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THE GENESIS AND HISTORY OF *IUS GENTIUM* IN THE ANCIENT WORLD AND THE MIDDLE AGES

The Kraków School is often described in popular Polish tekxtbooks as if it was the beginning of the evolution of international law; hence, one must maintain a certain sense of proportion as regards the achievements of its mediaeval masters. Altough they played a distinguished and still insufficiently appreciated role in world literature on the subject they were not the creators, as such, of international law.

The roots of *ius gentium* reach back into prehistorical times. Even at that time customs existed among peoples which regulated their mutual relations in matters of how to conduct warfare properly treat ambassadors, conclude agreements, designate places of asylum, etc. They were not based, however, on mutually recognized legal principles but, above all, on religious beliefs and the customs associated with them. The immunity of an ambassador derived from his being under the special protection of the gods and his use of religious symbols. Contracts were concluded with religious oaths and sacrifices offered to the gods according to defined rituals. The essential role in maintaining proper relations among different peoples or tribes was carried out by their common religious cult, as in the case of the ancient Greek tribes[1].

Montesquieu says, in his *De l'esprit des lois*, that practically all peoples applied the law of nations. According to Nussbaum, ethnologists do not share that opinion. They state that even today among certain primitive peoples one cannot discern a difference between states of war and peace, since one of the fundamental principles guiding them is ceaseless hatred and enmity towards

[1] August Wilhelm H e f f t e r, *Das europäische Völkerrecht der Gegenwart*, Berlin: E. H. Schraeder, 1861, p. 8.

their neighbours. The „other" is treated by them in principle as if he was „not a man"[2].

The first explicit signs of the existence of a „law of nations" reach back to the fourth millenium B.C., among the Sumerians. The closer we come to modern times, the more we encounter a practically universal recognition of that law in all cultures: both in Babylon and Egypt as well as in ancient India and China. That law regulated the sealing of treaties, the making of peace and the prosecution of war, the taking and dividing of war spoils and slaves, and the wartime treatment of an enemy's fields and settlements[3].

In ancient Greece people lived from earliest times as if they were within the scope of two horizons. On the one hand, they felt themselves connected with their own *polis,* or city-state. At the same time, because of a common language, religious cult, the Olympic games, etc., they felt a strong bond to the Panhellenic community. They treated non-Greeks as their natural enemies and regarded war against them as justified by nature[4]. One can find explicit traces of such attitudes towards others in, for example, Aristotle[5].

In ancient Rome the principle of personal law obliged, i.e., that a person was bound by the laws of the *civitas* to which he belonged regardless of where he was. The primordial sources of Roman *ius civile* were custom, royal statutes, and the resolutions of popular assemblies *(leges, plebiscita).* In earliest times priestly colleges served as interpreters of the law, thereby giving birth to the science of law. Foreigners at first remained outside the law in Rome; hence, Roman law only affected Roman citizens. It was their *ius civile* to which foreigners were not subject because they would not be permitted to be part of it. In their relations with Romans, however, foreigners could apply their own personal laws because Romans, in turn, could not take advantages of those laws. Legal relations between Romans and foreigners or between foreigners on the territory of Rome were thus of necessity based upon the norm of customs existing among the peoples of the Mediterranean region. At the basis of these customs lay *naturalis ratio.* That collection of norms was called the *ius*

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[2] Arthur N u s s b a u m, *Geschichte des Völkerrechts in gedrängter Darstellung*, München und Berlin: C. H. Becksche Verlags Buchhandlung, 1960, p. 1.

[3] Ibidem, p. 6.

[4] Benedetto B r a v o and Ewa W i p s z y c k a , *Historia starożytnych Greków* [*The History of the Ancient Greeks*], Warsaw: Państwowe Wydawnictwo Naukowe, 1988, vol. 1, p. 137.

[5] See Benjamin Apthorp Gould F u l l e r, *Historia filozofii* [*The History of Philosophy*], transl. Zygmunt Glinka, Warsaw: Państwowe Wydawnictwo Naukowe, 1966, vol. 1, p. 177.

gentium. Concretely summarizing the matter, it originated from the experience of praetors responsible for pilgrims. It was also applied when Rome became an empire of worldwide proportions and swallowed up various nations. Under those conditions working out the principles of a law which had international scope, binding in the whole state, became a necessity. The principles of *ius gentium* were relatively simple and the basis upon which the various sides were bound by it were their mutual trust *(fides)* as well as the principles of utility and justice *(aequitas)*[6].

Ius gentium was basically a private law, i.e., regulating mutual relations among individuals. That understanding of *ius gentium*, however, was subject to certain changes with the passage of time. Gaius (2nd century A.D.), the author of the *Institutiones*, a collection in four books containing a narrow and systematic survey of Roman civil law, differentiated *ius civile* (i.e., the law a given people [*populus*] made for itself) from *ius gentium* (i.e., established by all peoples on the basis of natural reason and, in this understanding, accepted by all peoples [*gentes*]). This signified a philosophical generalization of the legal relations which existed in Rome. Thus understood, *ius gentium* contained in itself all the rules and legal institutions (which in Gaius' opinion were universal) such as marriage, protection of property, compensation for injuries, diplomatic immunity, etc. From this it results that Gaius' *ius gentium* is made up both of public and private law. Mediaeval lawyers took over this distinction between *ius gentium* and *ius civile* to such an extent that the former became a synonym for universal law. Only in the 17th century was *ius gentium* turned into a technical term to designate the law accepted by independent states to regulate relations among them[7].

A. Nussbaum regards the universal identification of ancient and mediaeval *ius gentium* with the „law of nations" or „international law" as erroneous. This fallacious identification can be seen in various languages in the constant translation of *ius gentium* by terms like „Völkerrecht", „law of nations", „droits des gens", etc., even though the ancient and mediaeval *ius gentium* did not in the

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[6] John E p p s t e i n, *Catholics and International Politics, or, The Catholic Citizen: His National and International Responsibilities*, London: Cath. Troth Society, 1924, p. 7; Ludwik E h r l i c h, *Prawo narodów* [*The Law of Nations*], 3d edition, Kraków: Nakładem Księgarni Stefana Kamińskiego, 1948, p. 12; Henryk K u p i s z e w s k i, *Prawo rzymskie a współczesność* [*Roman Law and Contemporaneity*], Warsaw: Państwowy Instytut Wydawniczy, 1988, p. 19.

[7] A. N u s s b a u m, *Geschichte*, p. 16.

least encompass the modern understanding of „law of nations"[8]. That opinion does not, however, seem justified. The somewhat different compass of the modern „law of nations" is connected, after all, with the evolution of the *ius gentium* over many centuries. It is the continuation of *ius gentium*, not some completely new reality. From the Greek tradition there arises still another terminological problem in defining the relationship between *ius gentium* and *ius naturale (ius naturae)*. The idea of a law of nature as universally obligatory rules whose content are immanent in human reaches back to Greek (and more precisely, Stoic) philosophy of the third century B.C.[9] The Romans took over Stoic philosophy and, thanks to Cicero, the notion of *ius naturale* entered Roman law. Marcus Aurelius (d. 180), another Stoic, also accepted this idea as did the early Fathers of the Church, who claimed that we received natural law as a consequence of the fall of our first parents, who up until the moment of original sin needed no law[10]. Natural law is sanctioned by God, who is the author of nature, hence, every human law must conform to the law of nature. This likewise applies to the laws of nations[11].

In Roman sources *ius naturale* was very often identified with the philosophical *ius gentium*, since the universality of defined legal rules were treated as a characteristic quality of nature and human reason. Gaius' definition of *ius gentium* explicitly appeals to „natural reason" and, therefore, to the element of nature as the foundation of that law. On the other hand, some Roman sources oppose *ius gentium* to *ius naturale*. The great Roman lawyer Ulpianus (d. AD 228), author of a commentary to the pretorian edict, *Libri ad edictum* (in 81 books) differentiates those two types of law very explicitly, stating that *ius naturale* applies not only to people but to all living beings in those things that they and man have in common. *Ius gentium*, on the other hand, is a law which serves the human race[12].

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[8] Ibidem, p. 16.

[9] Ibidem, p. 16; Jan R o h l s, *Geschichte der Ethik*, Tübingen: J. C. B. Mohr, 1991, p. 148; Bertrand R u s s e l l, *A History of Western Philosophy*, London: George Allen and Unwin LTD, 1947, p. 292.

[10] J. E p s t e i n, *Catholics*, p. 7; L. E h r l i c h, *Prawo narodów*, p. 20; A. N u s s b a u m, *Geschichte*, p. 17.

[11] J. E p s t e i n, *Catholics*, p. 8.

[12] A. N u s s b a u m, *Geschichte*, p. 17; Władysław R o z w a d o w s k i, *Prawo rzymskie* [*Roman Law*], Poznań: Ars Boni et Aequi, 1992, p. 25.

To the Roman mind, nature makes man a free being. On the basis of *ius naturale* all people come into the world as free beings. If, despite this, someone becames a slave it is either a matter of the *ius gentium* or by force of the ius civile. Ulpianus expressed those thoughts and the Empire Justinian (d. AD 565) repeated them[13], the latter being convinced that natural law comes from God and defining it as „those principles which are observed in the same way among all peoples, and established by Divine Providence, always remaining permanent and immutable"[14].

Over the course of several centuries following the fall of the Western Roman Empire, the Church developed a legal system known as „canon law", codified in several basic collections which together constituted the *Corpus iuris canonici* (in contrast to Justinian's *Corpus iuris civilis*, published under that title by Dionysius Gothofred in 1583). Canon law was neither national nor international law. As A. Nussbaum puts it, it was a supra-national and universal law, inasmuch as it touched Christians throughout the world. Canon law primarily regulated ecclesiastical issues, matters of faith and morality. It nevertheless also intruded, directly and indirectly into territory proper to the secular authorities[15]. Various ideological factors, such as a certain notion of the supremacy of spiritual over secular authority, determined this. One must also take account of the fact that the Church was the only well-organized institution at that time. As such, it was the only one capable of giving stability to social and political life. Having at its disposal a host of people who were relatively well-disciplined and at the same time the best educated of their day, the Church could be of help in the governing of states. It was even forced to assume these functions, roles which *par excellence* are domain of the lay state[16]. It is therefore understandable that the Church was particularly entitled and even predestined to establishing the norms of international relations in those days. One also cannot forget that at a time when the consciousness of belonging to *christianitas* was incomparably stronger than the awareness of belonging to a given state, the Church had at its disposal serious sanctions, like excom-

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[13] W. R o z w a d o w s k i, *Prawo*, p. 25.

[14] *Institutiones*, I, 1, 2, 11; W. R o z w a d o w s k i, *Prawo*, p. 25.

[15] A. N u s s b a u m, *Geschichte*, p. 19.

[16] Stanisław W i e l g u s, *O micie „ciemnego" średniowiecza i „światłej" nowożytności polemicznie* [*On the Myth of the „Dark" Middle Ages and „Enlighted" Modern Times: A Polemic*], in: *Z badań nad średniowieczem* [*Research on the Middle Ages*], Lublin: Redakcja Wydawnictw KUL, 1995, p. 40.

munication and interdict, which were recognized everywhere. Perhaps the greatest contribution of the Church to the sphere of secular life dealt with the law of war and peace. One must keep in mind that for many centuries so-called „private wars" were a real plague and weighty Divine scourge on Western Europe. These wars went on almost endlessly among feudal lords, cities, tribes, etc. They sometimes broke out over very insignificant reasons. When the chroniclers or other mediaeval authors wrote about the cruelties of war, they almost always had in mind private wars (with their tragic consequences for ordinary people), not the great wars about which we read in history books. The Church neither could nor wanted to tolerate such collective insanity which, without exaggeration, had the characteristics of cruel and bloody sport[17]. The Church thus made maximum use of all of its possibilities to eliminate these wars, or at least to limit them to a minimum[18]. The proclamation of the so-called „Divine Peace", for example, served this purpose. The „Divine Peace" was a period when such conflicts were prohibited under heavy ecclesiastical sanctions. Thus the Church in France decreed, in 1041, a period of peace every week from sundown Wednesday to sunset Monday. The Third Lateran Council, in 1179, gave that decree the character of a universal law. That Council also introduced a prohibition on the taking of prisoners-of-war into slavery. Kings and emperors followed the eclesiastical example. In 1152 Emperor Frederick Barbarossa introduced peace into his whole country; in 1235 Frederick II renewed the decree. Private wars were forbidden in England from the time of the Norman Conquest. Emperors also issued laws aimed at protecting foreigners and the shipwrecked[19].

Being unable to climinate private wars completely, the Church strove as far as she could to temper them. For that reason the Second Lateran Council (1139) forbade the use in battle of crossbows and bows as „lethal weapons particulary hated by God". There emerges here explicit associations with today, *toutes proportions gardees*, regarding the use of chemical, biological, or nuclear weapons[20].

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[17] A. N u s s b a u m, *Geschichte*, p. 19.

[18] S. W i e l g u s, *O micie*, p. 40; A. N u s s b a u m, *Geschichte*, p. 19.

[19] A. N u s s b a u m, *Geschichte*, pp. 20, 24.

[20] *Concilium Lateranense II Generale sub Innocentio II, Summo Pontifice*, canon XXIX: „De ballistariis et sagittariis, in *Sacrorum conciliorum nova, et amplissima collectio*, 29 vls. ed. Ioannes Dominicus Mansi. Venetiis: Apud Antonium Zatta, 1796, vol. 21, col. 533: «Artem autem illam mortiferam et Deo odibilem ballistariorum et sagittariorum adversus Christianos et Catholicos exerceri de caetero sub anathemate prohibemus»": A. N u s s b a u m, *Geschichte*, p. 20.

Troughout the entire Middle Ages the custom of swearing to agreements according to solemn and strictly defined forms was maintained. These customs had great significanse for the preservation of the agreements made because breaking them not only entailed political and military consequences but also brought about the worst ecclesiastical punishments leading, for the deeply believing Christian, to eternal damnation. Mediaeval *ius gentium* was thus deeply rooted in canon law as well as in Christian theological and philosophical theories. The identification of natural law with the Divine Will led to treating the former as the universal norm for all human law, including the *ius gentium*. Christian theologians and philosophers had no doubts that natural law was inborn to human reason. At the same time they believed that reason was darkened by original sin. Driven by love for humanity, God was in some sense compelled to reveal that law once again in Sacred Scripture. The consequence of such convictions was the postulate that man, a nation or nations must design their laws in conformity with the natural law as illuminated by the revealed law[21]. St. Augustine (d. 430) had a tremendous influence within Christianity on the reception and understanding of Stoic law. (One might note in passing that one already finds among the Sophists an explicit differentiation of natural law [*physei*] – from positive human law [*thesei*]). Augustine recognized natural law as immanent to human reason and will but, unlike the Stoics, did not identify it with fate, the causative law of the Logos. He treated it instead as the order of creation, existing archetypically in the Divine Mind. Taking into account the stances of Tertullian (d. 230) and Origen (d. 254), who had invoked Scripture to proclaim a Tołstoy-like pacifism and opposition to Christian participation in warfare (even to military service), St. Augustine formulated a Christian teaching on war. According to that teaching a Christian had a right to serve in the military and to take part in war, under condition that the war was just. A just war was allowed only then when it was undertaken to fight an injustice. Wars undertaken at the desire of rulers, for plunder or vengeance are never just. Like Cicero, St. Augustine proclaimed that war should serve as a means towards obtaining a lasting peace, which is something superb. War should therefore be treated as a last resort. In his „Letter to Darius" St. Augustine says: „Maioris est gloria ipsa bella verbo occidere quam homines

[21] Jan R o h l s, *Geschichte der Ethik*, Tübingen: J. C. B. Mohr [Paul Siebeck], 1991, p. 149.

ferro"[22]. St. Augustine's theory became the doctrinal foundation for the Church in its struggle against war, and the problem of the so-called „just war" was extraordinarily frequently analyzed by Christian scholars. One of them, Isidore of Seville (d. 636) invoked relevant Roman, and in particular Ciceronian texts in his doctrine on war. Isidore accepted Gaius' use of *ius gentium*, understood as universal law, but modified his definition by adding that the universality of that law will be preserved if it is accepted by „almost" all nations[23]. That qualification was subsequently universally accepted. One should note that Isidore dealt with only the following questions of the *ius gentium*, which later entered into the structure of the modern law of nations: taking over, creating and arming military bases; war; slavery; covenants; peace agreements; ceasefires; diplomatic immunity; etc. Hence the author of the famous *Etymologies* anticipated in surprising fashion modern international law. A certain lack of clarity in his theory of the *ius gentium* was brought about by accepting Ulpianus' notion of *ius militare*. The problem comes from the fact that the compass of *ius militare* partially coincides with *ius gentium*. Both, for example, deal with the matter of declaring war, of making agreements, etc. The Isidoran notion of *ius militare* would subsequently serve modern, particulary Spanish authors in formulating the principles of military law[24]. The use of natural law understood as common to all nations and immanent in human nature as well as Isidore's use of *ius gentium* were taken up by the Decretals of Gratian (1150),[25] in which all the most important canons dealing with war derive from various works of St. Augustine[26].

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[22] A u r e l i u s A u g u s t i n u s, *Domino merito inlustri et Magnificentissimo atque in Christo Carissimo Filio Dario*, in: *S. Aureli Augustini Hipponensis Episcopi Epistulae*, Recensuit et commentario critico instruxit Aloisius Goldbacher, Vindobonae: F. Tempsky, Lipsiae: G. Freytag, 1911, Epistula CCXXIX, p. 498 [*Corpus Scriptorum Ecclesiasticorum Latinorum*, editum consilio et impensis Academiae Litterarum Caesareae Vindobonensis, vol. LVII. *S. Aureli Augustini Operum*, Sectio II, *S. Augustini Epistulae*]; A. N u s s b a u m, *Geschichte*, p. 39; J. E p p s t e i n, *Catholics*, p. 9; Ernest N y s, *Les origines du droit international*, Brussels: A. Castaigne, 1894, p. 45.

[23] I s i d o r u s H i s p a l e n s i s, *Etymologiarum libri XX*, lib. V, cap. VI, PL vol. 82, col. 199-200: „Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera, paces, induciae, legatorum non violandorum religio, connubia inter alienigenas prohibita. Et inde ius gentium appellatur, quia eo iure omnes fere gentes utuntur".

[24] A. N u s s b a u m, *Geschichte*, p. 40; L. E h r l i c h, *Prawo narodów*, p. 22; J. R o h l s, *Geschichte*, p. 149.

[25] J. R o h l s, *Geschichte*, p. 149.

[26] Ludwik E h r l i c h, *Polski wykład prawa wojny XV wieku*, Warszawa: Wydawnictwo Prawnicze, 1955, p. 19.

The distinguished mediaeval masters appealed above all to the thought of St. Augustine. This was especially true of the Franciscans, in particular Alexander of Hales (d. 1245) and Bonaventure (d. 1274)[27]. One should also note in passing that Alexander of Hales had a particularly strong influence on Cracovian theologians of the fifteenth century[28]. Paweł Włodkowic [Paulus Vladimiri] also found himself to a certain degree under influence, as will be later discussed.

Regardless of the various available options, Thomas Aquinas' (d. 1274) theory of the *ius gentium* became dominant in the thirteenth century. He developed it in the second part of the *Summa theologiae,* focusing primarily on matters of war. Other questions connected with the law of nations which had been given primary attention by Isidore of Seville, are treated only in passing and by accident. Replying to the question he poses to himself – „Is it always sinful to wage war?" – Thomas answers: not always. One can prosecute a war if the three following principles are observed: (1) It is authorized by competent authority (*auctoritas principis*): (2) the war takes place because of an appropriate reason (*iusta causa*), i.e., due to some wrong on the part of the other side (*propter aliquam culpam*); (3) those prosecuting the war are guided by an appropriate intention (*recta intentio*), i.e., to the end of aiding a threatened good or to defeat evil.

The essence of the Thomistic doctrine of just war is the *iusta causa* mentioned above. Thomas treated that condition (like, in the final analysis, all the others) as a norm of moral theology, by which he connected the problem of warfare to the jurisdiction of Church authority[29]. Generally considered, the Thomistic doctrine of just war does not go beyond Augustine's. Yet given the enormous authority he possessed, it was Thomas understanding that became one of the pillars of the Church's official doctrine on war, even though Catholic authors also universally appealed to Augustine's theory of war. As stated above, Thomas made the doctrine of just war a part of moral theology. This had an influence on the connecting of religious-moral teaching on just war with

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[27] J. R o h l s, *Geschichte*, pp. 149-150.

[28] Stanisław W i e l g u s, *Die Theorie des Menschen in den Werken Krakauer Theologen aus der zweiten Hälfte des XV. Jahrhunderts*, in: *Historia Philosophiae Medii Aevi*, Burkhard Mojsischt and Olaf Pluta, eds., Amsterdam/Philadelphia: B.R. Grüner, 1991, vol. 2, p. 1064. See also S. W i e l g u s, *Średniowieczna łacińskojęzyczna biblistyka polska*, Lublin: Redakcja Wydawnictw KUL, 1992, pp. 97-98, 122-123.

[29] T h o m a s A q u i n a s, *Summa theologiae*, II-II, 40, 1; J. E p p s t e i n, *Catholics*, p. 9; A. N u s s b a u m, *Geschichte*, pp. 40-41.

the *ius gentium*. That connection had its basis in the mediaeval understanding of the law of nature, which played a preeminent role in international relations among the Christian nations of mediaeval Europe. As was hitherto pointed out, the Fathers of the Church connected the law of nature to Christian theology as the Divine Law standing above human law. Thomas introduced new elements into the categories of the Fathers by distinguishing Eternal Law, the eternal plan of Divine Wisdom which surpasses human intelligence and rules the entire *universum*, from the Law of Nature, which constitutes the imperfect participation, willed by God, of human reason in Eternal Law. The highest principle of that law declares: „Do good and avoid evil". The law of nature, understood broadly, obviously encompasses all living beings, even the entire created world, as Ulpianus had already said. Thomas' understanding of the law of nature morally understood, encompassing both moral and legal norms, had a fundamental significance for the evolution of the *ius gentium*. Aquinas' theory of war was in fact based on that norm. Law and morality are here inseparably joined. Only the differentiation of natural law (which has divine origin) from laws made by man was important to Thomas as well as other mediaeval authors. According to that differentiation they treated the law of nature as superior to human law. As a consequence, in the consciousness of people of the Middle Ages no law, decree, sentences, agreements, treaties, etc. had any significance if they were not in accord with the law of nature or if they violated them. The final resolution of such matters was left to the competence of the Church[30].

Other mediaeval authors spoke out on the subject of just war in this spirit. It should be noted that 15th century Cracovian scholars made use of these authors to a high degree. Among these authors Raymond of Penyaford (d. 1275) belongs in first place. He is the author of the well-known work *Summa casuum conscientiae,* in which he deals with the problem of war in the course of treating various moral questions. Among other things he provided five conditions for a just war. They were: (1) only lay people could take part in war; (2) one could only prosecute war in defense of one's country or to recover captured possesions; (3) war must be necessary means to achieve the return of peace; (4) the motive for war cannot be hatred, revenge, or greed but only a sense of justice and zeal in fulfilling the Divine Law; (5) it should be sup-

[30] A. N u s s b a u m, *Geschichte*, pp. 42-43; Stefan S w i e ż a w s k i, *U źródeł nowożytnej etyki* [*Sources of Contemporary Ethics: Moral Philosophy in 15th Century Europe*], Kraków: Znak, 1987, pp. 143, 146-147.

ported with the authority of the Church, particularly when it is begun on behalf of the faith. In addition, Raymond addressed issues like the use of forbidden weapons in war, the fate of disbanded soldiers and their possessions, inheritances, reparations, etc[31].

Wilhelm of Rennes (Redonensis, 13th century) wrote an extensive gloss to the *Summa* of Raymond, in which he added a series of important supplements. He developed the matter of war reparations owed by those who initiated an unjust war. He also wrote that war was not permitted if one's opponent agreed to resolution of the conflict by arbitration or judicial means[32].

The *Apparatus Decretalium* of Innocent IV (Sinibald da Fiesco, d. 1254) played a very important role in the history of *ius gentium*. Innocent became famous in the history of international relations for his liberal views on relations with non-Christians, to whom he assigned the same rights as Christians, and on the possession of nations and property, arguing that the world had been created for all peoples, not just Christians. Innocent allowed only one exception not of an immediately defensive character to the question of the permissibility of war: he permitted war against the Saracens to recover the Holy Land, who in his day had taken it over unjustly[33].

Henry of Segusio (Ostiensis, Hostiensis, d. 1271), the author of the famous *Summa aurea*, expressed opinions on war and the treatment of pagans and other unbelievers by Christians contrary to those of Innocent IV. He reveals himself in that work as a defender of the idea of offensive war against pagans and an advocate of the then-widespread theory that original sin deprived pagans of the right to possess a family, private property, and their own country. Their property was destined to become no one's property, *res nullius*. After the coming of Christ the right to all property and to possess their own countries belonged only to Christians. They also were the only ones capable of disposing

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[31] R a y m o n d o f P e n y a f o r t, *Summa casuum conscientiae*, Kraków, Biblioteka Jagiellońska, M.S. 2189, f.88v; Wrocław, Biblioteka Uniwersytecka, M.S. II Q 28, f. 115v-116r; See L. E h r l i c h, *Polski wykład*, pp. 23-28, 94, 96; S. S w i e ż a w s k i, *U źródeł*, p. 247.

[32] W i l h e l m o f R e n n e s, *Glossa super Summam casuum conscientiae Raymundi de Penyaford*, Kraków, Biblioteka Jagiellońska, M.S. 2189, ff. 88v, 89v-90r, 90v; Wrocław, Biblioteka Uniwersytecka, M.S. Q 28, ff. 116r, 117v, 118r; See L. E h r l i c h, *Polski wykład*, pp. 28-30, 100, 102, 106, 110, 112.

[33] *Innocenti papae quarti Apparatus quinque librorum Decretalium* (Strassburg 1478 and 1495), III, 34, 8 „Quod super hiis"; See: L. E h r l i c h, *Polski wykład*, pp. 30-31, 134, 138.

of *res nullius*[34]. Paweł Włodkowic (d. 1435/36) polemized with Henry's opinions and, like Stanisław of Skarbimierz (d. 1431), came out unambiguously in favour of Innocent IV's position on these matters.

A source having significance for the evolution of *ius gentium* was also the very well disseminated in the Middle Ages *Tabula Martiniana* of Martin the Pole of Opawa (d. 127/9), containing an alphabetically arranged summary of the norms found in the Decretals of Gratian[35].

One of the most famous canonists of the first half of the fourteenth century was Oldradus de Ponte (d. 1335). He was author of the highly valued collection of legal opinion, *Consilia seu Responsa et Quaestiones aureae*, in which he considered, among other things: (1) whether a Christian can without sin make use of the help of non-believers in self-defense; (2) whether war against the Saracens is permitted; (3) whether a monarch can, without legitimate cause, expel pagans and other non-believers from his lands. Oldradus replied firmly only to the second question, having in mind the Saracens who in his day had unjustly invaded Spain[36].

Johannes Andreae (d. 1348) was another well-known canonist of the fourteenth century, known universally as *„fons et tuba iuris"*[37]. Author of *Liber additionum „Speculi Iudicialis" Guillelmi Durantis*, he addressed the questions and answers about the prosecution of war and treatment of non-believers which Oldradus had[38].

John de Lignano's (d. 1383) treatise, *De bello, de repressaliis et de duello*, appeared several decades later, in 1360. John, a distinguished lawyer and the master of Francis Zabarella (d. 1417) addressed the question of the permissibility of war, presented exclusively on the basis of the Decretals of Gratian. In it he reaffirmed, following Innocent IV, that war for the Holy Land was permissible. He did not deal with the problem of making use of the help of non-believers in just war. On the other hand he underscored imperial sovereignty over „almost" Catholic peoples. He also described in systematic fashion

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[34] Karol G ó r s k i, *Zakon Krzyżacki a powstanie państwa pruskiego* [*The Order of Teutonic Knights and the Origin of the Prussian State*], Wrocław: Zakład Narodowy im. Ossolińskich, 1977, p. 132.

[35] L. E h r l i c h, *Polski wykład*, p. 33.

[36] Ibidem.

[37] Johann Friedrich v o n S c h u l t e, *Die Geschichte der Quellen und Literatur des Canonischen Rechts*, Stuttgart: Enke, 1877, p. 205.

[38] L. E h r l i c h, *Polski wykład*, pp. 34-35.

all types of wars, i.e., spiritual, territorial, corporeal, moral, private, public, particular and other wars. He devoted considerable space to the organization of defensive forces, the right to initiate war and to particispation in it, prohibited times for military action, matters of spoils and prisoners, the necessity of showing mercy towards the latter, etc[39].

Mediaeval legal literature, particularly Italian literature, was not without influence on the evolution of *ius gentium*. The *Corpus iuris civilis* introduced by Justinian was, after all, functioning in Italy. In the 12th and 13th centuries the University of Bologna as well as other Italian universities, undertook systematic studies of Roman law. We find a reflection of this in the numerous glossal commentaries to that collection, which became the point of departure for numerous legal works at the height of the development of Italian law in the fourteenth and fifteenth centuries. This was the period when scholars like Bartolus (d. 1357) and his student Baldus (d. 1410) were active. Both were actively interested in the problem of the relationship between the imperial power and the independent Italian cities. Bartolus recognized the emperor as lord of the world while simultaneously affording full freedom and independence to the Italian cities. Baldus went even further. Accepting the French theory which can be formulated as *Rex in regno suo est imperator regni sui* he stated at the same time that only the Pope and emperor are entitled to prosecute war. In addition Bartolus was author of the tract, classic for *ius gentium*, on: the means of revenge applied in a just war; legal means against the coercion of Christian prisoners-of-war; and on war spoils, which he directed to be handed over to the authorities who were to deal with their just division.

The greatest contribution by Italian lawyers was made in that field which had already been begun by the ancient Romans and which we today call „private international law", dealing with the right and duties of physical persons in international relations[40].

Various theories that tried to resolve the vitally important contemporary question of defining the proper relationship between Church and Empire, Pope and Emperor also had great significance for the evolution of *ius gentium* in the Middle Ages. These theories appealed to legal, theological, philosophical, and even mystical premises. They were expressed in the famous mediaeval „theory of two swords" of which there is mention in Luke's Gospel („Lord, here are two swords. He answered them: Enough!" [Lk 22:38]). Those swords, accord-

[39] Ibidem, pp. 35-37, 80-81; J. S c h u l t e, *Die Geschichte*, p. 258.

[40] A. N u s s b a u m, *Geschichte*, pp. 44-46.

ing to the convictions of mediaeval theologians, symbolized clerical and lay power at the same time indicating that Christ has full power over them, which he has passed on to his successors, i.e., Peter and the popes[41].

The fourteenth century was a very difficult time for Europe. Feudalism collapsed and the dynamic growth of towns began. Agrarian crisis broke out, social tensions heightened, and rebellions by the starving multiplied. An already difficult situation was made worse by natural disasters like bad harvests, plagues, etc. All this led to doubts about the seeming inviolability of the principles of social life which had hitherto been taken for granted. In place of a universal empire there arose numerous nation-states and the Church itself was divided by schisms both internally and externally. In such a situation the competing powers-emperor and papacy, later emperor and nation-states strove to document their rights in legal fashion. As a consequence the following three distinct political theories arose:

(1) The papal option, which appealed to the relationship between Church and Empire defined by Thomas Aquinas. Its main representatives were Aegidius the Roman (d. 1316) and Augustine Triumphus (de Ancona, d. 1328). In their understanding the Pope, as representative of Christ on earth, joins in himself the two powers, spiritual and temporal. He therefore has the right in a final manner to decide matters of faith and morals, including having the competence to enthrone and dethrone emperors. The only power which the Pope has over himself is God, whereas the Emperor ought to be subordinate to the Pope[42].

(2) The Hohenstauff ideology, reborn in Dante's *De monarchia*, which sought a balance between emperor and Pope. According to Dante both the temporal as well as ecclesiastical power has its source in God. Ecclesiastical power has a purely spiritual character and needs protection from the Emperor who alone has a universal temporal power over all peoples. Only he can assure the world of order and establish laws binding on all nations. The principle *Quod principi placet, legis habet vigorem* applies to him[43].

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[41] Ibidem.

[42] J. R o h l s, *Geschichte*, pp. 159-160; Kurt R ö t t g e r s, *„Macht"*, in: *Historisches Wörterbuch der Philosophie*, vol. 5, Basel/Stuttgart: Schwabe & Co.AG. Verlag, 1980, col. 591.

[43] Stanislaus F. B e l c h, *Paulus Vladimiri and His Doctrine Concerning International Law and Politicts*, 2 vols. (London–The Hague–Paris: Mouton & Co., 1965), p. 56; J. R o h l s, *Geschichte*, pp. 161-162; Władysław S e ń k o, *Wstęp* [Introduction], in: *Johannes Falkenberg, „De monarchia mundi"*, „Materiały do Historii Filozofii Średniowiecznej w Polsce", IX (XX) 1975, pp. VII-LVI.

(3) The third theory originated in the Munich Court. It was advanced by thinkers like William of Ockham (d. ca 1350), whom Emperor Ludwig the Bavarian patronized, and Marsilius of Padua (d. ca 1343), author of the famous work *Defensor pacis*. They tied themselves to the theory of national sovereignty worked out by John Quidort. According to that theory all power originally was found in the nation, which remains the central source of power. God gives power neither to Pope nor Emperor but to the nation, which loans its power to the emperor or the king. It thus follows that the ruler is always answerable to the nation which has the power to remove him. The Pope's power is limited exclusively to the spiritual realm. Marsilius transferred his theory of national sovereignty to the Church as well. Like the nation, God gives complete power to the society of the faithful. The Church's Rock is not the Pope but always only Christ. The Pope is fallible and the measure of this orthodoxy is Sacred Scripture which alone is infallible. The community of the faithful is the sole sovereign in the Church. It loans spiritual authority to the dignitaries of the Church and it can deprive them of that authority. The proper representative of the orthodox community is the ecumenical council, which is the highest authority in the Church[44].

An interesting contribution to the law of nations in the Middle Ages was also the theory of Peter Dubois (d. ca 1312), author of the brochure *De Recuperatione Terrae Sanctae* [On the Repeated Recapture of the Holy Land], which demanded the creation of universal peace in the whole of Christian territory. This was to be a condition for a new Crusade. In the opinion of Dubois an ecumenical council should be called, before which should appear all spiritual and temporal rulers. The Council should prohibit all types of wars among Christians. All conflicts would be resolved by an arbitral tribunal made up of three temporal and three spiritual dignitaries from each side who would be chosen by the Counsil. In the case of any violation of the prohibition against war all Christian rulers would be obliged to bring the violator immediately to order. The violator should be punished by deprivation of all his dignities and possessions and then exiled to the Holy Land where he might satisfy his desires to wage war. In Dubois plan there was no discussion of any prerogatives for the Emperor, which was typical for the French vision of Europe[45].

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[44] J. R o h l s, *Geschichte*, pp. 162-164.

[45] A. N u s s b a u m, *Geschichte*, pp. 47-48; E. H. M e y e r, *Staats- und völkerrechtliche Ideen von Peter Dubois* (1908); K n i g h t, *A mediaeval pacifist – Pierre du Bois*, „Transactions of the Grotius Society", 9 (1924), p. I.

GENEZA I HISTORIA *IUS GENTIUM* W STAROŻYTNOŚCI I W ŚREDNIOWIECZU

Streszczenie

Ius gentium sięga swoimi korzeniami czasów prehistorycznych. Związane było wówczas z wierzeniami religijnymi i opartymi na nich obyczajami. Przekonanie jednak wcześniejszych autorów, wyrażone chociażby przez Monteskiusza, jakoby wszystkie ludy stosowały prawo narodów, w świetle współczesnych badań okazuje się błędne. W wielu kulturach takie prawo nie występowało. U niektórych prymitywnych narodów jeszcze dziś „obcy" traktowany jest z zasady jak „nieczłowiek".

Prawo narodów stosowali jednak już w czwartym tysiącleciu przed Chrystusem Sumerowie. Występuje ono również w starożytnych kulturach Babilonii, Egiptu, Indii i Chin. Starożytni Grecy stosowali je tylko do tych ludzi, z którymi łączył ich wspólny język, kult religijny, igrzyska olimpijskie itp. Niegreków traktowali jako naturalnych wrogów. Rozwój i precyzacja *ius gentium* dokonały się w starożytnym Rzymie, gdy stał się imperium o światowym zasięgu i wchłonął liczne narody. Prawo to obejmowało zespół norm regulujących prawne stosunki między Rzymianami a obcymi. Z biegiem czasu ulegało ewolucji. Gaius (II w. po Chr.) rozróżnił *ius civile* – prawo ustanowione przez określony naród dla siebie – od *ius gentium*, tj. prawa ustanowionego przez wszystkich ludzi w oparciu o naturalny rozum (*naturalis ratio*). Rozróżnienie powyższe przyjęli i rozwinęli prawnicy średniowieczni, którzy *ius gentium* uznali za synonim prawa uniwersalnego. Przyjmując z greckiej tradycji rozróżnienie między *ius gentium* a *ius naturae*, liczni autorzy rzymscy, zwłaszcza stoicy (Cycero, Marek Aureliusz), a także wcześni Ojcowie Kościoła, utożsamiali prawo narodów z prawem natury. Byli jednak także tacy, którzy te dwa prawa sobie przeciwstawiali (Ulpianus, †228), stwierdzając, że *ius gentium* dotyczy wyłącznie rodzaju ludzkiego, podczas gdy *ius naturae* rozciąga się na wszystkie żywe istoty. Po upadku Zachodniego Cesarstwa Rzymskiego Kościół rozwinął system prawny zwany prawem kanonicznym. Nie było ono ani prawem narodowym, ani międzynarodowym. Miało charakter prawa ponadnarodowego, dotyczącego wszystkich chrześcijan. Ze względu na uniwersalny – politycznie i społecznie – charakter ówczesnego Kościoła, prawo kanoniczne regulowało nie tylko życie wewnątrzkościelne, lecz także stosunki międzynarodowe, zwłaszcza w odniesieniu do wojny i pokoju. Kościół wykorzystywał prawo kanoniczne i sankcje, które mu ono dawało, do łagodzenia obyczajów i do eliminacji różnego rodzaju wojen, w tym zwłaszcza tzw. wojen prywatnych, które stanowiły szczególnie dotkliwą plagę średniowiecznych społeczeństw Zachodniej Europy. W tym celu pod karą ekskomuniki proklamował tzw. Boży pokój i zakazywał używania do walki broni szczególnie groźnej i podstępnej, a mianowicie kusz i łuków. Średniowieczne *ius gentium* było więc głęboko zakorzenione w prawie kanonicznym, chociaż pozostawało również pod dużym wpływem chrześcijańskich teorii teologicznych i filozoficznych. Myślicielami, którzy wywarli znaczący wpływ na jego oblicze i rozwój, zwłaszcza w odniesieniu do tzw. doktryny wojny sprawiedliwej oraz do pokoju między narodami, byli: św. Augustyn, Tertulian, Orygenes oraz Izydor z Sewilli (†636), który zmodyfikował Gaiusową definicję *ius gentium*, dodając, że uniwersalność prawa narodów będzie zachowana, jeśli zaakceptują je „prawie" wszystkie narody. *Ius gentium* w ujęciu Izydora obejmowało nie tylko sprawy wojny i pokoju, lecz także takie zagadnienia, jak tworzenie i zbrojenie baz wojskowych, niewola, przymierze, układ pokojowy, zawieszenie broni, nietykalność posłów itp. Ujęcie Izydora włączone zostało do Dekretu Gracjana (1150). Franciszkańscy uczeni średniowieczni, podejmujący

rozważania na ten temat (np. Aleksander z Hales i Bonawentura), nawiązywali do myśli św. Augustyna. Dominującą jednak w XIII w. opcją stała się teoria *ius gentium* w ujęciu Tomasza z Akwinu, który korzystając z teorii prawa narodów św. Augustyna oraz Izydora z Sewilli, wniósł do niej nowe ujęcie, a doktrynę wojny sprawiedliwej wprowadził na stałe do teologii moralnej. Korzystając z dorobku swoich poprzedników, tematem wojny sprawiedliwej zajmowali się w sposób szczególny następujący autorzy średniowieczni: Rajmund z Pennafort, Wilhelm z Rennes, papież Innocenty IV, Henryk de Segusio (Hostiensis), Marcin Polak z Opawy, Oldradus de Ponte, Ioannes de Lignano, Bartolus, Baldus, Idzi Rzymianin, Augustyn z Ankony, Dante, Wilhelm Ockham, Marsyliusz z Padwy, Jan Quidort, Piotr Dubois i inni. Godna szczególnej uwagi jest kontrowersja na temat wojny oraz traktowania przez chrześcijan pogan i innych niewiernych, która to kontrowersja wystąpiła między Innocentym IV – przyznającym niechrześcijanom takie same prawa, jakie mają chrześcijanie – a Henrykiem de Segusio, który uważał, że poganie nie mają prawa do posiadania rodziny, własności prywatnej i własnego państwa. Trzeba zaznaczyć, że polscy średniowieczni uczeni (Stanisław ze Skarbimierza, Paweł Włodkowic i inni) jednoznacznie opowiadali się za stanowiskiem Innocentego IV. Duże znaczenie dla rozwoju średniowiecznego *ius gentium* miały także różne teorie usiłujące rozwiązać kwestię określenia właściwej relacji między Kościołem a Cesarstwem, papieżem a cesarzem. W XIV w. opracowano trzy główne teorie na ten temat: opcję papieską (Idzi Rzymianin, Augustyn de Ancona), przyznającą papieżowi absolutną władzę duchową i świecką; opcję Dantego, prezentującą ideologię Hohenstaufów poszukującą równowagi między władzą papieża i cesarza; oraz opcję Ockhama i Marsyliusza z Padwy, przyznających całą władzę świecką narodowi, a duchowną wspólnocie wiernych. Interesujący wkład do teorii prawa narodów wniósł także Piotr z Dubois (†1312), który domagał się ustanowienia powszechnego pokoju w obrębie całego chrześcijaństwa. Pokój ten winien zapewnić specjalny trybunał powołany przez specjalnie zwołany sobór, w którym winni wziąć udział wszyscy liczący się dostojnicy chrześcijańscy – zarówno kościelni, jak i świeccy.