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Justice as the basis of law and social order

Introduction

As the object of scientific analysis, the idea of justice is primarily a field of interest in theory of justice, which is a subdiscipline of moral philosophy. Key areas of considerations in theory of justice are patterns of interpersonal relationships of men to each other, also through social institutions. The normative aspect of justice is analyzed not only by philosophers but also in the fields of political science, economics, law or theology. Some argue that multidimensional and interdisciplinary character of justice, the diversity of paradigms and the risk of ambiguity lead to the situation that questions about meaning of justice cannot be answered in the form of analytical definition. The notion of justice is vulnerable to semantic abuse what is confirmed by the history of political and legal doctrines. Political upheavals, coups d'état, bloody revolutions, wars, terror, repression – all those have taken place in the name of justice¹. Despite all abuses, the notion of justice is still functioning in the area of positive connotations in everyday and legal language. The idea of justice in every generation captures attention of scholars and artists, lawyers and politicians, elites and ordinary citizens.

Since the beginning of philosophical reflection, justice has been treated as a virtue and general pattern of behavior of an individual. Justice has been seen

¹ H. Brighouse, *Justice*, Cambridge 2004, p. 1–13.

as desired trait of personality, the most important and guiding moral virtue. In that view, justice is an ideal which refers to a specific category of human actions, the pattern of behavior, the form of perfect aspirations and moral maturity. Justice is seen as normative, critical obligation, basic principle of moral conducts, expressing the need to respect others and what they are entitled to. The function of justice is to control human behavior in relation to others, putting order in interpersonal links, regulating strict duties of men to each other. The *Digest* defines justice as a constant and permanent will to allow each person what is his right (*iustitia est constans et perpetua voluntas ius suum cuique tribuendi*). References to the value of justice seem to be natural, intuitive and confirmed by personal experience from early childhood².

Since ancient times, the idea of justice has been furthermore seen as an important value of the political and institutional order³. Justice has become the first virtue, the most important moral criterion for social institutions, their most important aspect, an indicator of the general direction of social change. Justice has just become not only a criterion for an individual, his behavior, but also for the system of rules and institutions in which an individual operates⁴. Justice is seen as relevant to the horizontal interpersonal relationships, as well as to the level of individual–community–state. The criterion of justice is the core of the classical critique of social relations, economic and political conditions in social groups. Justice is a pattern for ideals on which should be constructed state's organization and other social structures and institutions. One of the most important areas in which justice should be implemented is the legal order. Despite the impressive legacy of classical philosophy and heritage of jurisprudence equipped with venerable formulas and definitions, contemporary legal elaborations and commentaries rarely employ the notion of justice. Representatives of contemporary jurisprudence and political sciences emphasize ideological, ambiguous and creative nature of interpretation of 'justice'.

In classical philosophy, ideal criteria associated with justice referred its material content to relatively stable moral system based on the classical concept of truth. The truth was referenced to the objective nature (essence) of things and intimately supported by beliefs based on religious doctrines. Today, in normative

² S. Lebovici, *C'est pas juste*, in: W. Baranès, M.-A. Frison-Roche (eds.), *La justice*, Paris 1995, p. 16–27.

³ M. Canto-Sperber, *La vertu individuelle, modèle politique*, in: W. Baranès, M.-A. Frison-Roche (eds.), *op. cit.*, p. 28–41.

⁴ J. Rawls, *A theory of justice*, Cambridge 1999, p. 1–16.

disciplines of the Western world, after denying any theological references in humanities and social sciences and questioning any objective point of valuation, so-called ideal criteria are treated as variable and arbitrary values, involved in the particulars of social relations. There is no doubt that the scientific analysis of relations of social order and law to justice depends primarily on certain paradigm based on axiological assumptions and acknowledged methods accepted by the particular group of researchers. In legal philosophy, obvious differences are evident from the perspective of the concepts of natural law, legal positivism and postpositivism. Consequently, different conclusions about justice as basis of law and social order arise from these approaches.

The logocentric view of justice

From the classical point of view, the essence of the dispute about justice is the reference to the *Logos* – the human intuition and consequently philosophical concept that the world has got rational and objective structure which is knowable and normative both to an individual and political structures. The idea of a rational structure of the world includes not only the laws of physics but also universal principles of human conduct. According to this concept, human reason is able to and also obliged to discover general moral rules of human conducts and adapt to them. The essence of philosophical dispute about the relationship of justice to law and social order refers to the idea that the *Logos* – as real, transcendent, timeless order – has got objective character and involves men in the moral sphere.

On the basis of logocentric assumptions, researchers have developed various concepts of natural law (the laws of nature), according to which, besides positive law, there are the rules of moral law, arising from the objective order of the world and objective structure of human nature which have valid (normative) character independently and supremely to the will of the legislator. In that view, man does not create natural law but finds and obeys it. Both an individual and a community should respect and implement valid standards imposed by the nature.

In the concept of 'natural law' justice, arising from the order of nature, assessing the social order, including legal institutions, is an essential criterion. If justice is a virtue, the law should be a tool for realization of this virtue in social order. Natural law is regarded as the basis of what is good and fair for others, a fundamental criterion for establishing and applying the standards of positive law. As far as positive law is consistent with the natural pattern, it is

considered to be just and fair, and if it is contrary to this pattern, it is assessed negatively as unjust and unfair. From the perspective of natural law, there is a fundamental intrinsic connectivity between the positive law and justice. Just and fair attitude is a requirement that applies to all legal actions from legislative activity to law enforcement. As the idea pervading the entire law, justice belongs to the essence of the law, it is its guiding principle which exists before and above the positive law.

By the decision of the legislator, the idea of justice can be entered into the system of positive law, it can become a fundamental, residual principle of the legal system. Being one of the principles of positive law, justice would affect the legislative, judiciary and executive authorities, becoming the basis for the creation, interpretation and application of the law, and even a criterion for assessing the validity of particular legal norms. On the basis of the principle of justice in a legal system, the legislature should make just and fair laws, and the executive and judiciary authorities should achieve just and fair solutions. Flagrant violation of justice by the authorities would, in certain circumstances, entitle to a legitimate rebellion against law and state.

Commutative and distributive justice

The concepts of natural law emphasize the material aspect of justice (substantive justice). Analyzing substantive justice, researchers formulate certain rules of conduct, and therefore the content of the specific principles of justice. The main goal of substantive justice is formulating the basic standards that must be inherent in the positive law if it is to be recognized as just and fair law. Scholars point out certain absolute values as evaluation criteria of substantive justice, such as dignity of man or nature of human being. To know and formulate specific rules of just and fair conduct, there should be analyzed structure and nature of the person and his natural, inherent, spontaneous actions and reactions. Man, as being not fully satisfied, feels diverse needs of physical, emotional and spiritual kind, and spontaneously tends to satisfy them. His reason recognizes his own abilities and deficiencies, and wants to achieve and realize them. The realization of natural goals, needs and desires seems to be a kind of good. The result of this capacity and potentiality is the judgment of the reason: “good is to be done and pursued, and the evil is to be avoided” (*bonum est faciendum et*

prosequendum, et malum vitandum), which is the guiding principle of natural law and the basic rule of a substantive justice⁵.

This general principle of natural law requires exemplifications. Its concretizations are the results of the analysis of innate tendencies (inclinations) of human nature. The basic inclinations of human being, indicating the content of norms of the natural law, manifest themselves in the pursuit of preservation of life, procreation, education of children and the need for growing of human's personality in a properly organized society. These inclinations include physical, emotional, cultural, economic, moral, religious and other human needs. Psychosomatic structure implies the need for human life, food, procreation, family, freedom, equality, development, truth, religion, housing, clothing, work, etc. The lowest subjectivity of natural needs is in the range of minimum of subsistence, and the largest – in the area of culturally conditioned social needs. Basic needs, demonstrating the greatest similarities between individuals, are objective and universal. They indicate the universal content of natural law and rules of justice⁶. There are other principles perceived as general rules of natural law, such as 'agreements must be kept' (*pacta sunt servanda*), prohibition of violating other people's property, right to defense, prohibition of cheating and harming others, obligation to repair damage caused to one's property, etc.

Authors developing the concept of substantive justice traditionally consider two major categories of justice: commutative and distributive. The distinction comes from Aristotle⁷. Commutative justice is based on the rule of equal measure. The basis for this rule is the egalitarian principle, which implies equality of all eligible units and has the function of equalization in interpersonal relations. The principle of equalization in relations between human beings refers to obligations arising voluntarily (as a result of the agreements and exchanges) and caused involuntarily (as a result of deception or violence). Distributive justice is a set of rules for the distribution of goods (rights and obligations) between people in accordance with certain previously accepted criteria. It takes forms

⁵ St. Thomas Aquinas, *Summa theologiae*, I–II, q. 94, a. 2; English translation: *The Treatise on law: being Summa theologiae, I-II. QQ. 90 through 97*, transl. R.J. Henle, Notre Dame 1993.

⁶ M.A. Krąpiec, *Person and the natural law*, transl. M. Szymańska, New York 1993, p. 200–218.

⁷ Aristotle, *Nicomachean ethics*, transl. C.D.C. Reeve, Indianapolis 2014, p. 77–96; A.-H. Chroust, D.L. Osborn, *Aristotle's conception of justice*, "Notre Dame Law Review" 1942, vol. 17, no. 2, p. 129–143.

of several formulas: from each (to each) according to his/her strength, abilities, vocation, efforts, results, merits or what it should be according to the law⁸.

Although the categories of commutative and distributive justice are usually discussed separately, they remain closely related. There is only one idea of justice but described in various aspects. Marta Soniewicka emphasizes that retribution is the type of distribution where equalization of losses and profits can determine distribution of benefits and burdens (rights and obligations). In case of voluntary agreements, it comes to the distribution resulting from cooperation (exchange) cooperative surplus, whereas in case of offense, there is an appropriate distribution of pain (penalties)⁹.

The positivistic denying of justice

Philosophical and legal positivism of the 19th century, as opposed to the concept of natural law, assumes that the law is only positive law created by the authority. The basis of the law and social order is only the will of the legislator. Systems of legal and moral norms are separated, and legal standards inconsistent with common morality are still treated as law. In the area of methodology, legal positivism is coherent with general assumptions of the positivistic paradigm. Within this perspective, human knowledge is seen as corresponding to assumptions of empiricism and scientism. Positivism – declaratively at least – rejects types of valuating and assessing statements, as based only on intuition and speculation rather than on experience. Consequently, the only reflection of reality is the scientific truth achieved by empirical tools. All kinds of moral, social and political issues should be resolved with the use of empirical methods. It is not about justice but only about effective organization of society.

From the positivistic perspective, the reason of the law is not the realization of justice in social relations but preventing anarchy and providing social order and public safety. Justice, as an element of morality, is not a purpose of the law, is not a criterion for the evaluation of the substance or basis of law's validity. From this point of view, the legal standards cannot be considered as just and unjust, fair or unfair. Justice can only mean legality, understood as acting according to the dispositions of the norms of positive law. Only positive

⁸ Z. Ziemiński, *O pojmowaniu sprawiedliwości*, Lublin 1992, p. 93–120.

⁹ M. Soniewicka, *Granice sprawiedliwości, sprawiedliwość ponad granicami*, Warszawa 2010, p. 40–61.

law created by the state is the sole source of justice. Where there is no positive law, there can be no justice¹⁰. Justice, seen as a value, must be identified with obedience to the positive law.

Post-positivistic concepts of justice

Legal positivism has been criticized largely as a result of traumatic experiences of wars and totalitarianisms of the 20th century. These experiences led to the revival of the concepts of natural law in legal philosophy, so-called soft positivism, and later post-positivistic concepts of justice. The erosion of the hardcore of legal positivism was connected with the spectacular developing of the concept of human rights. Strengthening individualistic attitudes, growing importance of the autonomy of individuals, participation of individuals and non-governmental organizations in creating state's policies led to the fact that today, in an egalitarian society, methods recognized by the legal positivism are assessed as insufficiently justified tools to solve social problems and conflicts. Definition of the law as a set of standards that the state imposes unilaterally does not correspond to contemporary humanitarian and liberal standards. The law – it is suggested – should be created in the process of communication and determining the positions of all the social partners. According to Ronald M. Dworkin, justice is the value that can be understood only through the lens of fairness, due process, procedures and integrity¹¹. The idea of justice concerns the proper distribution of opportunities, resources and freedom between individuals and groups within the community. Justice focuses on the proper results of operation of fair institutional systems¹².

According to post-positivistic ideas, the way to know the reality is a discourse, and the instrument of investigation of the truth is a consensus. The objective truth becomes 'consensual truth'. The truth is seen as what all participants of discourse agree. Another kind of truth would exclude weaker individuals and minorities. Truth and justice are seen as the emanation of the procedural rules governing the process of rational communication. Consensus becomes the criterion of truth and justice. Law and social order must be justified by the

¹⁰ H. Kelsen, *What is justice? Justice, law, and politics in the mirror of science: collected essays*, Union 2000, p. 147.

¹¹ R.M. Dworkin, *Law's empire*, Cambridge 1986, p. 140–275.

¹² J. Skorupka, *O sprawiedliwości procesu karnego*, Warszawa 2013, p. 43–48.

strength of ‘better argument’ considered in relation to clear communication and an ideal situation of discourse. The discourse procedure should guarantee the equality of all involved participants. Justice is the most universal criterion which direct and indirect consequences are acceptable to all participants in the discourse¹³.

Procedural justice

Post-positivistic point of view is characterized by an attempt to separate material from the formal aspects of justice and by an emphasis on the formal aspect. Analysis of the formal justice is connected not with the material content of rules but with the way that rules are applied. Special interest falls on justice in its procedural aspect. The idea of procedural justice generally does not need to reject the result pointed out by specific material values (but it only assumes results ensured on the basis of independent, pre-established formal criterion for fair distribution), however the concept of ‘pure procedural justice’ is reduced to a proper and impartial adherence to adopted rules, regardless of their content and the purpose they serve. Within this perspective, adopted rules of justice should not be assessed from any axiological point of view; finally the rules themselves can be arbitrary or even absurd. What only counts is to oblige the procedure regardless of substantive results. Justice is simply reduced to the obligation to respect formal rules. Procedural justice precedes truth and goodness. Justice is seen as a pure procedure that allows to define what is true and fair. Justice means institutionalization of dispute about what is socially good. Justice is the rigorous application of formal rules of accepted procedure, even if the result is contrary to what is considered to be an objective truth¹⁴.

The literature indicates, however, that excessive emphasis on the theory of procedural justice leads to ontological relativism. The pure procedure becomes – from the ontological point of view – the ‘first’, deciding finally on substantive contents of the notion of justice. Through the pure procedural justice, it can be even legalized what is widely recognized as a moral degeneration and blatant abuse of law. It is good to remember that totalitarian governments firmly cared for the preservation of justice procedurally understood. Moral dissonance occurs

¹³ J. Habermas, *The theory of communicative action*, vol. 1: *Reason and the rationalization of society*, transl. T. McCarthy, Cambridge – Boston 1984, p. 286–287.

¹⁴ K. Komplak, *Rozważania o sprawiedliwości*, “Prokuratura i Prawo” 2004, no. 3, p. 11.

when a fully acceptable procedure (formally fair) leads to disapproved results from moral or legal point of view¹⁵.

In recent decades, in philosophy of law, there has been a particularly important theory of justice as fairness presented by John Rawls¹⁶. The idea of justice as fairness rests, on the one hand, on the Enlightenment's dogma to ensure maximum freedom for each individual, which must be reconciled with the freedom of others; on the other hand, it raised the postulate that all social inequalities should bring the largest benefit to those who are most disadvantaged. The concept of fairness assumes that justice is a meta-rule which requires social institutions to apply the tactics of balancing and searching the golden mean between the extremes, between overflow and underflow. Fairness requires that laws and institutions must treat equally all the members of undefined groups. Fairness must be applied to the initial (primary) situation when the perfect social agreement (social contract) is created under conditions in which no one is privileged or discriminated. At this stage, everyone is in a similar situation and the case of favoring or discriminating anyone cannot be predicted. Justice as fairness, which is a form of social contract theory, is more perfect when the starting position of participants of the agreement lacks any feature of inequality or privilege for anyone. Justice can be discovered by asking what principles people would choose if they could not know what social position they shall occupy, finding themselves behind the 'veil of ignorance'.

However, critics of Rawls' theory indicate that 'justice as fairness' is not neutral towards competing value systems. Just the opposite, Rawls presupposes axiological choices about what features and characteristics of the entities should be and what should not be considered as a condition for resolving the conflict of interests. Using 'fairness' under the guise of neutrality, the theory smuggles particular preferences in favor of some and at the expense of others. Rawls' 'veil of ignorance' is in fact seen more like a screen to transmit predominant relativistic and consensual axiology and practice as the value of objectivity and neutrality¹⁷. The theory of 'justice as fairness' and other concepts of 'pure procedural justice' are not only procedural theories of justice because they are always based on the material foundation, in Rawls' case – on foundation of liberal and

¹⁵ J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999, p. 145–146.

¹⁶ J. Rawls, *Justice as fairness: political not metaphysical*, "Philosophy and Public Affairs" 1985, vol. 14, no. 3, p. 223–251.

¹⁷ Z. Tobor, T. Pietrzykowski, *Roszczenie do bezstronności*, in: J. Stelmach (ed.), *Filozofia prawa wobec globalizmu*, Kraków 2003, p. 73.

relative concepts of equality and freedom of people. These kinds of assumptions determine the result of justice and latter criteria for evaluation procedures. In Rawls' theory, the procedure is designed to lead to a particular purpose: liberal equality or equal opportunities for all members of society, with special emphasis on minorities' rights. The construction of the procedure is intended only to convince everyone that these particular assumptions are reasonable¹⁸.

Conclusion

Justice as basis of law and social order cannot be reduced to pure procedural justice because it always serves to ensure a predetermined result that is considered true and fair in accordance with certain approved moral assumptions. Placing the obedience to procedure at the top of criteria for assessing law and social order is in itself the axiological resolution entering into the sphere of substantive rules of justice. The popular concept of procedural justice is the result of deliberations in the area of substantive justice but from relative and liberal point of view. In fact, strict and rigorous separation of substantive and procedural justice is neither possible nor reasonable¹⁹.

Substantive and procedural aspects of justice are mutually complementary strands. One is not possible without the other. Formal and procedural justice refers to the rule of equal measure. Nevertheless, the rule of equality does not contain any content in itself, because for instance it does not determine who is equal to whom. It depends on the premise of justified distinctions, which is the domain of substantive justice. Procedural justice does not provide a sufficient criterion for assessing the distribution of goods. Formally, fair can be any, even the most absurd distribution if only apply to previously adopted formal criteria of distribution. Justice treated as a pure formal rule becomes empty formula which can be filled with any content. In the end, it is clear that no normative theory can eliminate axiology. In each case, the core of discussion on justice is the question what is considered as true and good, and this is eternal and constant moral issue²⁰.

¹⁸ M. Soniewicka, *op. cit.*, p. 40–61.

¹⁹ M. Borucka-Arctowa, *Sprawiedliwość proceduralna a orzecznictwo Trybunału Konstytucyjnego i jego rola w okresie przemian systemu prawa*, in: J. Trzciński, A. Jankiewicz (eds.), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej*, Warszawa 1996, p. 25.

²⁰ Ch. Perelman, *O sprawiedliwości*, transl. W. Bieńkowska, Warszawa 1959, p. 101.

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Abstrakt

Idea sprawiedliwości obejmuje normatywne sposoby wzajemnego odnoszenia się ludzi do siebie, także za pośrednictwem instytucji społecznych. Autor przedstawia najważniejsze koncepcje sprawiedliwości w kontekście określania podstawowych założeń aksjologicznych systemu prawnego i społecznego. Prezentuje najbardziej doniosłe ujęcia kwestii sprawiedliwości z punktu widzenia filozofii klasycznej, pozytywistycznej i postpozytywistycznej, a więc koncepcje prawa naturalnego, sprawiedliwości materialnej, wyrównawczej i rozdzielczej, wreszcie formalnej i proceduralnej. Wedle autora, koncepcja tzw. czystej sprawiedliwości proceduralnej, rzekomo wolnej od wartościowania, w rzeczywistości ma materialny charakter, opiera się na uprzednich aksjologicznych założeniach liberalnej ideologii.

Słowa kluczowe: sprawiedliwość, sprawiedliwość proceduralna, bezstronność, prawo, porządek społeczny

Abstract

The idea of justice refers to interpersonal relationships of individual to individual, also through social institutions. The author presents the most important concepts of justice, considered as the axiological basis of law and social order, in terms of classical philosophy as well as positivistic and post-positivistic approaches. He analyses the problem of justice in such concepts as natural law, substantive justice, commutative and distributive justice, and finally formal and procedural justice. The author claims that the idea of 'pure procedural justice', allegedly free of valuating, is in fact substantive and is founded on prior axiological assumptions of liberal ideology.

Key words: justice, procedural justice, fairness, law, social order