan Zabłocki, Anna Tarwacka, *Publiczne prawo rzymskie*, Wyd. Liber, Warszawa 2005, 51.

of his predecessor's edict to a large extent, but he could also – if he found this necessary – introduce his own arrangements. The praetor did not formally create law, but by applying the existing *ius civile*, he adapted it to changing needs. This relationship between *ius civile* and the effect of corrections made by successive praetors (referred to in Roman sources as *ius honorarium*) was described by Papinian in the well-known formula: '*ius praetorum est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia*'.[23] The praetor thus clarified *ius civile*, supplemented it, and sometimes even rectified it (relying on the principle of justice and equity).[24] It follows that the praetor, in considering a specific case, could effectively block the validity of a provision of civil law that he considered unjust (but could not repeal it), and his successor – in drafting his own edict – could take such a correction into account. In particular, the praetor could also disregard rules introduced by his predecessor when he considered them erroneous. This was the case with Verres, as mentioned above.

When taking over the office of praetor in 75 BCE, Verres introduced a significant amendment to the *lex Voconia* in his edict.[25] That law of 169 BCE imposed significant restrictions on the freedom of testation by wealthy Roman citizens holding significant property and included in the first class of census: they could not bequeath property to their daughters in their will (and the amount of possible legacies in their favour was significantly reduced).[26] In his edict, Verres extended the *lex Voconia* to all Roman citizens with a sufficiently large wealth, regardless of their census status and, moreover, he decided that this provision of the edict was to apply retroactively from the moment of the adoption of the *lex Voconia*. Verres' actions were corrupt: the change in the interpretation of the *lex Voconia*, set forth in the edict, was to enable the estate of Roman citizen Asellus to be taken over by a cousin of the deceased, with whom Verres had entered

[23] *Digesta*, 1.1.7.1.

[24] This practice of the praetor is confirmed by Gaius when discussing procedural objections in his *Institutions*: '*Saepe enim accidit, ut quis iure civili teneatur, sed iniquum sit eum iudicio condemnari [...] Exceptiones autem alias in edicto praetor habet propositas, alis causa cognita accommodat. Quae omnes vel ex legibus, vel ex his, quae legis vicem optinent, substantiam capiunt, vel ex iurisdictione praetoris proditae sunt*' ('It often happens that someone is responsible under civil law, but it would be unfair to convict him in court proceedings [...] The praetor has some charges proposed in the edict and he accommodated others after having examined the case. All of them derive their substance either from statutes, or from what has the force of statutes, or have emerged from the jurisdiction of the praetor'), cf *Institutions*, IV, 116, 118.

[25] The Verres case involved many charges concerning the manner in which he exercised the office of governor of Sicily. This article deals with only one of the charges brought against him by Cicero in connection with holding the office of praetor.

[26] For more on *lex Voconia*, cf Dixon, 'Breaking the Law to Do the Right Thing: The Gradual Erosion of the Voconian Law in Ancient Rome', Adelaide Law Review 1985 Vol 9(4) and the literature listed there.

into an agreement. Asellus, who died in 75 BCE, bequeathed all his vast fortune to his daughter. Since he was not a citizen of Rome registered with the census, he was not subject to the restrictions provided for in the *lex Voconia* and his will was approved. Verres' edict, through its retroactive effect, was to lead to the annulment of the will, with the cousin of the deceased becoming the heir. In his accusatory speech, Cicero first pointed out to Verres the entire corrupt context of the case, but he also raised the issue of the effectiveness of the edict to the extent that it would exceed the time of Verres' holding the office of a praetor.[27] Verres, by giving his decision retroactive effect, entered, as it were, the time remit of his predecessor. The praetor's edict was valid only for one year, i.e., during the term of the praetor's office. In a way, Verres supplemented the edicts of his predecessors, i.e., he went beyond the scope of his jurisdiction.[28] Cicero, therefore, tried to demonstrate in his speech that Verres' edict, in so far as it referred to the *lex Voconia*, violated several basic principles and, therefore, could not be the basis for effective deprivation of the property of Asellus' daughter. According to Cicero, the crucial factor was the legal status in force at the time of Asellus' death: '*Heres erat filia. Faciebant omnia cum pupilla, legis aequitas, voluntas patris, edicta praetorum, consuetudo iuris quod erat tum cum Asellus est mortuus*' [His daughter was the heiress. Everything worked in her favour: the equitable rules of law, the will of her father, the edicts of the praetors, the legal custom prevailing at the time of Asellus' death].[29] In addition to the argument mentioned above, Cicero cites one more: namely, he points out that the practice followed by Verres' predecessors (who all accepted the provisions of the *lex Voconia*) became common and its change would require solid argumentation (which was lacking in the case of Verres).[30] Finally, which is of fundamental importance from the point of view of this study, the provisions of Verres' edict questioned by Cicero were not taken over by his successor, so they did not become part of what was called *edictum perpetuum*, i.e., provisions which, repeated by successive praetors, assumed the character of *ius honorarium* and were finally enshrined in the *edictum Salvianum* (c. 130 CE), a collection of praetors' revised edicts forming a closed compendium.

[27] *In Verrem*, 2.1.109, in Cicéron, Discours, Vol II, Société d'Edition 'Les Belles Lettres', Paris 1938.

[28] Witold Wołodkiewicz cites the Verres case as an example of breach of the *lex retro non agit* principle. While the principle itself in this form was unknown to the Romans, the Roman lawyers emphasised that in civil law, the law does no operate retroactively (*Lex retro non agit. Sformułowanie w polskiej doktrynie prawniczej*, Zesz. Prawn. UKSW 1 (2001), 108–109).

[29] *In Verrem*, 2.1.104.

[30] Ibid, 2.1.114.

Therefore, it can be said that with regard to principles established by the praetor, in the republican times of Rome, there was a mechanism in place that allowed provisions which violated the rules of equity to be eliminated from the legal system. However, it is difficult to determine whether such a negative assessment, as a result of which a specific regulation was not included in the succeeding praetor's edict, allowed the validity of a legal transaction undertaken on the basis of the contested provision of the edict to be effectively challenged. On the contrary, Cicero's reasoning appeared to imply that the *ex tunc* annulment of such a rule would be a kind of interference in the edict of the previous praetor, and thus a violation of the principle that the praetor's edict was valid only for one year. Moreover, the next praetor did not have to explain why he had omitted some previous decisions of his predecessors in his edict: he simply did not include them in the edict. Therefore, the resolution would solely remain in the discretion of the court. Unfortunately, we do not know how Cicero's intervention in the interest of Asellus' daughter, deprived of inherited property, ended. Verres, faced with the number of accusations and the strength of Cicero's arguments, did not wait for the court decision and (on the advice of his lawyer) left Rome, which allowed him to save his fortune (he eventually settled in Massalia, i.e., today's Marseilles).

In the legacy of ancient Rome, another source of law can be found, and one of extreme importance for the European legal tradition. These are imperial constitutions, which, along with the development of the principate and its transformation into the dominate, became an independent source of law, gradually eliminating all the others (such as *leges* passed by popular assemblies, the Senate's *senatusconsulta* or praetor's edicts). Their force was contained in the formula written down by Ulpian: *quod principi placuit legis habet vigorem* [what pleases the emperor has the force of law].[31] Thus, the will of the emperor began to be identified with the content of the law, and law itself (through the formula *princeps legibus solutus est*, meaning that the ruler was not bound by the law),[32] once a domain managed and agreed by lawyers became an attribute of sovereign power, losing its original autonomy. In this context, the evaluation of the law assumed a special character, as it became at the same time an assessment of the manner in which power was exercised. For medieval and early modern Europe, in which the monarchical system, referring to imperial Rome, was established for good, it was of great importance.

[31] *Digesta*, 1.4.1.
[32] Ibid, 1.3.31.

MEDIEVAL EUROPE

In the medieval debate, there were two ways of legitimising royal power, which also translated into different ways of creating law. At the end of the Roman Empire, the concept of divine legitimacy of power was established, which was strengthened by the growing role of the Church (after the reign of Emperor Constantine the Great, 306–337 CE). This way of justifying all power, including the legislative power, became widespread in medieval Europe, and its external manifestation was the solemn coronation performed by the bishop. At the same time, however, there was a second way of justifying royal power, referring to the earlier Roman tradition of perceiving the people as the primary source of power. In the Middle Ages, the second part of the Ulpian formula quoted above was eagerly recalled, in which the legendary *lex regia* appeared, under which the people were to transfer their legislative powers to the princeps.[33] This approach gave rise to the contractarian concept of power, which assumed the participation of other entities (individuals or collegial bodies) in the lawmaking process. It should also be remembered that the feudal system, developed in a large part of Europe, usually meant the participation of vassals in the senior's decision-making process. Finally, it should be realised that from the 13th century onwards, the concept of the state as a common good was consolidated, which entailed the gradual involvement in activities concerning the state of social groups that had previously remained on the sidelines of public affairs (above all the Third Estate). This resulted in the estate monarchy with the participation (to a greater or lesser extent) of representations of the estates in the law-making process. All this was important in matters related to the evaluation of the law and the selection of tools used for this purpose.

However, it should be remembered that for a large part of the Middle Ages, customary law played a dominant role. It would gradually lose its importance, especially when the discovery of the Justinian Digests and the related reception of Roman law reminded European rulers of imperial legislative powers (and the economic development of Europe needed a legal framework that common law could not provide). But even in the 13th century, the statutes of Italian cities pro-

[33] *Utpote cum lex regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestem conferat* [But it was by the royal act, which was passed concerning his empire, that the people conferred upon him all empire and law-making power], *Digesta*, 1.4.1. No such royal statute was ever passed in Rome, but Ulpian evokes this legend to lend credence to the legislative role of the emperor, cf Marek Wąsowicz, *Prawo i obywatel. Rzecz o historyczno-prawnych korzeniach europejskiego standardu ustrojowego*, Wyd. Nauk. Scholar, Warszawa 2015, 31–32. On different interpretations of *lex regia*, cf Ernst Kantorowicz, *The King's Two Bodies. A Study in Mediaeval Political Theology*, Princeton University Press, Princeton 1997, chap. IV: Law-Centered Kingship.

vided that 'the law is a sacred sanction, but the custom is more sacred, and where custom speaks, all law is silent'.[34] The dominance of customary law meant that primarily the observance of the law was the subject of special attention, and this was expected of the ruler in the first place. Importantly, this expectation, arising from the exercise of customary law, will also be of significant importance in relation to statutory law.

The thesis about the primacy of customary law was opposed by the Church. It usually had a distant origin, often dating back to pagan times. Acceptance of the supreme character of customary law would, therefore, mean consent to the primacy of what was essentially pagan law, which was difficult to accept by the Church hierarchy (this is one of the reasons why regulations inconsistent with Christian doctrine were often omitted or corrected in writing down customary law).[35] The Fathers of the Church (such as Origen, Tertullian or St Augustine) believed that human rights deserve respect only if they are in accordance with God's law. They perceived the Truth and Reason written in the Holy Scripture, especially in the 10 commandments as God's law. This involved the introduction of a hierarchy of norms and the recognition that there was a higher order over the statutory law. The examination of the conformity of human rights with divine law would be the task of the clergy. Such a position obviously had a political dimension to it and was part of the great dispute between two universalisms, imperial and papal, which dominated the European scene in the twelfth and thirteenth centuries.

The proponents of the supremacy of imperial power tried – as did the Church – to question the primacy of customary law, and for this purpose they eagerly invoked the legislative powers of the Roman emperors, but at the same time they did not intend to accept the Church as an evaluator of statutory law. Initially, there was a belief that statutory law gave greater effectiveness to customary law, which meant that the emperor's legislative activity should take the legal custom already in place as a starting point. This view resounded perfectly during the Congress of Roncaglia in 1158 in the speech of Emperor Frederick Barbarossa: *Sive ergo ius nostrum sive vestrum in scriptum redigatur, in eius constitutione considerandum est, ut sit honestum, iustum, possibile, necessarium, utile, loco temporique conveniens* [When a law is reduced to writing, we must be sure that it is honorable, just, possible, necessary, useful and suited to the time and place].[36]

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[34] Jan Baszkiewicz, *Myśl polityczna wieków średnich*, Wyd. Pozn., Poznań 2009, 174.

[35] One example of such an operation is recalled by Karol Modzelewski, *Barbarzyńska Europa*, Wyd. Iskry, Warszawa 2004, 56–59.

[36] We know Frederick's speech from Rahewin's account, but its accuracy raises many doubts, cf Kenneth Pennington, *The Prince and the Law 1200-1600. Sovereignty and Rights in the Western Legal Tradition,* University of California 1993, 10–11.

Respecting these principles is, according to Frederick, of fundamental importance, because if the law is made by the emperor, it cannot be judged by anyone and must be strictly applied (*quia cum leges institutae fuerint, non erit liberum iudicari de eis, sed oportebit iudicare secundum ipsas*).[37] Over time, when the statutory law began to introduce new legal solutions, previously absent in the customary law, this was accompanied by the development of a set of superior norms (such as 'necessity', 'raison d'état', 'utility'), which made it permissible to depart from God's law being higher in the hierarchical order of legal norms, and thus to question the controlling role of the Church in this respect. This approach took on a special dimension in the legal doctrine in Sicily during the reign of Frederick II Hohenstauff. In clear reference to the Ciceronic-Stoic argumentation (mentioned above), the thesis was developed that natural reason should manifest itself in law (as it was said, *ratio* is the mother of human law, and its father is the monarch), which resulted in the conclusion that the law is not God's law, but a natural, higher order defined and followed by the ruler. Thus, the law created by the king is inherently good and equitable.[38] This was sometimes accompanied by the belief that all activity of the ruler deserved nothing but praise. Pierre Dubois, an author working in the entourage of King Philip IV of France, wrote that 'no subject in his right mind should think that a monarch is capable of violating his duties' (i.e., establish an equitable law).[39] For the sake of order, let us also note the position of Marsilius of Padua, according to which the validity of the law is not determined by its internal values (such as goodness, justice or rationality) but by external criteria, such as the effectiveness of power (i.e., the possibility of using coercion) and the law originating from a legitimate legislature. For Marsilius, the people were such a legitimate legislature, and the people – as he believed – did not issue bad laws, because the community always strives for equitable laws (this belief would later be expressed by many Enlightenment authors who were close to the concept of the sovereignty of the people, such as Jean-Jacques Rousseau). The above-mentioned strands, present in the doctrine and legal practice of the Middle Ages, result in a conviction, quite common in that era, that the nature (origin, legitimacy) of power presupposes that it cannot act reprehensibly, and in any case that its subjects do not have the opportunity to assess its legislative achievements: an equitable authority always makes an equitable law. As St Thomas wrote, 'there is no man who can judge the deeds of a king [but at the same time] the sovereign is subject to the law by his own will'.[40]

[37] Ibid, 19.
[38] Baszkiewicz (n 34) 179.
[39] Quoted from Baszkiewicz (n 34) 179.
[40] St Thomas, *Summa Theologica*, Vol 13 Treatise on Law, Q 96, Art 5.

In the Middle Ages, however, there was also another trend, according to which – even if we recognise the ruler's full authority to make law – it is possible to evaluate the ruler's actions from the point of view of the law established by him or his predecessors. This theme was present especially where other bodies were involved in the legislative process, and thus law-making was shared by the ruler with the representation of the estates.

The issue of the monarch being bound by his own law bothered ancient authors. Ulpian's well-known maxim is *Princeps legibus solutus est* [The emperor is not bound by the established law]. However, many warned against a similar approach. Seneca reminded Nero that 'Caesar is allowed to do everything, but that is why he is not allowed to do many things', and in the treatise 'On Clemency' (*De Clementia*), he admonished him that he should behave as if he were bound by the laws he established. It is worth paying attention to this line of thought. The necessity of observing previously established laws (by oneself or by predecessors) was expressed in the formula of a moral imperative: this is what St Ambrose, Bishop of Milan, did ('what you have prescribed for others, you have prescribed for yourself; the emperor issues laws that he ought to be first to preserve'.[41]), St Isidore of Seville ('A ruler may require his subjects to obey the law, provided that he respects it'[42]), or Charlemagne's tutor Alcuin, who admonished him on his coronation as emperor in 800 that he was bound by the laws enacted by his Roman predecessors.[43] An interesting statutory source that raised the issue of compliance with the law was the *Digna vox* statute of 429 contained in the Justinian Code. It reads: 'It is a statement worthy of the majesty of the ruler for the prince to profess himself bound by the laws […] And truly it is greater for the imperial government to submit to the sovereignty of the laws' [*Digna vox maiestate regnantis legis alligatum se principem profiteri [...] Et re vera maius imperio est submittere legibus principatum*].[44] As can be seen, also in this case, extra-legal arguments were invoked.[45]

In medieval Europe, the view that the ruler is not completely free in his actions and is bound by the applicable law appeared first in England and took the form of the institution of the 'Crown'. Initially, it included the sum of the king's personal prerogatives, but from the 14th century it became a concept detached from the

[41] '*Quod praescripsisti alii, praescripsisti et tibi; leges anim imperator fert quas primus ipse custodiat*', St Ambrose, *Epistulae* 21.9., quoted from Pennington (n 36) 79.
[42] *Sententiae*, 3.51, in Św Izydor z Sewilli, *Sentencje*, translated [into Polish] and edited by Tatian Krynicka, Wyd. WAM, Kraków 2012, 203.
[43] Kelly (n 3) 99–100.
[44] *Cod. Iustiniani*, 1.14(17).4; quoted from Pennington (n 36) 78.
[45] On the interpretation of the *Digna vox*, cf Pennington (n 36) passim.

person of the ruler, which was expressed in the new formula of the coronation oath, including the obligation to preserve and respect the rights of the Crown. Henry Bracton wrote as early as the 13th century: 'The king should not himself be subject to man, but should be subject to God and the law' (*Rex non debet esse sub homine, sed sub Deo et sub lege.*)'.[46] A similar view is to be found in a French 13th century anonymous treaty, a compilation of customary law of the Orleans district, canon law and royal ordonnances (*Li Livres de Jostice et de Plet*): 'Kings are not above the law, but the law is above the rulers',[47] and also in the statements of Italian post-glossators: 'It is right and worthy for the king to live according to the laws' (Saxoferrato),[48] or 'The prince should live according to the laws because his authority depends on the law' (Baldus de Ubaldis).[49] In the centuries that followed, the belief that power is subordinated to law can be found almost across entire Europe. It was put rightly by Andrzej Frycz Modrzewski: 'It would therefore be necessary for both kings and all officials to recognise the law over themselves, in which they would find protection against the passions of the heart and have a norm according to which they would govern themselves and the people'.[50] Another good example can be found in the provisions of the Spanish *Nueva recopilacíon* (1567) set of laws, where the king was reminded that he was limited by existing legal procedures and obligations vested, e.g., by way of privileges. This regulation was expressed by a rather common practice of ignoring royal decisions, contrary to customary law or privileges granted, in line with the formula *obedézcase, pero no se cumpla* [obey but not comply].[51]

It should be clearly emphasised, however, that these claims of the king being bound by law (*Princeps legibus alligatus est.*) were primarily about applying the law promulgated by the ruler himself (or his predecessors) in the practice of ruling, i.e., within the remit of his *gubernaculum*.[52] If the sphere of *gubernaculum* is referred to the activities of the executive power in the constitutional era (including, in addition to individual decisions, also the creation of executive legal acts), then the medieval restrictions on the royal power can be perceived as

[46] *De legibus et consuetudinibus Angliae*, 3.9.3. Quoted from Kelly (n 3) 154.
[47] Cf Baszkiewicz (n 34) 189.
[48] Bartolus de Saxoferrato, *Lectura super Codice*, Venice 1476, quoted in Latin by Pennington (n 36) 87: *Fateor quod ipse est solutus legibus, tamen equum et Dignum est quod legibus uiuat.*
[49] Baldus de Ubaldis, *Lectura super Codice*, Venice 1474, quoted from Pennington (n 36) 214.
[50] *De Republica emendanda*, in *Dzieła wszystkie*, Vol I, Warszawa 1953, 301.
[51] Francis Fukuyama, *Historia ładu politycznego. Od czasów przedludzkich do rewolucji francuskiej*, Wyd. Rebis, Poznań 2012, 408.
[52] For more on this topic, cf Jan Baszkiewicz, Andrzej Wójtowicz, 'Z zagadnień ideologii ustawodawczej wieków średnich', Czasopismo Prawno-Historyczne, Vol XXVI 1974 (1), 31.

the beginnings of the concept of binding the actions of the executive power by statutes, characteristic of the 19th century formula of the state of law.[53]

The postulate of the ruler's compliance with the law took on particular significance where it was based on contract theory. Its origins can be traced back to the legendary royal law (*lex regia*), which Ulpian mentions in his well-known formula *quod principi placuit*.[54] It is important to note that in the contracts of power between the ruler and representatives of the estates or the most influential bodies of the kingdom (e.g., barons), the issue of making law or defining mutual participation in its enactment was usually of high importance. At the same time, it should be recalled that the resulting dualism in law-making (decisions of state assemblies – royal decisions) did not automatically mean that the decisions of the collegiate body were superior (in the sense in which today a statute is superior to a regulation of the executive power). Therefore, the proponents of contract theory were all the more interested in making the king feel bound by the law adopted with the participation of representatives of the estates and not changing it with his decisions. For example, in England, relatively quickly, laws adopted under the King-in-Parliament formula began to be given special legal force, imposing on the king the obligation to observe this law in his actions, including the legal acts issued. The Act of Proclamations, passed in 1539 (i.e., during the reign of Henry VIII Tudor), clearly stated that royal proclamations – while having the force of statutes – must be in accordance with the common law of England and earlier acts of Parliament. It is particularly important here to refer to common law as a certain binding standard. The content of common law was decided by the courts, which meant that judges adjudicating in specific cases would be able to express their opinion on the effectiveness of the laws. This would result in a famous ruling, which will be discussed further below.[55]

In general, as can be seen, in medieval Europe, the belief prevailed that the ruler was not completely free in his legislative power and was bound by certain higher rules in this respect. Their nature and origin, however, are of a very diverse nature: from being bound by God's law, self-restraint in the name of moral requirements, believing that power is rational and aware of the necessary limitations, to believing that the law established by the ruler or his predecessors binds him, in particular

[53] For more on this topic, cf Wąsowicz (n 33) 218–220.

[54] Cf footnote 33 above.

[55] The Act of Proclamations provided that royal proclamations 'shall be observed as though they were made by act of parliament, but this shall not be prejudicial to any person's inheritance, offices, liberties, goods, chattels or life […]', Putting Historic British Law Online, <https://statutes.org.uk/site/the-statutes/sixteenth-century/1539-31-henry-8-c-8-proclamation-by-the-crown/>.

when entities other than the ruler are involved in its creation, jointly caring for the good of the Crown.

However, the question that inevitably arose was one of a possible sanction in the event of a violation of such restrictions, its nature and the persons who would be entitled to apply such a sanction. Bracton, who – let us recall – believed that the king was *sub lege*, claimed, for example, that in the event of a violation of the law, the ruler can only be reminded of the obligation to obey it. 'Let it be enough for him as a punishment to await God's vengeance', he wrote, adding, 'there is only the possibility of begging him to correct or rectify his deed'.[56] Such a position was quite common. It was represented, for example, by St Thomas, who emphasised that the king is not subject to the coercion of laws, but in the case of breaking them, he exposes himself to eternal damnation. However, the formula of moral binding of the ruler by law gave rise to the temptation to react on an ongoing basis to cases of violation of God's commandments by rulers. The Church felt particularly empowered to take such actions, as it had various tools for disciplining 'sinful' monarchs, including public penance or excommunication.[57] However, the effectiveness of such actions was limited, although in several cases the announced excommunication entailed serious political consequences, as in the case of Emperor Henry IV in his conflict with Pope Gregory VII or King John Lackland of England, who was forced by the barons to sign the Magna Carta. However, it is necessary to distinguish between the general assessment of the rule of a ruler and the evaluation of a specific legal act issued by him. In both of the above-mentioned cases, it was about expressing disapproval of the policy pursued by the ruler concerned.

It is also worth looking at the right to resist, i.e., the right of the king's subjects (usually only some) to renounce obedience to him, written in a document approved by the ruler. Such documents were, for example, the English Magna Carta Libertatum of 1215 (Article 61), or the Hungarian Golden Bull of Andrew II of 1222 (Article 31), and later also the Polish Henrician Articles of 1573 (*de non oboedientia* article). It should be noted, however, that the right to resist was less about sanctioning a reprehensible behaviour of the ruler, and above all about defending the rights or privileges obtained against the despotic actions of the

[56] Baszkiewicz (n 34) 190.

[57] Regardless of the general thesis of the supremacy of spiritual power over secular power, expressed emphatically by Gregory VII in the document *Dictatus Papae* or by Innocent III, in such cases the biblical example of high priest Samuel was often referred to, through whom God conveyed his will to take away Saul's rule over the kingdom of Israel because of the violation of God's commands.

monarch.[58] The origins of the right to resist should be sought in the senior's failure to perform his duties under the feudal contract: in such a case, the vassal could renounce obedience to his senior. As we read in the *Sachsenspiegel*, 'The vassal must fully resist the lawlessness of his king and judge and help to protect them from lawlessness in every way [...] And then he does not act against his faithfulness'.[59] Over time, with the gradual strengthening of estate consciousness and the emergence of group privileges, this individual right assumed the character of a right vested in a specific group of people. This is the case with the Magna Carta Libertatum, or the Hungarian Golden Bull mentioned above, in which magnates formed a privileged group. Article 61 of the Magna Carta (incidentally, willingly omitted by Henry III – ruling after John the Landless – in subsequent editions of the Charter) was used as the basis for the abdication of Edward II in 1327. It is worth noting that among the numerous accusations made against the king, there were also those of making laws contrary to human rights: it was about the statute pushed through Parliament in 1322, which made the ruler's actions independent of Parliament and about the granting of permissions to rule on behalf of the king.

As can be seen, the law created by the ruler could be evaluated by various bodies at the end of the Middle Ages. At the same time, they had – depending on the nature of these bodies – various means at their disposal. Most often, however, the evaluation concerned the policy pursued by the ruler in general and the accusations raised against the law created by him were only a part of the list of grievances. It is characteristic that there are basically no judges among those who evaluate the monarch's legal output. This does not mean, however, that the problem of assessing the applicable law did not arise in resolving specific cases. St Thomas wrote: 'In these earthly laws, though men judge about them when they are making them, when once they are established and passed, the judges may judge no longer of them, but according to them'.[60] But at the same time, he clearly pointed out that 'if the written law contains anything contrary to the natural right, it is unjust and has no binding force. [...] such documents are to be called, not laws, but rather corruptions of law […] and consequently judgment should not be

[58] As noted, e.g., by Baszkiewicz (n 34) 194.

[59] Ibid 195. A similar statement by the author of the *Schwabenspiegel* was as follows: 'We should serve our lords for they protect us; if they do not protect us, justice does not oblige us to serve them', quoted from Susan Reynolds, *Fiels and Vassals. The Medieval Evidence Reinterpreted*, Oxford: Clarendon Press, 1994, 37.

[60] St Thomas explains this by the need not only for the ruler himself but also for his officials, including judges, to be bound by law – let us recall that in continental Europe, the judiciary remained closely linked to royal power until the Enlightenment (the exception was England, where judges managed to gain an independent status relatively early), St Thomas Acquinas, *The Summa Theologica*, Second Part, Justice, Q 60, Art 5, Burn Oetes & Washbourne Ltd., London 1929, translated by Fathers of the English Dominican Province, 153.

delivered according to them'. And he further added that 'Laws that are rightly established, fail in some cases, when, if they were observed, they would be contrary to the natural right. Wherefore in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view'.[61]

It is worth noting that, in fact, this was the spirit in which the Roman praetor took action, who – as mentioned above, not being able to change the letter of the civil law, derived from the Laws of the Twelve Tables – corrected them in specific cases, referring to the principle of equity. It is also necessary to pay attention to a certain convergence of St Thomas's reasoning with Cicero's way of thinking. Let us recall that the Roman philosopher denied the status of law to the resolutions of popular assemblies when they violated the eternal, immutable and universal law of nature.[62] St Thomas wrote about natural law as a criterion for the evaluation of a just (equitable) law, explaining at the same time that law has its source in natural reason, which follows God's eternal law. Thus, he clearly referred to the Stoic idea of the eternal and universal law of nature.[63] But, importantly, the postulate that unjust law should not be the basis for decisions and that in special cases reference should be made to the principle of equity and use it to correct the binding letter of the law, is presented by St Thomas not when discussing the principles to be followed by rulers in creating and observing the law, but in the part of his reflections devoted to the judiciary power, i.e., the application of law by judges.

A continuation of this approach, i.e., the involvement of the court or judges in the process of evaluating the law that would be applicable in deciding a specific case, can be found in the practice of English case law of the 17th century and in the activity of French parlements, i.e., supreme courts. In both of these cases, we are dealing with a kind of summary of views and theories present in legal doctrine since antiquity: the law is subject to evaluation of its content, and this

[61] St Thomas, ibid. It is worth noting that in his description of good law, St Thomas referred to the guidelines laid down in the work of St Isidore of Seville, *Etymologiae*, Book V, 'On Laws and Chronology': 'a law should be honest, just, applicable, in accordance with nature, in accordance with national custom, appropriate to place and time, necessary, useful, clear (so that no one is mistaken by its vague argument), and also issued not for private benefit, but for the benefit of the community of citizens', Antoni Dębiński, 'Wiedza o prawie w ujęciu Izydora z Sewilli', Studia Prawnicze KUL 2022, 1(89), 132 [a law should be '*honesta, iusta, possibilis, secundum naturam, secundum consuetudinem patriae, loco temporique conveniens, necessaria, utilis, manifesta quoque, ne aliquid per obscuritatem in captionem contineat, nullo privato commodo, sed pro communi civium utilitate conscripta*']. Cf Grzegorz Maroń, 'Wzorzec prawa w Etymologii św. Izydora z Sewilli jako przyczynek do rozważań nad cechami dobrego prawa', Zeszyty Naukowe Uniwersytetu Rzeszowskiego, Seria Prawnicza 2009 (8).

[62] Cicero, *On the Laws*, cf footnote 16 above.

[63] Cf Kelly (n 3) 143.

evaluation is made using the criterion of superior legal order and the principles of justice. What changes, however, is the party making the evaluation (the judge) and, consequently, its effects.

BONHAM'S CASE

In England, Edward Coke was the person who contributed significantly to the promotion of this new approach. Coke (1552–1634), as Chief Justice of the Court of Common Pleas, and then the Court of King's Bench, and subsequently – after his dismissal from his post as judge by James I – as one of the leaders of the opposition in the House of Commons and the author of several important acts, including in particular the *Petition of Right* of 1628, was a consistent advocate of the principle of supremacy of common law.[64] In his view, it meant not only the superior nature of common law over other systems of law (such as equity or church law), but above all, it set the limits of royal power and was a guarantee of the rights and freedoms of the subjects.[65] Coke's claim of the supremacy of common law was expressed, among other things, in an opinion he drew up in 1611 on the legality of a royal proclamation prohibiting the construction of new houses in London without appropriate permission. Coke (consulting his position with the Chief Justices of the Court of King's Bench and the Court of Exchequer) stated in his opinion that the source of law in England is common law, alongside statutes and custom, and the king may not change them by proclamation, in particular, he must no supplement them with new prohibited acts or prohibit those that common law allows. And he recalled that 'The King has no prerogative but that which the law of the land allows him'.[66]

Coke, however, went even further in his belief in the supremacy of common law and presumed that it was also above the acts of Parliament. A spectacular manifestation of this position was Bonham's case, decided in 1610. Thomas Bonham was a Cambridge physician who also practised medicine in London, but without

[64] For more on Coke's views, cf Andrzej Bryk, *The Origins of Constitutional Government. Higher Law and the Sources of Judicial Review*, Wyd. Uniw. Jagiel., Kraków 1999, Chapters VII–IX.

[65] This was expressed, among others, in the idea of the 'ancient constitution', which Coke set out in his commentary on the Magna Carta, which is laid down in the Second Part of his *Institutes of the Laws of England.*

[66] Dariusz Stolicki, *Recepcja orzecznictwa sir Edwarda Coke'a w brytyjskim i amerykańskim prawie konstytucyjnym – analiza porównawcza*, in Robert Kłosowicz and others (eds), *Konstytucjonalizm, doktryny, partie polityczne: księga dedykowana Profesorowi Andrzejowi Ziębie*, Wyd. Uniw. Jagiell., Kraków 2016, 697–698.

the permission of the College of Physicians, which, according to Henry VIII's privilege of 1518, confirmed by the Acts of Parliament of 1523 and 1553, had the right to grant such licences. The Act of Parliament also granted the College the power to impose fines on persons acting without such a licence, and in the event of refusal to pay the fine imposed – to punish them with arrest. Such measures were taken by the College against Bonham. Bonham, however, appealed to the Court of Common Pleas, accusing the College of trespass against his person and property. The court chaired by Coke stated in its decision that the Act of Parliament, which formed the basis of the powers of the College of Physicians, infringed the principles of common law, since the power to impose fines and imprisonment under common law was vested only in the royal courts, so that the College of Physicians, which is not a court, could not be vested with that power. Moreover, the fine imposed by the College was intended (in half) to contribute to its finances, which meant that the Board would have a direct financial interest in the case under consideration, and this – in the opinion of the Court of Common Pleas – would violate the principle of *nemo iudex in causa sua*. In the statement of reasons (case report), Coke wrote: 'It appears in our books that in many cases the common law will control acts of parliament and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void'.[67] It should be recalled that judges in England interpreted the acts of Parliament quite freely and, trying to find in them the proper content (the spirit of the law), they did not attach undue importance to the letter of the law. It can be said that in this way, they sought to reconstruct the proper intentions of the lawmaker. This was well expressed by Edmund Plowden (1518–1585), author of the Commentaries (Reports), in his 1574 opinion: 'It is not the words of the law but the internal sense of it that makes the law […] and it often happens that when you know the letter you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive'.[68] This meant that judges of all courts (not only the Court of Chancery) should follow the principle of equity when applying the acts of Parliament. In a particular case, this could even mean assuming that a Parliament official had misspelt the true intentions of the Houses and that only the court interpreted them correctly. Coke's view, however, was radical: he believed that a court could declare an act of Parliament invalid if it were incompatible with common law and refuse to apply it (rather than merely reinterpret it).

[67] John H Baker, *An Introduction to English Legal History*, Butterworths, London 1979, 182.
[68] Note to *Eyston v Studde*, cf Baker ibid 181.

Coke's position was rather isolated and the vast majority of English lawyers of his time did not share this position. They believed that in the event of a fundamental contradiction between the content of the Act and the principles of common law, only the Parliament – as the creator of the law – can make an appropriate correction.[69] This view was later clarified by William Blackstone in his *Commentaries on the Laws of England*, who wrote that vesting the courts with the power to question legislation would be 'to set the judicial power above that of the legislature, which would be subversive of all government').[70] This critical position was undoubtedly reinforced by the Glorious Revolution of 1688, which reaffirmed the principle of parliamentary sovereignty.[71] But as late as 1701, Coke's judgment was quoted approvingly (e.g., in *City of London v Wood*, John Holt, Chief Justice of the Court of King's Bench, wrote that Coke's view was a 'true saying'.[72]

Coke's view, on the other hand, gained many supporters in the English colonies in America, which tried to emphasise their distinctiveness and demanded participation in the decision-making process (including legislative decisions) together with the authorities in London, affecting the status of the colonies and the legal situation of their inhabitants. Thus, Coke's argument that a particular act of Parliament can be challenged on the grounds that it violates the principles of common law seemed very attractive. For example, in 1765 the Massachusetts Assembly spoke out against the Stamp Act, passed by Parliament in London, accusing it of being 'against Magna Charta and the natural rights of Englishmen, and therefore, according to the lord Coke, null and void'.[73] James Otis, a lawyer and active activist for the independence of the English colonies, expressed a similar opinion in 1764: 'Should an act of parliament be against any of his natural laws, which are immutably true, their declaration would be contrary to eternal truth, equity and justice, and consequently void: and so it would be adjudged by the parliament itself, when convinced of their mistake'.[74] This way of thinking contributed to the fact that the judicial review procedure was established in the English colonies, and

[69] As Lord Chancellor Ellesmere wrote in response to Coke's opinion, 'acts of parliament should be corrected by the same pen that drew them than to be dashed in pieces by the opinion of a few judges', quoted from Baker ibid 182.

[70] William Blackstone, *Commentaries on the Laws of England*, Vol I, 90.

[71] Cf Henry J Abraham, *Judicial Process. An Introductory Analysis of the Courts of the United States, England and France*, Oxford University Press, New York 1980, 322.

[72] Raoul Berger, *Doctor Bonham's Case: Statutory Constitution or Constitutional Theory?*, University of Pennsylvania Law Review, 117 (4), 1969, 523. Earlier, in 1695, in *King v Earl of Banbury*, Justice Holt noted, it was the judge's task 'to construe acts of Parliament and adjudge them to be void', Bryk (n 64) 220.

[73] Catherine D Bowen, *The Lion and the Throne*, Hamish Hamilton, London 1957, 172.

[74] James M Beck, The Constitution of the United States, Whitefish, MA: Kessinger Publishing, 2010, 17–18.

later in the independent states, subsequently referred to in the famous Supreme Court ruling of 1803 in *Marbury v Madison*. It is not without reason that the New York State Bar Association stated in 1915 that 'The American Revolution was a lawyers' revolution to enforce Lord Coke's theory of the invalidity of Acts of Parliament in derogation of the common rights'.[75]

ACTIVITY OF FRENCH *PARLEMENTS*

The activity of French *parlements* (i.e., courts) in exercising control over statutory law had the opposite effect. It contributed (paradoxically!) to the formation in the constitutional era of the doctrine of the supremacy of the statute as an expression of the will of the sovereign. In the 19th century, this resulted in the concept of a 'state ruled by law', under which the executive power was obliged to act only on the basis and within the scope specified by law (which in many European countries was subject to the control of administrative courts), with a simultaneous reservation (sometimes made expressly, as in the Prussian constitution of 1850) that judges could not assess the compliance of laws with the constitution.

First of all, it should be noted that the French *parlements*, as supreme courts, operated in a different political environment than in England. 17th and 18th-century France was (until 1789) an absolute monarchy. The only legislator was therefore the king, who also acted as the supreme judge. Judges sitting in the so-called royal delegated courts performed their tasks under the authority of the monarch and were subordinated to him (and the king could summon any case at any stage and decide on it). However, the *parlement* was an institution originating from the medieval royal council. Thus, in accordance with feudal customs, it was composed of direct royal vassals, princes of the blood, and a number of *parlement* councillors, usually university law graduates or legal practitioners. Over time, *parlement* councillors became irremovable, but the office of the councillor of parlement was in the group of saleable offices in the 17th century, which meant that one could become a councillor of *parlement* either by inheritance or by buying the office. In either case, this provided certain guarantees of irremovability and was of great importance when the *parlements* found themselves in opposition to the royal authority. Initially, there was only one such court – on the Parisian Island of la Cité. Then, with the centralisation of the French state and the annexation of more territories, the number of *parlements* gradually increased. In the mid-18th

[75] New York State Bar Association, *Report of the Committee on the Duty of Courts to Refuse to Execute Statutes in Contravention of the Fundamental Law*, Government Printing Office, Washington, 7.

century, there were already 16 of them. Importantly, their formal status was the same, so they all performed the functions of the supreme court (each for its own region), and all enjoyed the same powers (although the *Parlement* of Paris was undoubtedly the most renowned).

One of the important activities performed by the *parlement* was the registration of royal edicts, *ordonnances* and *lettres de patente*, i.e., the ruler's legislative acts.[76] Registration was initially formal and technical: in the absence of an official central register of royal *ordonnances*, it was necessary for the court to record legal acts in order to provide an open and unambiguous basis for judicial decisions issued by the court within its territorial jurisdiction. Each *parlement* therefore kept its own register of royal *ordonnances*. Over time, however, the practice of referring the *ordonnance* back to the king, called remonstrance, developed so that the ruler could make necessary corrections. Initially, such an operation was initiated by the king himself, who asked the *parlement* for an opinion or advice on the content of the legal act submitted. Later, however, the *parlement* began to make such an assessment without the ruler's request and returned the legal act back to the king when it decided on its own initiative that it needed to be changed. Since the rulers did not respond to such cases of arbitrary remonstrances, after some time the practice began to be recognised as the *parlement*'s right. The refusal to register and the referral of an *ordonnance* back to the king meant that such a royal act could not be applied within the jurisdiction of the *parlement* concerned (i.e., it was not effective). The *Parlement* of Paris played a crucial role in this regard, because – apart from its location in the capital – its geographical jurisdiction covered a significant part of the country's territory.

The refusal to register an *ordonnance* was not final, as the king retained the possibility of forcing the councillors of the *parlement* to register a legal act. To this end, in the first place, he sent the so-called *lettres de jussion*, demanding registration, and if this measure turned out to be ineffective, he arranged for the so-called *lit de justice*, i.e., he went to the *parlement* in person and dictated his will directly to the assembled councillors. However, both measures were quite troublesome, and rulers used them as a last resort, having previously tried to negotiate the content of controversial regulations in *parlements*. An additional problem was also the fact that in the 17th century, there were already nearly 10 *parlements*, so forcing registration by the *lit de justice* would require many interventions (although *parlements* could differ in the assessment of the content of the *ordonnances*). One example of such problems was the registration of the Edict of Nantes by Henry IV. The *Parlement* of Paris refused to register it in 1599, and its members, summoned

[76] For more on ordonnances issued by French rulers, cf Anna Klimaszewska, 'Ordonanse królewskie we Francji', Czasopismo Prawno-Historyczne, 2017, 69(2).

by the king to the Louvre, forced the monarch to make several amendments and only then registered the edict. The other *parlements* did not do so until 1600 (with the *parlement* in Aix after *lettres de jussion*, and the *parlement* in Rennes after two such letters had been served), while the *parlement* in Normandy delayed its registration until 1609.[77] A worse fate befell the *ordonnance* of 1629, which was an attempt to bring together the decisions made during the sessions of the Estates General in 1614 and the assemblies of notables in 1617 and 1626. *Parlements* subjected it to a severe scrutiny and demanded so many changes that, consequently, this meant the rejection of the most important provisions.[78] Interestingly, however, for a long time the rulers did not question the right of *parlements* to register *ordonnances* or to issue remonstrances; they only believed that the *parlements* were doing this task poorly and usurped an authority they did not possess. This was largely due to the origin of the *parlements*, which – as mentioned above – emerged from the royal council, and thus constituted a kind of extension of royal power. The right of remonstrance was connected with the traditional obligation to give advice to the king: the successive *ordonnances* of 1318, 1320 and 1344, governing the organisation of the *Parlement* of Paris, clearly emphasised this.[79] It is also worth recalling that the *Parlement* of Paris played an important, stabilising role during the reign of Charles VI: in the face of rival nobles, it was perceived as a kind of anchor of the state.[80] This is perhaps why Cardinal Richelieu, the First Minister of King Louis XIII, wrote in his memoirs that '*l'autorité du parlement en beaucoup d'occasions importantes est nécessaire à la maintenance de l'Etat*'.[81] In the 16th century and in the early 17th century, there was often an argument that the registration of *ordonnances* was an activity strengthening the king's power, because it weakened critical voices against the monarch's decisions. Such an opinion was voiced, for example, by Claude de Seyssel, chancellor to Louis XII (later bishop of Marseilles). He believed that although the king's power is unquestionable, the ruler is only human and can be wrong: the registration of the *ordonnance* by an independent court means that the king's decision is in accordance with religion, the principles of justice and the existing law, and thus alleviates possible fears of the recipients of the law.[82]

[77] Joël Cornette, *L'affirmation de l'Etat absolu (1492–1652)*, Hachette Supérieure, Paris 2012.

[78] Klimaszewska (n 76) 51.

[79] Matthieu Bertozzo, *Le 3 novembre 1790. La mise au pas des juges sous la Revolution: de la vacance indéterminée à l'abolition des Parlements d'Ancien Régime*, Revue générale du droit, 2015, No 22827.

[80] Michel de Waele, 'Une question de confiance? Le parlement de Paris et Henri IV, 1589–1599', Thèse de doctorat, Mc Gill University, Montreal 1995, 26–27.

[81] *Mémoires du cardinal Richelieu*, Paris 1907–1931, Vol 5, 236.

[82] de Waele (n 80) 53–54. In his primary work (*Le monarchie de France,* published in France in 1519), Seyssel developed the concept of three restraints, which limited the royal power. One of

The point of reference for possible remonstrances of the *parlement* was, in the first place, citing earlier royal edicts, already registered, and therefore correct and respected.[83] However, references to the medieval concept of the state as a kind of sum of various corporations can also be noticed in the activities of *parlements:*[84] in this view, the state is an organic community consisting of smaller communities, each operating on the basis of customs and privileges. This meant, according to the *parlements*, that the king's arbitrary power did not extend to the area of powers previously obtained by his subjects.[85]

At the end of Louis XIII's reign, however, tensions between *parlements* (especially the *Parlement* of Paris) and the monarch began to surface. In 1641, Louis XIII even considered trying to limit their right of remonstrance, as evidenced by a statement on the occasion of one of the *lit de justice*: 'You are established to settle disputes between master Peter and master John [...] If you continue with your actions, I'll trim your claws so badly that it hurts you'.[86] However, it was not until Louis XIV took concrete action. First (in the 1667 *Ordonnance* on Civil Procedure), he limited the time allowed for returning an ordonnance to the king to 8 days, and then in 1673 he permitted the remonstrance to be executed only after the *ordonnance* had been registered, which deprived the *parlements* of any real influence on the content of royal legal acts.

After the death of Louis XIV in 1715, however, the *parlements* regained their original powers (this was the price they demanded from the regent, Philippe II, Duke of Orléans, for refusing to register Louis XIV's will in favour of the Duke of Maine – the registration of the king's will was the traditional authority of the *Parlement* of Paris), and began to use them in an increasingly open manner in opposition to Louis XV. At the end of his long reign, Louis XV (1715–1774) finally made another attempt to limit the role of *parlements*. First, during the famous *lit de justice* of 1766, he reminded the councillors of the *Parlement* of

them would be the parlement judges, whose opinion the monarch should hear, cf Bogdan Szlachta, *Konstytucjonalizm czy absolutyzm. Szkice z francuskiej myśli politycznej XVI wieku*, Księg. Akademicka, Kraków 2005, 133.

[83] This is a fairly common position in the literature of the time, e.g., Charondas le Caron, *Loys, Pandectes ou Digestes du droit français*, Paris 1596; Poisson de la Bordinière, *Traité de la majesté royalle en France*, Paris 1597; La Roche Flavin, *Treize livres des parlements de France*, Bordeaux 1617.

[84] E.g., as James of Viterbo wrote: '*regnum continet congregationes plurimas ad invitem ordinatas*', Jacob of Viterbo, *De regimine christiana*, 1302, quoted from Joseph Canning *Ideas of Power in the Middle Ages*, *1296–1417*, Cambridge University Press 2011, 39, footnote 74.

[85] Szlachta (n 82) 132. Szlachta also recalls the 1579 treatise *Vindiciae contra tyrannos*, in which the role of judges was emphasised: 'all matters relating to the community must be approved by the parlement', (n 82) 424.

[86] Marek Kinstler, Marian Ptak (eds), *Powszechna historia państwa i prawa. Wybór tekstów źródłowych*, Wyd. U.Wr., Wrocław 1987, 33.

Paris that sovereign power rests only in the person of the king: 'All public order comes from me, and the rights and interests of the nation, which some dare to make a body separate from the monarch, inevitably rest in my hands and in my hands alone'.[87] This was to make the councillors aware that all the powers of the *parlement* (including the right of remonstration) arise solely from the will of the ruler. Then, in the face of further resistance from *parlements*, in 1770, Louis XV, with the help of Chancellor René Maupeou, limited the powers of *parlements*, divided the *Parlement* of Paris into several institutions, abolished the hereditary nature of the office of councillor of *parlement*, and stripped the fiercest protesters of office.[88] But that attempt also failed. Immediately after Louis XVI (1774–1792) took power, Chancellor Maupeou lost his position, and the reform of *parlements* was revoked. As a result, the years of Louis XVI's reign until the convocation of the Estates General in 1789 were filled with constant disputes with the *parlements*, which – by refusing to register royal *ordonnances* – blocked the necessary political reforms, especially those relating to taxation.

The Estates General, later transformed into the Constituent Assembly, quickly dealt with the problem of the administration of justice and the organisation of the judiciary. One of the key topics was the continued existence of the *parlements*. Their powers, which allowed them to quite effectively oppose the will of the king as a sovereign, were incompatible with the concept of the sovereignty of the people, which became the basic assumption of the political system, and which was related to the creation of law. As a result, the activity of *parlements* was first suspended, and then by a decision of 30 September 1790 provincial *parlements* were abolished, and on 14 October 1790 – the *Parlement* of Paris. At the same time, a deep reform of the judiciary was carried out, introducing the election of judges and limiting their powers in the interpretation of laws.[89]

This was accompanied by the reasoning, referring to Montesquieu's theory, which assumed a strict separation of the judicial power from other powers. In the French constitutional doctrine, this meant the absolute supremacy of a statute as an expression of the will of the sovereign and – until the times of the Fifth Republic

[87] Ibid 35.

[88] For more on *lit de justice* 1766 and Maupeou's reform, cf Julian Swann, 'Un monarque qui veut «régner par les lois»: le Parlement de Paris et le roi dans la France de Louis XV', Revue d'histoire politique, 2011 (15), 44–58.

[89] The institution of the so-called legislative recourse was introduced, under which in the event of interpretative doubts, a judge was obliged to request the legislature for an appropriate interpretation of the law; this was a reference to the institution of *référé* associated with absolutism, according to which it was the monarch's sole discretion to explain his will, cf Yvan-Louis Hufteau, *Le référé législatif et les pouvoirs du juge dans le silence de la loi*, Paris 1965, 10.

– lack of any possibility of examining the content of statutes for compliance with the Constitution.[90]

CONCLUDING REMARKS

The end of the 18th century lent a new dimension to the discussion on the substantive and procedural assessment of the decency of the law. This happened for several reasons. Firstly, the idea of the constitution emerged, which was understood not only as a document defining the system of the state and expressing its philosophical concept but also as a legal act having the character of supreme law.[91]

Secondly, the end of the 18th century brought the consolidation of the concept of substantive rights, whereby every human being is endowed with certain natural rights, which are not granted to them by the authorities as a privilege, but with which they come into the world, and the public authority should guarantee those rights to them.[92]

Thirdly, in the late 18th and early 19th centuries, the law began to interfere with the lives of individuals to a much greater extent than before. As Alexis de Tocqueville wrote, the public administration under the Bourbon monarchy 'constantly helped, transformed, permitted [...] in a thousand ways, it already exerted an influence not

[90] Except for two cases from the times of the Second Republic, when the Court of Cassation rejected a statute on the grounds that it was unconstitutional, cf François Saint-Bonnet, 'Le contrôle a posteriori: les parlements de l'Ancien Régime et la neutralisation de la loi', Cahiers du Conseil Constututionnel, 2010 (28).

[91] This was expressed, for example, by the Supremacy Clause contained in Article VI of the United States Constitution. The supreme legal character of the constitution was also expressed in special procedures for its adoption and amendment, different from those for ordinary legislation, cf Hubert Izdebski, 'Konstytucja Trzeciego Maja wśród konstytucji swojego wieku', Państwo i Prawo 1991 (5), 7. As the constitution combined the features of a legal act and those of a document setting forth certain philosophical views (such as indicating the sources of state power and determining the relationship between the citizen and the state) meant that at the same time the constitution became 'an interpretative directive for itself, but also (perhaps above all) for ordinary legislation', cf Wąsowicz (n 33) 20.

[92] These rights were listed in special documents, most often solemn acts passed by constituent or legislative assemblies. The most famous document of this kind was the French Declaration of the Rights of Man and of the Citizen of 1789, but a similar solution can be found, for example, in the Virginia Bill of Rights of 1776 (and in similar declarations of other states, such as Massachusetts, Rhode Island and Connecticut). The original version of the U.S. Constitution did not contain a catalogue of fundamental civil rights, but very quickly (within 3 years) the first 10 amendments to the Constitution were passed, forming a kind of Bill of Rights.

only on the general management of state affairs but also on the fate of families, on the private life of every human being'.[93]

All this meant that the contact of the individual, endowed with substantive rights, with the regulations and activities of state institutions became more and more intense. Thus, the scale of potential collisions between the particular interests of a citizen or groups of citizens and the legislative invention of and the decisions of the state administration was growing at a rapid pace. Therefore, it became necessary to find a remedy that would allow a balance to be maintained between the substantive rights of the individual and the policy of the state.

The answers to this challenge would be the judicial review procedure and the concept of the *Rechtsstaat*, developed over the centuries of evolution outlined above.

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[93] Alexis de Tocqueville, *Dawny ustrój i rewolucja*, Wyd. Znak, Warszawa-Kraków 1994, 22–23.

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