The Universal Protection of Human Rights

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| Chapter 2 |

Philosophical Framework for Human Rights Law and Their Development

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ABSTRACT

The chapter provides analysis of the concept of human rights considered as the rights of a subject (subjective rights). It describes its emergence in 17 c. as well as further development of the construction, explaining why it is dubious to attribute emergence of rights in ancient times or in Middle Ages. Controversy between naturalistic and positivistic approach towards human rights is also discussed and explained along with the theory of will and that of interest.

The chapter proposes to consider human rights as legal description of conditions considered to be necessary for development and flourishing of human being, providing it is understood as individual. This anthropological reservation is of fundamental importance as the philosophical concept of man determines the way we understand conditions enabling human life and development; hence it determines identity of the rights' concept as well as course of its evolution. Contemporary postmodern transgressions in this respect are also addressed, and it is discussed if the controversial developments of human rights, are to be considered as minor deviations from the generally sound idea, or should they be attributed to intrinsic deficiency of that concept, rising doubts as to the correctness of individualistic anthropology.

KEYWORDS

human rights, subjective rights, natural rights, legal rights, theory of will, theory of interest, person, non-human person

1. The Concept of Human Rights: Why It Is So Important?

The concept of the "human rights" is present everywhere in the contemporary public discourse and more broadly in the contemporary intellectual culture. The term is naturally central for law but even more important for politics. As well, it is greatly discussed in philosophical discourse. However, when speaking about human rights we are addressing a more fundamental question about conditions that enable human beings to lead satisfactory lives. Satisfactory, means the life which continuously makes human life better – enables human development and flourishing. This most

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basic human need might be described in different terms using different words. The term 'human rights' is one of the linguistic ways to describe conditions considered as necessary for continuing human life and development. It is important to understand this linguistic dimension of the issue at stake, as the language of rights is not so much about describing real things (the rights) but rather the way people think about social conditions considered as necessary for them to lead satisfactory lives. It is necessary here to emphasise that the issue of making peoples' life satisfactory is a central one for politics. Therefore, even if the aim of the chapter is to speak about the law, it must be realised, that the subject is strictly political, even if approached from a legal perspective, or – perhaps, better stated – described in legal terms.

1.1. Diversity of Perspectives for Rights – An Overview

Rights by no means should be reduced only to their legal dimension but are central to any kind of reflection about and conceptualisation of the social life. This is basically a political concept deeply rooted in anthropology and ethics. On each of those levels it has its specific expression. Therefore, when someone says, 'I have a right to do something' or 'I have right to be treated' in a certain way, this oftentimes means that actually the law does not provide me with what I claim to 'have the right to'. Furthermore, the law that does not provide me with what 'I have a right to' is believed to be deficient in justice until it will finally provide me with what I claim to 'have a right to'.

This peculiarity of the rights-talk (attributing right to what is actually not granted by the law but is desired by a subject) stems from the simple fact that the importance of the rights category far exceeds a legal dimension. The concept of "human rights" describes in legal terms what one desires in social life from different levels of analysis. The language of rights is first used in philosophy (anthropology and ethics) in order to describe in an abstract way, conditions necessary for man to be able to continue his existence. This philosophical perspective then starts to inspire political discourse that aims at transformation of the existing (and somehow deficient) social reality towards what is considered as desired conditions of social life. This political discourse is materialised in adoption of various political declarations of rights, but the real aim is to transcend this political dimension. This transgression takes effect through instruments of legal enforcement that transform politically declared rights into legal rights enforceable in courts, by means of statutory instruments. Affirmation of human rights through political action made the individualistic ethical agenda the driving force of social life.

It must be emphasised, that enforceability of rights is of key-importance for the idea of subjective rights (rights of a subject). Implementation of certain rights in the legal system does not end their operation at the philosophical or political levels of public discourse. Implementation amounts to normative description, and each description implies differentiation of some reality from its surroundings. However, each legal delimitation always amounts to limitation. Therefore, the operation of an original ethical idea, when confronted with its specific implementation into a

normative text, is still important and inspires ongoing development – be it legislative or judicial.

Moreover, also at the legal level, rights vary in nature depending on where they are located within the legal system. In the hierarchical structure of legal systems, constitutional rights[1] that result from constitutional regulations are placed at the top. These can be enforced through constitutional review, as performed by constitutional courts. Below these constitutionally protected subjective rights are legal rights created by statutory instruments, the source of public or private legal relationships and the rights resulting from them. These public and private legal rights are protected in administrative courts (as public rights) or in common courts (as private rights). This modern nation-state perspective must, however, be supplemented with the legal rights resulting from procedural regulations (administrative or judicial) as the operation of legal procedures, dedicated for the sake of rights enforcement, creates a concurrent legal perspective with a system of distinct interests, which are legally protected within the framework of legal procedures. This dimension is seldom discussed why analysing of the concept of *rights*; however, it must not be overlooked, but rather always kept in mind.

Distinguishing between different levels of the legal system upon which rights have been operating, those qualified as fundamental are often understood as a bundle of simple rights pertaining to a legal entity that describe its relationships with other legal entities. A distinction is made in this context between a subjective right (the bundle) and simple legal rights (entitlements), in which the latter are considered to be single fibres within the bundle. Each specific (simple) right is intended to realize or to protect a specific aspect of a complex subjective right, i.e. a specific interest of a given subject.[2] This way of thinking about rights has emerged within the process of moving constitutional rights from the level of political postulates to the level of a legal system upon which they became enforceable in courts. In this way, the fundamental rights which were declared in constitutions, originally as unenforceable political principles, began to be enforceable in the constitutional court. In this context, a subjective character of a right emphasises not only its complexity but also its legal enforceability. Constitutional rights (also called fundamental rights) are more general and ethically oriented than simple rights (entitlements) protected at a statutory level.

Robert Alexy, based on his theory of fundamental rights, has called the bundle a "*prima facie* right", which has the character of a principle (understood in a specific way as described by Alexy himself), whereas a simple right, being a statutory protected fibre in the bundle of the subjective right, is described by him as "a

1 The constitutional rights are often called fundamental, as constitution is the "fundamental law". Oftentimes however, the reason for this is to escape – trouble-some – adjective "human" in relation to rights granted to legal persons. Moreover, contemporary the notion of fundamental rights is also popular as it can encompass, without obvious confusion, concept of the rights of non-human person, attributed to some of animals.

2 Brzozowski, Krzywoń and Wiącek, 2018, p. 22.

definitive right" having the normative character of a rule (again, according to Alexy's understanding).[3]

In fact, both of these categories (general bundle of *prima facie* right and specific fibres of definitive right) are subjective rights, i.e. they belong to a subject, but they are identified and protected in a way envisaging the specificity of a given level of a legal system upon which they are enforceable. Constitutional rights (also called fundamental rights i.e. rights granted by the fundamental law – German *Grundgesetz*) are more general and ethically oriented than simple rights (entitlements) which protect specific interests that the general fundamental right consists of, at statutory level.[4] They are specified according to the number of specific interests that are to be protected by virtue of the protection of the general fundamental right. At this statutory level, however, rights are still described in general and abstract terms. Based on such general and abstract statutory provisions, the particular interests of a concrete subject are determined by concrete administrative decisions addressed to specific subjects or by means of a specific private contract that involve its parties.

One more important remark in this context is, that if we find the description of a right in terms of the bundle and fibres, it means, that the description has been made in terms of the *Interest Theory*. However, if the description of a right is done in terms of a sphere of freedom, or a sphere within which an individual can legitimately impose his or her will on others, it means that the description was formulated in terms of the *Theory of Will*, which was the original one. Both theories, their origin and specificity, will be discussed later.

Notwithstanding the logical order of the description of different categories of rights within a hierarchical context of a legal system, any historical description should be in the opposite direction. In the beginning, private rights were enforceable in common courts (at the bottom of the hierarchy, in contemporary thought, and later in administrative courts (for public rights). Conceptualisation and protection of rights on this lower level of the system preceded the protection of fundamental rights in constitutional courts, which in most countries were established but after World War II, notwithstanding that the first of them were established in Central Europe just before the war.[5]

However, the process of the development of social life based on the individualistic anthropology is characterised by the gradual displacement of sovereignty into higher levels of social life. One of the stages of this process resulted in the emergence of the centralised modern nation-state. However, after the crystallisation of the modern parliamentary states, a quest towards creation of new supranational political structures

3 See: Alexy, 2002, pp. 197–200. For his distinction between Principles and Rules, see: Ibid., pp. 44–47.

4 However, instead of statutory concretisation, the same effect might be achieved also by means of a constitutional judgement, which provides concrete protection to a specific interest falling within the scope of the situation protected by a constitutional Principle (the *prima facie* right i.e. the bundle). See: Alexy, 2002, p. 60.

5 Lewandowski, 2020, pp. 11–30.

have emerged.[6] This process was in its important part justified by the need for the creation of supranational warranties for individuals against the states in which they are the citizens. In this way, human rights exceeded the framework of the modern nation-state and became an important factor of postmodern supranational political structures and international authorities (including courts) dedicated for the enforcement of human rights protection against modern nation-states. These structures constitute important components of the postmodern political structures emerging on the supranational level.

In each of these diverse contexts, the rights operating there have their specificity, including specificity of the enforcement mechanism.

1.2. Intellectual Identity of Rights

As already mentioned, when speaking about rights, we are dealing with a specific linguistic way of describing conditions that are considered by the people to be necessary for them to lead satisfactory life. Therefore, rights are basically a political issue. However, if we looked at classical ancient philosophers and their political theories, it would be vain to look for some theories of rights. Instead, they developed concepts and the language to discuss the issue of conditions for satisfactory life, describing the latter in terms of common good and justice, not that of the rights.

It must therefore be asked, what makes some authors address the issue of a happy social life with the term common good, rather than with the concept of rights? The reason lies in the different anthropology that underpins our concept of social life.

The term "human rights" describes conditions necessary for human life, development and flourishing if we understand man as an individual. If, however, we understand the human being not as an asocial individual but as a creature endowed with a social nature and thus living naturally in community (not needing to create it out of autonomous decisions taken by individuals), then we describe those conditions necessary for human development in terms of the common good. Since the chapter is about rights, I am not going to develop a parallel explanation about the common good, but it is worthwhile and important to mention this counterpoint since we are much more willing to understand a just social life in terms of rights, rather than in terms of the common good. This indicates that individualistic anthropology is the default theory for our contemporary Western World.

1.3. Should the Society Be Just or Free?

Human rights are most often understood as a foundation for a just social life. At first glance, it seems perfectly true, however, upon a deeper perspective, the association is not so obvious. Human rights tend much more to the idea of freedom than that of justice. The latter category – when considered in the context of individualistic anthropology – is not understood as a category *per se* but rather as the contingent effect of efficient protection of individual freedoms of members of society. This precedence of

6 Stępkowski, 2025, p. 64.

freedom before justice is important here, as the primary practical obstacle to individual freedom stems from social life i.e. from the necessary (some would add: "natural") cohabitation with others. Those "others" next to whom we live (our neighbours) limit our space of freedom. Those social determinants might be considered as something natural (a requirement of justice) but if we accept individualistic anthropology, then much more often those social determinants are considered as social coercion associated with a kind of injustice.

Here we arrive at the point, where the idea of human rights starts to provoke problems. At some point, human rights appear to be too unsocial and detrimental (if not destructive) to social life. Therefore, we admire *human rights* as promising a social life that respects our freedom, however, at the same time we are afraid that they might become an efficient instrument of social disintegration.

This demonstrates again that the very concept of the rights is inherently rooted in individualistic anthropology, being in fact its ethical or legal (depending on the context) manifestation. The anthropological question here is at the very centre of our dilemma. The answer to the question about human identity – are we social beings or unsocial individuals? – will determine all intellectual culture and social institutions.

It might be presented as a question about the competitive precedence between two basic categories for social life: freedom or justice. What was first? Either justice is first and determines the way we understand freedom, or freedom is first and determines the way justice is to be understood. If we accept the earlier position, than we understand social life as focused on the achievement of common good. If, however, we prefer the latter position, then we understand that the main goal for social life is to protect human rights.

The first option presupposes the social nature of the man; the second one, presupposes an individualistic human nature. The first one is the basis of pre-modern intellectual culture (thus Plato and Aristotle were not teaching about rights), the second one is the foundation of modern and subsequently post-modern intellectual culture. For the first approach, virtue was meant to achieve a just social life; for the second, right allows achievement of social cohabitation respecting individual freedoms.

Speaking from an abstract conceptual perspective, there is no third-compromising way. We must choose between either a social and community driven anthropology considering justice as the foundation of social life, or an individualistic anthropology considering freedom as the foundation. The promise of a third way in this respect is to propose a kind of communicative strategy allowing temporal mitigation of dysfunctions resulting from the implementation of the individualistic anthropology pertaining to social life.

1.4. The Concept of the Human Rights

Considering all that has been stated so far, we can conclude that human rights are about legal protection of the human ability to seek happiness with individual free choices. In other words, the *notion of human rights describes in legal terms the conditions for development and flourishing of human being understood as individual.* Moreover,

the rights presuppose, that those conditions for human development and flourishing are to be ultimately enforceable with legal means. Therefore, making human rights enforceable with legal means achieves perfection and destiny of rights.

2. Emergence and Early Development of the Concept of Rights

The concept of rights appeared in a mature form, in the middle of the 17th century by assigning a specific philosophical and political content – determined by modern intellectual categories – to the Latin term *ius*. This inspired academic writers to think as if the concept of "right" resulted from the historical development of the Roman law categories. This was however misleading[7] despite being popular.[8] In fact, the concept of rights emerged as an effect of the systematic development of individualistic anthropology considered as an intellectual foundation for modern political theory. First it was invented in political discourse that subsequently inspired modern legal science with the concept of rights at its centre. The said process was long-lasting, and it can be traced in the development of the meaning that has been attributed to the Latin term "*ius*" and its relation to the other Latin term – the "*lex*".

Mature demonstration of the concept of *the right* (which in continental European writings is qualified with the adjective "subjective" to emphasize its unbreakable relationship with an autonomous individual i.e. will-driven subject), appeared in the writings of Thomas Hobbes. He introduced a precise dichotomous distinction within our understanding of normative phenomena distinguishing between subjective and objective meaning of the law. The first meaning, relating to an autonomous subject, Hobbes reserved the term "right" (*ius*), and for the second meaning – relating to objective legal rule – he reserved the term "law" (*lex*). In this way he broke the traditional connection in European legal jurisprudence that had been sustained between *ius* and the category of justice (*iustitia*). Through this operation, and from the beginning of the modern era, the term "right" (*ius*) has become a legal way of expressing the ethical category of freedom (*libertas*). Moreover, this meaning as determined by the Thomas Hobbes is still valid in the Western legal culture. The term *ius/jus* is attributed with some natural law content having much in common with freedom, whereas the term *lex* is to be understood in terms of statutory enactment associated with rigidity of positive law and legal deficiencies resulting from the same.

7 Eminent public law professor Franciszek Longchamps, directly blamed for this intellectual fallacy the pandectists (lawyers adapting texts of Roman law for use in the conditions of modern society) – otherwise excellent school of legal thought – which led many good lawyers to 'think that the notion of subjective right derives in a straight line from Roman law'. See: Longchamps, 1961, pp. 108–109.

8 See: Opałek, 1957, pp. 111–112; Levy, 1951, pp. 202–203; see also: Kolańczyk, 2001, p. 117; Scholtens, 1958, pp. 163–169; Coing, 1982, pp. 241–264; Merkwa, 2018, pp. 23–153.

2.1. How the Concept Was Set by the Hobbes

According to Hobbes, man was to be understood as an individual, whose humanity could only manifest in a state of moral equality and absolute freedom from any social relations which deform his natural inclinations. Individualist anthropology does not allow one to start political theory with the constatation of social life but first requires one to explain the reasons why people decided to live in common. After all, according to this assumption, it is not the community that constitutes the natural environment for man, but a situation in which equal people live in absolute freedom unfettered by any social relationship.

In this way, the individualist anthropology is introduced into political philosophy through the construction of a pre-social condition of man, referred to as the "state of nature". The reasons and the mode in which human beings abandoned this pre-social state of existence were supposed to explain the nature of political power and the proper way it functions.[9] In practice, on the other hand, they were to constitute a critique of the existing political order, containing a revolutionary call for its fundamental reconstruction (destruction of the old society and the building of a new one upon the novel intellectual grounds).[10]

Hobbes consistently portrayed the pre-social condition as a situation in which man enjoys absolute freedom and reveals his true asocial nature. For Hobbes human nature is by no means the cause and the reason for the social life, but the cause of conflicts that lead to war of all against all.[11] Therefore, the state of nature – being the condition in which human nature finds its full expression – is a state of permanent war between individuals enjoying unlimited (natural) freedom. People therefore decide to form a political community in order to set limits to this natural freedom so that its exercise cannot lead to war. These limits are set by the sovereign, whose will is the law that constitutes the only criterion of right and wrong in human society.[12]

9 Locke, 1824, § 4, pp. 131–132: 'To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, and dispose of their possessions and persons, as they think fit, (...). A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another'.

10 Stępkowski, 2025, pp. 64–68.

11 Leviathan, 13, 6: 'in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory. (...) 8. Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man.' Hobbes, 2008, pp. 83, 84.

12 Leviathan, 6, 7: '(...) these words of good, evil, and contemptible are ever used with relation to the person that useth them: there being nothing simply and absolutely so; nor any common rule of good and evil to be taken from the nature of the objects themselves; but from the person of the man, where there is no Commonwealth; or, in a Commonwealth, from the person that representeth it' (souvereign *scilicet).* Hobbes, 2008, p. 35.

Thus, positive law becomes the only foundation of ethics.[13] The law laid down by the sovereign thus sets the limits within which people can enjoy their natural freedom without the risk of unleashing a war of each against each.

What is important in the current context, is that Hobbes described man's natural freedom in legal terms, referring to it as *jus naturale* (right of nature).[14] He also precisely distinguished the term right of nature (natural entitlement, or subjective right) from the concept of *lex naturalis* (law of nature). In the state of nature, an individual's freedom is not limited in any way other than by the physical strength of the individual concerned. Thus, the sphere of this freedom extends so long as one does not encounter an obstacle which cannot be overcome. In social life, on the other hand, a subjective right is a sphere of freedom whose limits are set by legal (statutory) rules creating others' obligation not to interfere into this sphere. A subjective right is thus a substitute for natural freedom, created for individuals by the sovereign. Statutory law – absent in the state of nature – enables peaceful coexistence between people. However, this artificial legal order is only possible due to the sovereign – the lawgiver empowered by the individuals to exercise the power stemming from their natural freedom in order to set universally binding, coercive rules for the members of the given society. The sphere delimited by positive law (*lex*), within which man can continue to enjoy his individual freedom, is precisely that of "subjective right" (*ius*) though no-longer natural but granted by the lawgiver. It is the sphere within which the individual might be considered fully sovereign.[15] Hobbes thus formulated the classical concept of individual freedom, according to which what is not forbidden by positive law (*lex*) belongs to a sphere (*ius*), which is free from external coercion. In this sphere, as it had been in the state of nature, individuals can act, guided solely by their own will.

Hobbes thus made a distinction, crucial for modern legal science, between subjective right and objective law. He did this by describing the former with the term

13 Leviathan, 29, 6: '(...) every private man is judge of good and evil actions. This is true in the condition of mere nature, where there are no civil laws; and also, under civil government in such cases as are not determined by the law. But otherwise, it is manifest that the measure of good and evil actions is the civil law; and the judge the legislator, who is always representative of the Commonwealth.' Hobbes, 2008, p. 214.

14 Leviathan, 14, 1: 'The right of nature, which writers commonly call jus naturale, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgement and reason, he shall conceive to be the aptest means thereunto.' Hobbes, 2008, p. 86.

15 Leviathan, 21, 5–6: 'But as men, for the attaining of peace and conservation of themselves thereby, have made an artificial man, which we call a Commonwealth; so also, have they made artificial chains, called civil laws, (...) In relation to these bonds only it is that I am to speak now of the liberty of subjects. For seeing there is no Commonwealth in the world wherein there be rules enough set down for the regulating of all the actions and words of men (as being a thing impossible): it followeth necessarily that in all kinds of actions, by the laws pretermitted, men have the liberty of doing what their own reasons shall suggest for the most profitable to themselves. 6. (...) The liberty of a subject lieth therefore only in those things which, in regulating their actions, the sovereign hath pretermitted.' Hobbes, 2008, p. 141.

ius (right) and the latter with *lex* (law). More precisely, what was done here was not so much to distinguish but to oppose the meanings of these words. For while Hobbes understood the term *ius* to mean "individual liberty", he identified the term *lex* with coercion originating from an enacted rule of conduct constituting a specific duty. Thus, he recognised that the terms *ius* and *lex* stand in the same relation as the notions of "freedom" and "duty".[16] Both the equivocation of *ius* with freedom and its opposition to *lex,*[17] quickly spread in philosophy, becoming a kind of universal philosophical and legal idiom, commencing in the 17th century. We find it both with Spinoza[18] then the representatives of the Enlightenment school of the law of nature[19] and finally with Immanuel Kant,[20] who made it an enduring element of German idealism.[21]

It was German idealist philosophy that was central to the development of the theoretical notion of subjective right in modern legal theory. Kantian transcendental idealism viewed human "freedom" mainly through the prism of an autonomous

16 Leviathan, 14, 3: 'For though they that speak of this subject use to confound jus and lex, right and law, yet they ought to be distinguished, because right consisteth in liberty to do, or to forbear; whereas law determineth and bindeth to one of them: so that law and right differ as much as obligation and liberty, which in one and the same matter are inconsistent.' Hobbes, 2008, p. 86. This passage refers to the state of nature, but mutatis mutandis perfectly applies to the social life.

17 As it seems, Hobbes was the proper author of this semantic juxtaposition of the two terms. The strangeness of such a juxtaposition before Hobbes, is witnessed by his polemic against Sir Edward Coke, to whom such a juxtaposition was alien, what Hobbes makes the subject of ironic remarks. (Hobbes, 1971, p. 73; See also: Letwin, 2005, p. 97). It is also worth noting that the Hobbesian distinction was meticulously continued in that current of English legal thought which was rooted in the Hobbesian tradition and linked directly to Jeremy Bentham and his followers. The dominant current, however, which was a continuation of the common law tradition, was still insensitive to this distinction. This can be clearly seen in the – otherwise not very precise – account by Opałek, K. who erroneously considered John Austin's position to be representative for English law. (Opałek, 1957, pp. 56–57).

18 'Per ius enim civile privatum nihil aliud intelligere posumus, quam uniuscuisque libertatem ad esse in suo statu conservandum, quae edictis summae potestatis determinatur, solaque eiusdem auctoritate defenditur.' See: Spinosa, 1846, XVI § 40, p. 214. For more about influence of Hobbes on Spinosa see: Borucka-Arctwowa, 1957, pp. 36–44, 78.

19 Puffendorff, 1688, Lib. I cap. VI. § 3: 'Cum enim homo illa omnia potestatem agendi habeas, que à viribus suis naturalisés proficisci posant, nisi que per legem prohibetur; inde usus loquindi fert, ut quae legis alicujus specie non interdicuntur, ex illa lege eadem agendi jus esse dicatur. Igitur in hoc quizem significatu jus ad libertatem pertinet: lex vero vinculum aliquod notation, quo libertas naturales constringitur.' For Hobbes' influence on Pufendorf, see: Borucka-Arctwowa, 1957, pp. 271–273. The same distinction between lex and jus is applied also by Christian Wolff. However, it is much more distinction, than juxtaposition. See: Wolff, 1750, §39, p. 20: 'Lex dicitur regula, juxta quam actiones nostras determinare obligamur.'; § 46, p. 24: 'Facultas ista, seu potentia moralis agendi dicitur Jus.'

20 Immanuel Kant differentiated between 'Der Rechte als systematischer Lehre' which has clearly objective character, and 'Der Rechte als (moralischer) Vermögen Andere zu verpflichten', which is precisely the subjective right. Each of those perspectives for Law is divided by Kant into its natural (primary) and social (secondary) dimensions. Kant, 1870, pp. 39–40.

21 As for German idealists, see: Opałek, 1957, pp. 163–165. It is worth quoting his conclusion from p. 165 '(...) Hegel presents the concept of subjective rights understood in terms of freedom inherent to human being – similar to that of Kant or Fichte'.

will by which the individual can impose obligations on other persons. This ability to impose obligation on others was what Kant called the "notion of right".[22]

Inevitably, the subjective right also became part of the construction of the "legal relationship" (*Rechtsverhältnis*), which was used to describe social relations, in philosophical terms,[23] and later, in legal terms. Hence, the German *Rechtslehre* (the *usus modernus pandectarum*) treated the *right* so understood as the "essence of the legal relationship".[24] Thus, in addition to the concept of subjective right as a "sphere of freedom," closely related to the concept of autonomous *will* (or the binding force of the will)[25] came to be used as a description of the subjective right.[26] This approach came to be known as the "will theory", according to which, a subjective right is a "force of will" (*Willensmacht*) granted to an individual by the legal order (the system of objective legal rules).[27]

22 'Freiheit (Unabhängigkeit von eines Anderen nöthigender Willkür), sofern sie mit jede andere Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht. ' Kant, 1870, p. 40; Kant, 1870, p. 42: '(...) unsere eigene Freiheit (von der alle moralischen Gesetze, mithin auch alle Rechte sowohl als Pflichten ausgehen) nur durch den moralischen Imperativ, welcher ein pflichtgebietender Satz ist, aus welchem nachher das Vermögen, andere zu verpflichten, d. i. der Begriff des Rechts, entwickelt werden kann'.

23 Kant explained the term legal relationship in the following way: 'Der Begriff des Rechts, sofern er sich auf eine ihm correspondirende Verbindlichkeit bezieht, (d. i. der moralische Begriff desselben) betrifft erstlich nur das äußere und zwar praktische Verhältnis einer Person gegen eine andere, sofern ihre Handlungen als Facta aufeinander (unmittelbar oder mittelbar) Einfluß haben können. ' Kant, 1870, p. 31. For similar in this respect position by Fichte, see: Opałek, 1957, pp. 154–156; Nowak-Juchacz, 2002, pp. 216–217.

24 'Das Wesen des Rechtsverhältnisses wurde bestimmt als ein Gebiet unabhängiger Herrschaft des individuellen Willens' This sphere in which the individual will reigns independently is precisely the subjective right, as Savigny wrote about in his system a little earlier. '(...) der einzelnen Personzustehende Macht: ein Gebiet, worin ihr Wille herrscht, und mit unsrer Einstimmung herrscht. Diese Macht nennen wir ein Recht dieser Person, gleichbedeutend mit Befugniß: Manche nennem es das Recht im subjektiven Sinn. ' Savigny, 1840, pp. 7, 334.

25 The same says the Savigny's disciple Puchta: 'Vergmöge der Freiheit ist der Mensch subject des Rechts. Seine Freiheit ist das Fundament des Rechts, alle Rechtsverhältnisse sind ein Ausfluß derselben'. Puchta, 1875, p. 6.

26 'Die Regel, wodurch jene Gränze und durch sie dieser freye Raum bestimmt wird, is das Recht', Savigny, 1840, p. 332. Georg Puchta described relationship between law in objective and subjective (right) sense, in the following way: 'Wir gebrachen das Wort Recht für den allgemeinen Willen, den Willen der Gesammtheit (...) Recht ist also hier eine Rechtsvorschrift (...) Das Wort Recht wird aber auch gebraucht für den Willen des Einzelnen, sofern er jenem allgemeinen Willen entschpricht, für die Herrschaft oder Macht (...), die der Person über einen Gegenstand gegeben ist.' Puchta, 1875, p. 8. Cursus der Institutionen, cit., Intellectual dependence of German jurists from idealistic philosophy is well known. For Savigny, see: Kiefner, 1969, pp. 3 ff. About the dependence in understanding category of "right" in terms of "liberty". See pp. 8–10. About Puchta's dependence from Kant and Fichte see: Opałek, 1957, pp. 161–162.

27 'Recht (Recht im subjectiven Sinn), subjectives Recht) ist eine von der Rechtsordnung (Recht im objectiven Sinn, objectives Recht) verliehene Willensmacht oder Willensvorschrift concreten Inhalts'. Windscheid, 1875, § 37, p. 91.

This definition demonstrates an important transformation in the way subjective right was perceived. Suddenly, the notion of the right is fully contingent to the notion of the law understood in a positivistic way as a system of statutory rules.

2.2. The "Subjective Rights" as Granted by the Legislation

The theories inspired by German idealistic philosophy that made the free *will* of the individual the core of the concept of subjective right, had one fundamental shortcoming. They were *a priori* theoretical constructs deliberately detached from the empirical world. Kant himself stipulated that he built his theory upon a view of man understood in terms of *homo noumenon* – a personality independent of physical properties, in which only the human capacity for freedom is essential.[28] Hence, the theoretical approaches based upon Kantian or Fichtean philosophical constructs completely disregarded the possibility that the subject of rights might be a person who could not use his or her will alone, such as children or persons mentally handicapped. This difficulty was however identified, and subsequently, inspired efforts to eliminate or at least marginalise the notion of the will in the concept of right. Instead of basing it on the categories of the "will" or "power" of the will, it came to be associated with the concept of an "interest" i.e. an "advantage", or a favourable situation, provided to the rights bearer. Thus, on the basis of German pandectistic jurisprudence (*Pandektenwissenschaft*), Rudolph Jhering proposed to completely eliminate the "will component" from the definition of right by formulating a "theory of interest", according to which the right (*subjektives Recht*) was to be understood as the "legally protected interest".[29]

Jhering did not succeed in the complete elimination of the component of "will", its "power" or "authority", from the concept of right. However, he permanently introduced the concept of *interest* into the concept of right. This is reflected in considering the concept of "interest" as the purpose for which the individual has been endowed by the legal order with the "power" or "authority of the will."[30] Jhering's theory of interest thus effected an extremely important qualitative change in continental legal science. For it made the subjective right not a primary (inherent, natural) category, but secondary (contingent) upon legislation. Jhering stipulated that statutory law, which is

28 '(...) in der Lehre von den Pflichten der Mensch nach der Eigenschaft seines Freiheitsvermögens, welches ganz übersinnlich ist, also auch bloß nach seiner Menschheit, als von physischen Bestimmungen unabhängiger Persönlichkeit, (homo noumenon) vorgestellt werden kann und soll, zu den Unterschieden von eben demselben, aber als mit jenen Bestimmungen behafteten Subject, dem Menschen (homo phaenomenon)' Kant, 1870, p. 42.

29 'der Wille ist nicht der Zweck und die bewegende Kraft der Rechte; der Willens- und Machtbegriff ist nich in Stande, das praktische Verständnis der Rechte zu erschließen', Jhering, 1954, § 60, p. 339.

30 Regelsberger, 1893, § 14, p. 74: '(...) rechtlich anerkanten und geschützte Interessen- und Machtkreise: das sind die Rechte der Einzelnen, die subjektiven Rechte.'; See also: Merkel, 1885, § 159, p. 88: 'Das subjektive Recht ist dem Gesagten zufolge ebenso wie objektive Recht Macht, und zwar eine Macht, welche um bestimmter – vom objektiven Rechte vorausgesetzter – Interessen willen verliehen und ihnen gemäß als ein Werkzeug für ihre Befriedigung gestaltet ist.'; Particularly worth of emphasise is theory by Roman Longchamps de Bérier. See: Longchamps de Bérier, 1911, pp. 75–131, in particular, pp. 96–102.

supposed to guarantee individual interests, cannot be an arbitrary will of the legislator, but constitutes the recognition of a claim immanent in every human being.[31] In practice, however, these elevated reservations by no means changed the fact that the concept of subjective right become a category fully contingent upon statutory law.

This evolution must be considered against the background of the general development of legal thought in the nineteenth century, when natural-law thinking was replaced by utilitarian paradigm. Eighteenth-century language of natural law, criticising the old (premodern) social order, was an excellent instrument of political critique,[32] especially of the ancient *ius commune*. However, as liberal ideas succeeded and modern law was implemented through legislation, positive law began to be considered no longer as an obstacle to this modern political agenda but rather understood as an instrument for its implementation. Hence, positive law became *de facto* a guarantee for natural rights, and the antinomy between positive law and natural law that had been dominating 18th century political writings,[33] the opposition between natural law and positive law has been replaced by a distinction between "subjective rights" and the "objective law" that constitutes them. Contemporary, confrontation of the concepts of *ius* and *lex* express the tension between statutory provisions (*lex*) and the just law, associated with the superior natural order (*ius*).[34]

The philosophical roots of such a concept of *subjective rights,* again, goes back to Vasquez and Grotius, who had inspired Hobbes. The author of Leviathan emphasised that the law enacted by a contractually created sovereign, allow man to know 'what goods he could enjoy and what actions he could perform'. Statutory law was the sole criterion of what was correct and therefore legitimate in the behaviour of citizens.[35] Thus, the positive law is the source of what was considered the essence and symbol of

31 'Nicht eines Künftigen, sondern eines Gegenwärtigen wegen haben jene Personen ihr Recht, nich wegen willkürlicher Laune des Gesetzgebers, sondern in Anerkennung des Anspruchs, den jedes menschliche Wesen auf seiner Stirn trägt. ' Jhering, 1954, § 60, p. 312.

32 Borucka-Arctwowa, 1957, p. 15.

33 Cf. Berkowitz, 2005, pp. ix-xviii. See also: Fletcher, 2002, pp. 15–16.

34 It is clearly described in Opałek, 1957, pp. 148–150. See also: Jakimowicz, 2002, pp. 31–32. This phenomenon is reflected in a very interesting way in the process, gradually taking place over the course of the 19th century, of the gradual equivocation of the Latin term *lex* and its equivalents in European languages with the modern concept of law understood in terms of legislative act of parliament. On the ground of the German legal science, the process is clearly demonstrated by the J. Bluntschli, who in the middle of the 19th century, still distinguished between three meanings of the term "Gesetz", the first of which meant all legal norms, including customary ones, the second of which already associated it only with the positive law, while the strictest meaning was to mean only an act of parliament: 'Im eigentlichen Sinne versteht man unter Gesetz nur die von der obersten gesetzgebunden Gewalt, dem Gesetzgebungskörper, mit höchster stattlicher Autorität ausgerüstete dauernde Rechtsregel und Rechtsinstitution.' Bluntschli, 1868, pp. 545–546 – quotation from the p. 456; See also Zakrzewski, 1959, p. 18.

35 Leviathan, 26, 3: 'Civil law, is to every subject those rules which the Commonwealth hath commanded him, by word, writing, or other sufficient sign of the will, to make use of for the distinction of right and wrong; that is to say, of that is contrary and what is not contrary to the rule'. Hobbes, 2008, p. 176.

individual independence: property.[36] The position taken by the Hobbes was continued in England by Jeremy Bentham, whose views on the matter are referred to by Herbert Hart as the "theory of benefit".[37]

As is well known, Bentham believed that the task of the state was to ensure the greatest possible happiness for the greatest possible number of people. The main means of achieving this, alongside state education, was legislation.[38] Bentham is in this respect a faithful follower of Hobbes,[39] whose ideas he assimilated largely through the French hedonists, namely Helvetius.[40]

As already demonstrated, according to this theory, state legislation is considered as being a necessary condition for social life. Hence, according to Bentham, the duties that the sovereign imposes on individuals, almost always[41] imply a certain benefit for others. This benefit, as derived from positive law, constitutes precisely a right ("right correlative to duty") to certain "benefits" from those obliged ("an enforced service" negative or positive, for the benefit of others). These benefits may be positive, but oftentimes they will be "negative benefits", constituting liberty-rights. Such liberty-rights, according to Bentham, will be, for example, all the "benefits" that people obtain as a result of the operation of criminal laws prohibiting commission of crimes, and thus indirectly protecting people from becoming victims. Thus, every positive

36 Leviathan, 18, 10: '(...) to the sovereignty [is annexed] the whole power of prescribing the rules whereby every man may know what goods he may enjoy, and what actions he may do, without being molested by any of his fellow subjects: and this is it men call propriety. For before constitution of sovereign power, as hath already been shown, all men had right to all things, which necessarily causeth war: and therefore, this propriety, being necessary to peace, and depending on sovereign power, is the act of that power, in order to the public peace. These rules of propriety (or *meum* and *tuum*) and of good, evil, lawful, and unlawful in the actions of subjects are the civil laws.' Hobbes, 2008, p. 119.

37 Hart, 1982, pp. 164–170.

38 '(...) the art of legislation (which may be considered as one branch of the science of jurisprudence) teaches how a multitude of men, composing a community, may be disposed to pursue that course which upon the whole is the most conductive to the happiness of the whole community, by means of motives to be applied by the legislator'; Bentham, 1823, pp. 255–256.

39 Leviathan, 30, 1: 'The Office of the sovereign, (be it a monarch or an assembly,) consistent in the end for which he was trusted with the sovereign power, namely the procuration of the safety of the people, to which he is obliged by the law of nature, ... But by safety here is not meant a bare preservation, but also all other contentment of life, which every man by lawful industry, without danger or hurt to the Commonwealth, shall acquire to himself. And this is intended should be done, (...) 2. (...) by a general providence, contained in public instruction, both of doctrine and example; and in the making and executing of good laws.' Hobbes, 2008, p. 222.

40 Helvétius, 1777, pp. 298–300, Chapter VIII and XI in particular. On Helvetius being the link between Hobbes and Bentham, see: Tatarkiewicz, 1997, pp. 148–149.

41 Bentham pointed to two exceptions when duties imposed on individuals do not at the same time imply benefits for others. These are, first, so-called "self-regarding duties" that prohibit things that would bring harm or detriment to the very individual to whom the duty applies. The second category consists of duties that the legislature has imposed contrary to the principle of utility i.e. those that do not benefit anyone. He calls them "ascetic" or "useful to no one". He believes that they have always been too numerous in the history of mankind and should obviously cease to exist. See: Hart, 1982, p. 168.

law provision carries with it some kind of benefit, thereby creating an entitlement for the individual, by safeguarding a particular interest of the individual.

Such a concept raises number of serious objections.[42] By way of correction, Rudolf von Jhering emphasizes that not every law protecting *de facto* certain interests creates a subjective right.[43] To a large extent, these differences already resulted from the distinct approaches in the legal scholarship of the two authors. Jhering focused on private law issues, whereas Bentham was mainly concerned with criminal law. Hence, accepting an essentially utilitarian point of view, Jhering's concept of the subjective right (individual interest protected by positive law), granted status of a subjective right only to situations specific to civil law, i.e. those in which the enforcement of the subjective right by means of appropriate legal procedures were left to the initiative of a specific rights-holder.[44]

However, it is worth noting that the apparent exaggeration that leads Bentham to consider every manifestation of individual freedom as the exercise of subjective rights is due to the intellectual consistency with which he developed the Hobbesian paradigm. In this context only positive law determines subjective status of an individual.[45] Since the (natural) freedom of the individual in the state, identified as subjective right, spans a sphere not covered by positive law regulation,[46] its scope does indeed depend directly on the content of the sovereign's legislative decision.

42 For critique see: Hart, 1982, pp. 171–188, particularly pp. 172–173. In Germany, similar position to Bentham's took Bernard Windscheid who was criticised in this respect by the A. Baumgartem and Hans Kelsen. See: Kelsen, 1936, p. 315; Opałek, 1957, pp. 28–29.

43 'Nicht jedes Gesetz, welches ein Interesse schüzt, verschaft dem Interessenten ein Recht im subjektiven Sinn, d.h. einen Rechtsanspruch auf Gewährung dieses Schutzes. (...) Polizei- und Kriminalgesezen, sie schutzen uns, aber nicht in Form eines uns zustehenden Rechts'. Jhering, 1954, § 61, pp. 351–352.

44 'Die Behauptung würde richtig sein, wenn das Recht im subjektiven Sinn an die Vorausstzung einer dem Berechtigten zum Zwecke der Behauptung desselben zur Verfügung gestellten Privatsklage geknüpft wäre (...) Das Kriterium derselben besteht nach römischem Recht in der Klage, d.h. in der Anrufung des zur Gerährung dieses Schutzes verpflichteten Zivilrichters. Sonach läßt sich das Recht definiren als Sebstschutz des Interesses. ' Jhering, 1954, pp. 352–353.

45 This subjective status primarily concerns the extent of individual freedom, the nature of which in the social state Hobbes described as follows *Leviathan*, II, 21, 6: 'The liberty of a subject lieth therefore only in those things which, in regulating their actions, the sovereign hath praetermitted: such as is the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit; and the like.' Hobbes, 2008, p. 141. It should also be stressed that this vision was by no means purely theoretical. It found its practical expression, for example, in the Napoleonic Code, in the form of the institution of "civil death" see: Sójka-Zielińska, 2007, p. 90.

46 Leviathan, 21, 18: 'The greatest liberty of subjects depends on the silence of the law: (...) In cases where the sovereign has prescribed no rule, there the subject hath the liberty to do, or forbear, according to his own discretion. And therefore, such liberty is in some places more, and in some less; and in some times more, in other times less, according as they that have the sovereignty shall think most convenient.' Hobbes, 2008, p. 146.

3. Between Naturalistic and Positivistic Paradigms of Rights

The evolution in understanding rights as outlined above, shows a clear shift from a natural law position to a positivistic one. However, this evolution does not yet resolve the dispute concerning the identity of subjective rights that exists between legal naturalists and positivists.

That the disfunctions of legal positivism allowed the proponents of the original naturalistic paradigm to insist on its restatement, despite the positivist position appears to be a logical consequence of the naturalistic one. Moreover, the very connection between Hobbes and the introduction of the concept of rights might also provoke disagreement. While the notion of *right* is properly regarded as a trademark of the liberal tradition, Hobbes usually (though incorrectly) is not included into it, being considered as an apologist for absolutism hostile to the liberal tradition. Hence, there is a clear tendency in the academic writings to weaken Hobbes' links with the notion of rights[47] associating the concept instead with Locke. However, more careful analysis demonstrates that Locke did not substantially change Hobbes' concept. He only hid its unpopular features in a rhetorical disguise creating the illusion of its radical opposition to the one described in the Leviathan. However, the entire novelty of Locke's philosophy in relation to that by Hobbes can be easily reduced to a superficial change in the literary narrative creating but a persuasive (though not real) impression of Locke's opposition to Hobbes.

Locke promoted the concept of natural rights (*property* understood in a specifically broad way[48]) as existing prior to the social life, and as such, not created by political authority. According to Locke, individuals, by entering into a social contract, did not relinquish their natural rights, but strengthened them.[49] The same conviction can later be found among French Economists,[50] and subsequently, in Article 2 of the French Declaration of the Rights of Man and Citizen.[51]

47 It was clearly stated by the Freeden, 1991, p. 12. 'Hobbes developed what are now considered to be important component of the notion of rights, but he is not part of the humanist tradition that placed rights-discourse firmly within emerging liberal thought'. Similarly, Hobbes's contribution is clearly downplayed in Freeman, 1994, p. 387, note 94.

48 Locke, 1824, § 123 p. 204: '(...) man is willing to join in society (...) for the mutual preservation of their lives, liberties and estates, which I call by the general name, property.'

49 Locke, 1824, § 131, p. 206. 'But though men, when they enter into society, give up the equality, liberty, and executive power they had in the state of nature, into the hands of the society, (...) yet it being only with an intention in every one the better to preserve himself, his liberty and property; (for no rational creature can be supposed to change his condition with an intention to be worse).'

50 '*Lorsqu'ils entreront en société, et qu'ils feront entre eux des conventions pour leur avantage réciproque, ils augmenteront donc la jouissance de leur droit naturel; et ils s'assureront même la pleine étendue de cette jouissance*', Quesnay, 1888, p. 368.

51 Article II: '*Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme.*'

The misleading characterization of Locke's narrative is perfectly demonstrated when one considers the quality of the state of nature he described. Locke insists, that 'The state of nature is to be governed by the law of nature which is binding upon every one', while

> 'Reason, which is this law, teaches the whole human race, if the latter is willing to be advised by it, that since all are equal and independent, no one ought to inflict damage on another one's life, health, liberty or property'.[52]

In this way, Locke suggested that originally people had been living peacefully and (having property) prosperously. Meanwhile, when explaining reasons for abandoning these natural peaceful conditions, Locke must acknowledge that in fact, situation is opposite and resemble very much state of war as described by the Hobbes.[53] Locke must admit, that

> 'though the law of nature be plain and intelligible to all rational creatures; yet men being biassed by their interest, as well as ignorant for want of studying it, are not apt to allow of it as a law binding to them in the application of it to their particular cases'.[54]

Thus, Locke implicitly conceded Hobbes' point, according to which the laws of nature (*leges naturales*) are only in force when individuals are secured by the political

52 Locke, 1824, § 6, p. 133: 'The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions'. Elsewhere, however, Locke, in describing the state of nature in which natural law was to apply, that it 'lacks an established, standardised, known law, formed and accepted by universal consent, such as to be the measure of right and wrong.' (Locke, § 124, p. 204; cf. *Leviathan*, 6, 7). Thus, while recognising the necessity of such a written measure of good and evil, Locke implicitly acknowledges that human reason is nevertheless incapable of recognising "good" on its own. What is good must be politically determined, by a decision of the legislature. This argument, explaining the reasons for abandoning of the state of nature, clearly contradicts the earlier quoted description of the state of nature. Moreover, the conviction that people are incapable of distinguishing in common between good and evil justifies the need for state. There is no discrepancy between Locke and Hobbes in this respect.

53 *Leviathan*, 13, 8: '(...) during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war as is of every man against every man. For war consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known: and therefore, the notion of time is to be considered in the nature of war'. Hobbes, 2008, p. 84.

54 Locke, 1824, § 124, p. 204. Elsewhere, Locke again acknowledges that in practice people do not obey the law of nature at all. See: Locke, 1824, §128, p. 205: '(...) And were it not for the corruption and vitiousness of degenerate men, there would be no need of any other; no necessity that men should separate from this great and natural community'.

authority.[55] Therefore, Locke must admit that in the state of nature no one obeys the principles of natural equity and justice. Thus, the state of nature, being the state of freedom, is also full of fears and continual dangers,[56] which Hobbes would call the (state of) war. Locke, therefore, must ultimately admit that in the pre-social state of nature man cannot lead a happy life,[57] and for this reason hastens to escape the original war 'under the protection of the laws established by the government'.[58] Notwithstanding the fact that Locke wrote somewhat differently at the beginning of the second treatise, he must admit in the course of his argument that the state of nature lacks established laws '*by which every one may know what is his*'. Thus, the positive law appears to be necessary for individual enjoyment of proprietary rights, which were depicted as if they were a pre-social phenomenon.

> 'To this end "it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws,

55 See: *Leviathan*, 15, 3: Among these laws of nature, not binding in the pre-state, Hobbes includes both: moral guidance (precepts of justice, benevolence, kindness, generosity, the use of repression only for corrective purposes, and prohibitions on insult, pride, arrogance) and rules for the distribution of resources in the community (the necessity of the common use of things that cannot be separated; rules for the acquisition of goods by primogeniture or appropriation) but also procedural rules for the settlement of disputes (binding force of judgements, guarantees for arbitrators, guarantees for the impartiality of judges, and rules for witnesses). Hobbes, 2008, pp. 95–96.

56 Locke, § 123, p. 204: 'for all being kings as much as he, every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure. This makes him willing to quit a condition, which, however free, is full of fears and continual dangers.' The significance of Locke's explanations in §123 of his Second Treatise for the proper reading of §6 is most often overlooked as if it was believed that the latter fully describe Locke's state of nature. See: Stawrowski, 2006, p. 250 (note 103).

57 This must be acknowledged also by François Quesnay in his treatise '*Le droit naturel*'. He was significantly influenced by Locke in presenting essentially identical position, although, in a manner peculiar to the Physiocrats placing greater emphasis on economic issues. While initially he argued against the Hobbesian position, insisting (p. 367) that 'dans l'état de pure nature, les hommes pressés de satisfaire à leurs besoins, chacun par ses recherches, ne perdront pas leur temps à se livrer inutilement entre eux une guerre qui n'apporterait que de l'obstacle à leurs occupations nécessaires pour pouvoir à leur subsistance'; However, in the course of further deliberations, he has to take a completely different position, actually identical to the Hobbesian. Thus, he states (p. 372) that 'les hommes dans l'état de multitude, où la communication entre eux est inévitable, et où cependant il n'y aurait pas encore de lois positives qui les réunissent en société sous l'autorité d'une puissance souveraine, et qui les assujettissent à une forme de gouvernement, il faut les envisager comme des peuplades de sauvages dans des déserts, qui y vivraient des productions naturelles du territoire, ou qui s'exposeraient par nécessité aux dangers du brigandage, s'ils pouvaient faire des excursions chez des nations où il y aurait des richesses à piller; car dans cet état ils ne pourraient se procurer des richesses par l'agriculture, ni par les pâturages des troupeaux, parce qu'il n'y aurait pas de puissance tutélaire pour leur en assurer la propriété.'; Quesnay, 1888, pp. 367, 372.

58 Locke, § 127, p. 205.

> or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature".'[59]

Despite Locke's promotion of the thesis regarding the pre-social and pre-political origin of rights, ultimately, he had to accept (although in an obscure way) the position taken by Hobbes, according to which human rights might only exist in practice when due to protection provided by statutory law.[60] Consequently, Locke must acknowledge that state-created positive laws are necessary for the people, so that they know about the extent of their property rights.[61] Hence, the property rights exist only in society and only by virtue of the positive laws of the community.[62]

The same position is taken by other philosophers that design the modern social philosophy, like Rousseau. The Geneva philosopher emphasised that entering the

59 Locke, § 136, p. 211: '(...) To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which everyone may know what is his. To this end it is that men give up all their natural power to the society which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature'. Zbigniew Rau points out, in truth, that in another earlier passage in the second treatise (§ 129) Locke states that in the social contract man gives up his natural liberty only so far as the self-preservation of man and society requires it (Rau, 1992, p. LXV), but a little further on (§ 131), Locke's argument indicates that the decision as to what this self-preservation requires depends solely on the discretion of the legislature.

60 The same conclusion reaches François Quesnay saying that: 'le droit naturel de chaque homme s'étend à raison de ce que l'on s'attache à l'observation des meilleures lois possibles qui constituent l'ordre le plus avantageux aux hommes réunis en société. Ces lois ne restreignent point la liberté de l'homme, qui fait partie de son droit naturel; car les avantages de ces lois suprêmes sont manifestement l'objet du meilleur choix de la liberté. L'homme ne peut se refuser raisonnablement à l'obéissance, qu'il doit à ces lois; autrement sa liberté ne serait qu'une liberté nuisible à lui-même et aux autres'. Quesnay, 1888, p. 377.

61 Locke, § 136, p. 211: 'To avoid these inconveniences, which disorder men's properties in the state of nature, men unite into societies, that they may have the united strength of the whole society to secure and defend their properties, and may have standing rules to bound it, by which every one may know what is his (emphasise added – A.S.). To this end it is that men give up all their natural power to the society (emphasise added – A.S.) which they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty, as it was in the state of nature.'

62 Locke, § 138, p. 213: 'Men therefore in society having property, they have such a right to the goods, which by the law of the community are theirs (emphasise added – A.S.), that no body hath a right to take their substance or any part of it from them, without their own consent: without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent.'

society requires giving up natural condition of men (his natural liberty) without any reservation and it is an indispensable condition for establishment of the society.[63]

Similar position – obviously inspired by Rousseau – took Immanuel Kant. According to this philosopher, 'positivistic character of subjective rights derives already from the very definition of the *civic* or *legal* state (*Rechtliche Zustand*), which encompass conditions that must be fulfilled so that anyone could exercise his rights'.[64] Hence, rights can only exist (be exercised) by virtue of law created by state. This follows from the very idea of the state of nature as understood in rational terms that individuals operating in this state could never be protected from the violence of others. This was because each individual living in the state of nature has the right to do what seems right and good to that person, and not to rely on the opinion of others. Hence, the necessity of leaving the state of nature, in which everyone is guided by his own opinion, and entering the "civic state", 'in which, what must be considered the property of each individual is legally assigned and secured to him by a sufficient force, which is not his own, but commonly accepted external force'[65] exercised by the public authority according to statutory provisions. Therefore, the rights of the individual ('the property of each individual subject') are created and effectively assigned only by the sovereign and they do not result from nature. Kant makes this even clearer when, considering land ownership as the archetype of all other property. He states that any right must originate from the sovereign as the supreme owner (*dominus territorii*) in the state.[66] Confusion about the natural character of rights stems from the need for property which is naturally inherent in every human being. This need for property,

63 According to Rousseau, the content of the social contract is so determined by its very nature that the slightest modification would make it vain and ineffective; so that Rousseau believed there is only one possible construction of such a contract. Its key provision required alienation of each associate, together with all his rights, to the whole community (*l'aliénation totale de chaque associé avec tous ses droits à toute la communauté*). Rousseau emphasise that the alienation must be without reserve so that to make the union as perfect as it can be (*l'aliénation se faisant sans réserve, l'union est aussi parfaite qu'elle peut l'être*) otherwise; the state of nature would continue, and the association would necessarily become inoperative or tyrannical. See: Rousseau, 1792, pp. 23–24.

64 Kant, 1870, § 41. p. 121: 'Der rechtliche Zustand ist dasjenige Verhältniß der Menschen unter einander, welches die Bedingungen enthält, unter denen allein jeder seines Rechts theilhaftig werden kann.'

65 Kant, 1870, § 44, pp. 150–151: 'Man müsse aus dem Naturzustande, (...) herausgehen und sich mit allen anderen ... dahin vereinigen, (...) in einen Zustand treten, darin jedem das, was für das Seine anerkannt werden soll, gesetzlich bestimmt und durch hinreichende Macht (die nicht die seinige, sondern eine äußere ist) zu Theil wird, d. i. er solle vor allen Dingen in einen bürgerlichen Zustand treten.' See also: Kant, 1870, § 8, pp. 61–62.

66 Kant, 1870, B, p. 164: '(...) Da der Boden die oberste Bedingung ist, unter der allein es möglich ist, äußere Sachen als das Seine zu haben, deren möglicher Besitz und Gebrauch das erste erwerbliche Recht ausmacht, so wird von dem Souverän, als Landesherren, besser als Obereigenthümer (dominus territorii, alles solche Recht abgeleitet werden müssen. (...) Dieses Obereigenthum ist aber nur eine Idee des bürgerlichen Vereins, um die nothwendige Vereinigung des Privateigenthums aller im Volk unter einem öffentlichen allgemeinen Besitzer zu Bestimmung des besonderen Eigenthums nicht nach Grundsätzen der Aggregation (die von den Theilen zum Ganzen empirisch fortschreitet, sondern dem nothwendigen formalen Princip der Eintheilung (Division des Bodens) nach Rechtsbegriffen vorstellig zu machen.'

however, could only by satisfied by the positive laws and not in the *state of nature*. Therefore, in the state of nature, the possible is only factual, provisional possession of goods and not the propriety rights,[67] as there are no legal conditions for an individual to become an owner.

3.1. The Unity of the Individualistic Paradigm

The foregoing arguments have attempted to demonstrate that, on the ground of the philosophical tradition promoting individualistic anthropology, the exercise of subjective rights is only possible in the "civic state" due to positive law. It appears that not only Hobbes, but also Locke, Rousseau and Kant acknowledge that subjective rights of individuals were created by the will of the sovereign and not by the operation of the law of nature. The state of nature demonstrates the individual's need for private property, which can be addressed and satisfied through escaping the state of nature.[68] Therefore, the situation of the individual in the civic state is radically new, contrary to the Lockean narrative, about the general persistence of the natural condition of man in the society, which is only slightly emended with the provision of the legal protection of natural rights. Kant discussed the issue and emphasised that by abandoning the state of nature, individuals surrender not part – as Locke tried to suggest – but all of their original freedom, gaining instead a freedom dependent upon positive law.[69] According to Kant, having been influenced by Rousseau,[70] people completely lose their previous natural subjective status and acquire a completely new subjective status as citizens.

An excellent illustration of this inseparable unity occurring between the Hobbesian and Lockean approaches to subjective rights is provided in Article 4 of the 1789 French Declaration of the Rights of Man and Citizen. This provision, while considering rights as natural (following the narrative by Locke and Quesnay), at the same time emphasises the necessity of their limits and acknowledge, that the only legitimate limitations of those (allegedly) natural rights are those provided by

67 See: Kant, 1870, § 15, pp. 72–75, and also § 44, p. 151.

68 Kant, 1870, § 8, p. 62: '(...) Wenn es rechtlich möglich sein muß, einen äußeren Gegenstand als das Seine zu haben: so muß es auch dem Subject erlaubt sein, jeden Anderen, mit dem es zum Streit des Mein und Dein über ein solches Object kommt, zu nöthigen, mit ihm zusammen in eine bürgerliche Verfassung zu treten.'

69 Kant, 1870, § 47, p. 155: '(...) man kann nicht sagen: der Staat, der Mensch im Staate habe einen Theil seiner angebornen äußeren Freiheit einem Zwecke aufgeopfert, sondern er hat die wilde, gesetzlose Freiheit gänzlich verlassen, um seine Freiheit überhaupt in einer gesetzlichen Abhängigkeit, d. i. in einem rechtlichen Zustande, unvermindert wieder zu finden.'

70 '(...) l'homme perd par le contrat social, c'est sa liberté naturelle et un droit illimité à tout ce qui le tente et qu'il peut atteindre; ce qu'il gagne, c'est la liberté civile & la propriété de tout ce qu'il possède', Rousseau, 1792, p. 31.

statutory provisions.[71] Thus rights, despite being believed to be natural, have their substance and identity determined by statutory law,[72] thus making them a creation of the sovereign.

Indeed, if one begins the analysis of social life by accepting the thesis that man is by nature a free and equal individual endowed with natural rights, then it is necessary to explain the reasons why people live not individual, but collective lives. This, in turn, necessarily leads to the conclusion that the real substance of those (allegedly) "natural rights" can only be provided by the positive law. Thus, viewing social and political life as an artificial convention set by autonomous individuals, must inevitably lead to the conclusion that the subjective status of the individual in social life is entirely determined by positive law alone. Therefore, Jeremy Bentham was right, when he ironically stated that the right can only be the child of the law, while the "natural right" is the son who never had a father.[73]

3.2. Importance of the Natural Law Paradigm for Individualistic Legal Theory

The above conclusion about rights as originating from positive, not natural law, urge one to ask: whether the naturalistic position in respect to law is a simple fallacy that should be abandoned in the name of intellectual honesty? However, a simple rejection of the naturalistic thesis must be properly allocated within the general framework of the liberal legal theory. In order to do so, it seems worthwhile to pay closer attention to the classical liberal approach as represented by one of the classics of legal positivism – Herbert Hart.

He is worth recalling in the present context for at least two reasons. Firstly, because having been a classical proponent of the twentieth-century legal positivism, he argued for the non-positivistic (moral) character of the rights that define the subjectivity of the individual. Secondly, Hart's argument substantially is the same as that presented by Kant, nearly two centuries earlier, which is something basic for modern legal theory.

In one of his classical texts,[74] Hart argued that if there are any rights at all, which are not derived from positive law, there must be at least one: the equal right of all people to be free. Hart stipulates, however, that he does not claim this right to be "absolute". He recognises its extra-positive (natural) character because it is not

71 Article IV: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi'.

72 In the context of the contemporary Polish constitutional law, this paradox was emphasised by Tuleja; 'If the legal norms enacted by the legislature (...) determine the scope of individual freedom, it is in fact the legislature that determines its content', Tuleja, 2003, p. 137.

73 'Right is with me the child of law: (...) natural right is a son that never had a father.'; Elsewhere, Bentham writes even more unceremoniously: 'Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, – nonsense upon stilts.' Bentham, 1839, pp. 501, 523.

74 Hart, 1955, pp. 175–191. Reprinted in the collection: Waldron, 1984, pp. 77–90 which will be quoted in this text.

created by any human act, and all human beings have this right simply because they are human beings, not because they are members of a particular society or occupy a particular position in relation to others.[75] There is no need for a detailed analysis of the Hart's position in this chapter. It seems sufficient to indicate that his conclusion concerning freedom as the natural right of man, is identical to the conclusion of Immanuel Kant, who also claimed that from the very fact of being human flows the only fundamental right of everyone to freedom.[76] Moreover, it also corresponded with his understanding of *homo noumenon* – to be considered later.

What is characteristic about these analyses, as well as those regarding Hobbes and Locke, is that they seek to explain the phenomenon of the social life of human beings, whose essential feature is freedom. Hence, in the seventeenth century, human beings so conceived were placed in a "state of nature". Hart, on the other hand, states that by "all human beings" he means any adult human being capable of choice.[77] This proviso is again superimposed on Kant's proviso requiring to take into consideration when discussing social life only fully autonomous person without any physical limitations, called *homo noumenon*.[78] Clearly, it must be said at once that this anthropological vision probably does not describe man in a truthful way.[79] However, the issue of the correctness of the premises on which the liberal theory of the state was based, notwithstanding its fundamental importance, is beyond the scope of the present discussion.

What is relevant here, is the conclusion that the naturalistic identity of rights is an expression of that very simplified anthropological concept that underpinned modern social philosophy. It was this concept that guided philosophers in their search for

75 Ibid., pp. 77–78.

76 See: Kant, 1870, p. 40; 'Das angeborne Recht ist nur ein einziges. Freiheit (Unabhängigkeit von eines Anderen nöthigender Willkür), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann.'

77 Hart, 1955, p. 77. Therefore, his theory of rights is labelled as the "theory of choice". See: Freeden, 1991, p. 44; Waldron, 1984, p. 9.

78 *Kant, 1870, p. 42;* 'Da in der Lehre von den Pflichten der Mensch nach der Eigenschaft seines Freiheitsvermögens, welches ganz übersinnlich ist, also auch bloß nach seiner Menschheit, als von physischen Bestimmungen unabhängiger Persönlichkeit, (homo noumenon).'

79 This is clearly expressed by Kant, when he denies numerous categories of people the status of citizenship (Kant, 1870 § 46, pp. 152–153). Although he asserts that this exclusion 'is not at all at odds with the freedom and equality of these persons as human beings' (Diese Abhängigkeit von dem Willen Anderer und Ungleichheit ist gleichwohl keinesweges der Freiheit und Gleichheit derselben als Menschen, given that civic community is only established between free and autonomous (selbständig) people who consequently acquire civic status ('das Attribut der bürgerlichen Selbstständigkeit, seine Existenz und Erhaltung nicht der Willkür eines Anderen im Volke, sondern seinen eigenen Rechten und Kräften als Glied des gemeinen Wesens verdanken zu können, folglich die bürgerliche Persönlichkeit, in Rechtsangelegenheiten durch keinen Anderen vorgestellt werden zu dürfen.'). There is thus an important link between citizenship status and the ability to acquire private property. Thus, the Kantian exclusion of a number of categories of persons from citizenship status does not merely deny these persons political rights but denies them the general capacity to become subjects of law, including the very possibility of acquiring property rights!

a new understanding of social reality in the 17th and 18th centuries. Conceiving of man as rational, free and equal, unconditioned by interpersonal relations, they explained the nature of social life through a mythical vision of a pre-social life, where no social conventions yet existed and man could be imagined in the purest form, not constrained by any social interaction considered most often in terms of coercion. This individualistic anthropological assumption was thus the axiom upon which a new conceptualisation of social life was designed, and all modern (as well as postmodern) political philosophy has been founded. It is also difficult to deny those authors, who point to the fundamental paradox of this modern social philosophy, as founding social life upon fundamentally unsocial principle such as natural rights.[80]

The relevance of this naturalistic perception of subjective rights, however, is not limited to the realm of the "founding myth". Although people have abandoned the state of nature and their natural status when they decided to start common life under the rule of statutory law, the positive laws are supposed to create conditions for individuals to live as free and equal as possible. This, however, was inclined, again, to a vision of the pre-social original condition of man. In this way, anthropology based on freedom and equality express the ideal goal-point towards which the social order should aim. The individualist anthropological assumption thus not only explains the reason for social order, but at the same time constitutes an ideal *telos* (an asymptotic point of destination), which determines further development of the political order.[81] In this ideal vision, at the same time, the state should provide the individual with full natural freedom and complete security. Moreover, the development of the institutions of the liberal rule of law seems to confirm this contentious inner tendency included in the liberal democracy. For these reasons, on the grounds of the liberal theory of law, it is impossible to eliminate the naturalistic (ethical) paradigm from the perception of rights. It has run always concurrently to reflections on individuals as subjects of

80 See: Loughlin, 2004, p. 130; Manent, 1977, p. 11.

81 Kant has expressed exactly the same thought when stating that the spirit of the original social contract imposes upon the authority so created fundamental perpetual obligation to conform the way of exercising its power with this fundamental idea of freedom. So even if this power cannot do so at once, it is obliged to make continuous and gradual changes aimed at bringing this government into conformity with the only lawful constitution, namely, the constitution of a pure republic... By this "pure republic", Kant meant practical realization of the theoretical premises of the authority established by means of a social contract. Hence, this "pure republic" has 'a primordial (rational) form which alone recognizes freedom as the principle, or even the condition, of all coercion indispensable to the legal constitution of the state in the proper sense'. Kant, 1870, § 52, p. 184: '(...) der Geist jenes ursprünglichen Vertrages (anima pacti originarii) enthält die Verbindlichkeit der constituirenden Gewalt, die Regierungsart jener Idee angemessen zu machen und so sie, wenn es nicht auf einmal geschehen kann, allmählich und continuirlich dahin zu verändern, daß sie mit der einzig rechtmäßigen Verfassung, nämlich der einer reinen Republik, ihrer Wirkung nach zusammenstimme, und jene alte empirische (statutarische) Formen, welche bloß die Unterthänigkeit des Volks zu bewirken dienten, sich in die ursprüngliche (rationale) auflösen, welche allein die Freiheit zum Princip, ja zur Bedingung alles Zwanges macht, der zu einer rechtlichen Verfassung im eigentlichen Sinne des Staats erforderlich ist und dahin auch dem Buchstaben nach endlich führen wird.'

law, providing inspiration for the political quest towards reform of positive law as determined by this liberal attitude.[82] It is positive law (in the meaning of the regulations supported by the public authority – be it statutory or judicial), however, and not natural law, which will be the only legitimate determinant of the subjective status of an individual in the social life.[83] And this status of an individual – the entity that is equal to others and free from others – is the leading idea which determines ongoing development of the rights concept.

4. Further Evolution of the *Rights* Concept in the Western Legal Culture

The shift in the conceptualisation of subjective rights towards the theory of interest, in the early 20 century resulted in abandoning the concept of natural rights, and in considering the rights of individual as an effect of the operation of statutory enactments. The situation has changed after the two World Wars, which clearly revealed the crisis of the modern social project and inspired one to look for natural sources of justice. It turned out that a democratic legitimacy of the legislative power does not properly secure respect for the rights of individuals. Protection as provided by positive law might not only appear to be ineffective in achieving this goal but might also constitute a primary threat to rights.

The reaction to this situation was the creation of constitutional courts that were granted with the power of reviewing statutory enactments in conformity with fundamental rights. Constitutional review has transformed political charters of fundamental rights, as contained in the texts of national constitutions, into normative texts that have legal effect in constitutional courts.

On the other hand, the same identification of the modern nation-states as the primary threat to human rights, resulted also in the creation of supranational (postmodern) political structures. One of the primary reasons explaining their creation, existence and development, was – apart from securing global peace – the protection of human rights.[84] This process also resulted in the transformation of fundamental legal and political concepts. The rule of law began to be increasingly perceived as a limitation to the modern concept of popular sovereignty considered as a fundamental principle undergirding the authority of the modern nation-state.[85] Both these phenomena – creation of the constitutional courts and establishment of the supranational institutional system, have shrunken authority of the modern nation-state based

82 Loughlin, 2004, p. 124.
83 See: Tuleja, 2003, pp. 137–141.
84 Universal Declaration of Human Rights, Preamble: 'The General Assembly, proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, (...) shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.'
85 Puppinck, 2018, pp. 18–30.

on the idea of the human rights protection. These phenomena also reflect crisis of modern categories and the occurrence of post-modern transgression.

Constitutional courts have taken control of the legislative activity of parliaments (hardly acceptable in terms of modern political theory) to perform functions analogous to those of administrative courts, however, not in relation to executive power, but to legislative power.[86] Within European legal culture, human rights, which for a long time were originally considered as political categories, were transformed and rendered legal and enforceable in the constitutional courts. Moreover, a considerable number of fundamental rights, which used to be just human rights (including the right to property, the right to a fair trial, or the prohibition of discrimination), were also applied to legal persons – thus not to human beings – as fundamental rights (no-longer human rights). Looking from theoretical perspective, this process consisted in a transition in the understanding of fundamental rights from the will theory to the interest theory.[87] Also, the judicial decisions of national constitutional courts started began to refer to the case law of the international system of human rights protection. This is an important phenomenon since the constitutional courts – despite their very weak democratic legitimacy – are empowered to repeal laws adopted by democratic parliaments. In this context, reference to the case law of the international human rights tribunals means providing these courts with additional quasi-political and quasi-legal legitimacy.[88] This is particularly important because most of the constitutional courts' decisions refer to constitutional provisions that are usually very general and vague. Hence, the constitutional courts rely more on the content of their own earlier judicial decisions than on the content of the constitutional text.

As it was already pointed out, the emergence and the development of the constitutional courts paralleled the creation of supranational institutions that claimed to protect human rights. In the linguistic rhetoric dimension, this new stage of development is also characterised by the novel linguistic disguise for individualistic anthropology, precisely that of *personalism*, whereby the rights of individuals became the rights of the person.

This shift in terminology was a kind of "image warming" that attracted Roman Catholic Christians to the human rights project.[89] The important inspiration for the construction of an international system of human rights protection after World War II were personalistic concepts by Jacques Maritain. He treated the international protection of human rights as a moral system that allowed the establishment of a rational global rule of law order to safeguard against the possible arbitrariness of nation-states. The common good in the global dimension was to be affirmed by means of limiting the sovereignty of a state.[90] A symbolic inauguration of this political project was the adoption in the 1948 Universal Declaration of Human Rights, and the 1966 covenants:

86 For more see: Stępkowski, 2010, pp. 159–163.
87 Stępkowski, 2013, pp. 122–126.
88 Safjan, 2006, p. 9; Granat, 2003, pp. 235–236.
89 Stępkowski, 2023, pp. 132 ff.
90 Puppinck, 2018, pp. 20, 31–33.

the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural* Rights (ICESC). At the same time, regional human rights protection systems began to be established. In Europe, these included the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950) with the Court thereby established. These international systems, which clearly manifested the tendency to set a gradual domination over the modern sovereign nation-state, constituted the institutional backbone for the postmodern stage of the development of human rights, in which the systematic radicalization of individualism occurred and resulted in the rapid proliferation of newly invented rights. This postmodern process is often labelled as the "revolution of rights," and leads to erosion of the sovereignty of modern nation-states, justified as protection of the equality and freedom of individuals with legal instruments, the most important of which, are those dealing with rights. This process also demonstrated its true nature leading to absolute autonomisation of the individual. The progress of the "human rights" (still valid as a label, but increasingly anachronical) became incorporated into the idea of human progress itself, an autonomous and lofty moral justification of postmodern politics.[91]

The diversity and inconsistency of these new rights resulted in attempts to provide a new articulation such as the famous distinction between the three generations of rights, proposed by Karel Vašák.[92] According to this classification, the first generation consists of "classical" or traditional civil and political liberties; the second encompasses social and cultural rights; whereas the third provides for so called "solidarity rights". The third is not precisely conceptualized and includes vague diverging concepts such as the right to development, the right to a healthy and ecologically balanced environment, or the right to world heritage. Despite the elevated rhetorical and the global resonance to this threefold division, it was soundly criticised,[93] and substantial doubts were raised as to whether it was even a useful categorisation.[94] The vagueness of the third-generation rights resulted from their identity of being, in fact, policy directives, rhetorically clothed in "rights talk". It allowed, however, for the inclusion of even the most dubious political agendas to be clothed as brave efforts towards protection of some newly invented human rights. The "rights clothing" provides social support for such political agendas.

This proliferation of rights is heavily enhanced by the international human rights bodies (including courts). They enjoy considerable authority as international institutions, while avoiding, however, at the same time, any real social control. Based on these features, they broadened systematically the scope of their jurisdiction and

91 'Ce " progrès des droits de l'homme"(...) C'est le progrès de la libération de l'individu : le progrès contre les inégalités et les discriminations à corriger, contre les traditions et les croyances à dissoudre dans la rationalité. Chaque développement des droits de l'homme, chaque nouveau droit réaliserait un progrès de la condition humaine'. Puppinck, 2018, p. 259.
92 Vašák, 1997, pp. 29–32.
93 Pocar, 2015, pp. 43–53.
94 Domaradzki, et al., 2019, pp. 423–443.

elaborated an evolutionary method of interpretation of international law,[95] without relevant social control. With time, these tribunals' own judicial decisions became normative, instead of the international treaties that had created them, and thereby determined their jurisdiction. The same applied *mutatis mutandis* to national constitutional courts.

Judicial decisions of the European Court of Human Rights (ECtHR) regarding freedom of expression can be used as an example of the practical application of human rights in order to bring about social change. According to the famous principle that protects free speech, as written in *Handyside v. the United Kingdom* (1976), which has been referred to in several hundred subsequent rulings, freedom of expression applies

> 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.[96]

In this way, under the label of protecting free speech, the ECtHR made itself a protector of opinions that intentionally attack the existing social norms. The beneficiaries of such guarantees of human rights are radical social movements that can freely shock or offend in the name of the freedom of expression. The social mainstream or non-radical groups never or rarely feel the need to resort to such measures.

Another example of the real function of human rights as an instrument of profound social change is the ECtHR's case law on Article 8 of the ECHR that protects private and family life. For a long time, this provision of the Convention was considered as not interfering with the criminalisation of homosexual practices.[97] With time, however, it started to be considered as protecting homosexual practices on the basis of privacy[98] and thereby imposed an obligation to treat them equally to the sexual intercourse between a man and a woman.[99] Finally, it became qualified as an aspect of family life, leading subsequently to the creation of the right to homosexual marriage.[100]

This example demonstrates very well the role that human rights protection played in changing the perception of regularity and irregularity of human behaviour as well as the identity of basic social structures (family or marriage). This, in turn, permits an insight – by no means obvious or unambiguous – into the identity of rights. This

95 Soloch, 2015, pp. 117–142.
96 *Handyside v. the United Kingdom* (Application No. 5493/72) of 7 December 1976, § 49.
97 *W.B. v. Germany* Application No. 104/55 (European Court of Human Rights, decision of 17 December 1955); *X. v. UK* Application No. 7215/75 (European Court of Human Rights, decision of 7 July 1977). For more, see: Puppinck, 2018, p. 112 and further reading in note 3.
98 *Dudgeon v. UK* (Application No. 7525/76) of 22 October 1982.
99 *L. and V. v. Austria* (Application No. 39392/98, 39829/98) and *S.L. v. Austria* (Application no. 45330/99) of 9 December 2003.
100 *Villanatos v. Greece* (Application No. 29381/09) of 7 November 2013; See also: Puppinck, 2015, pp. 161–171.

ambiguity, although appearing as somehow mysterious and confusing, in fact, is the expression of the very essence of human rights, the next topic, discussed infra.

5. The Declared v. Real Function of Human Rights

Usually, human rights are presented as instruments for the protection of an individual and his/her autonomy, thereby resulting in the stabilisation of social relations. Moreover, human rights are supposed to protect the weak, from abuse of the strong. However, despite those spontaneous associations, the immanently individualistic character of rights operating in social life disintegrates the existing social structure into an atomised one promoting progressive individualization. Each existing social structure, by its very existence, creates specific limitations for the desires of every individual. These limits can easily be presented as an instance of social coercion, if not oppression. In this way, human rights no longer focus on a universal understanding of the conditions necessary for human development but on the protection of groups (or just individuals) that challenge existing social structures and norms, arguing that the social order constitutes a threat for their autonomy. Thus, rights inspire long-term social, political, and legal processes that are aimed at the progressive autonomisation of individuals.

This is confirmed when we look at the rights-focused politics from a historical perspective. From the very beginning, the enforcement of rights led to radical reconstructions of the existing social order. It is easier to understand, when we realise that even the politics inspired by the early meaning of rights based on the concept of the law of nature and affirmation of the so-called "natural order", was focused on the moral critique of the social order existing in the 17th or 18th centuries, described as irrational and oppressive to the individual. In fact, early-modern declarations of natural rights aimed at destroying the premodern (community-based) social order and replacing it with the modern one, based on individualistic anthropology.

A good example of this ambiguous character of rights is the typical first-generation right, i.e. the right to property that was included in the famous triple slogan of the French Revolution (*liberté, égalité, propriété*). Despite its superficial perception as stabilising and protective, in fact it was not intended to protect the existing social structure of feudal ownership. To the contrary, it aimed at overturning it completely and re-establishing a new model of property, based on new principles (and new owners) as individual private property. From this perspective, the natural human right to property as advocated by Locke and others, was by no means protective – it was a strictly revolutionary slogan aimed at the fundamental change of the existing structure of ownership. Presentation of property as a natural right of an individualistic and pre-social character was directed against the social system that functioned at that time, and which reserved land ownership for the nobility. Beneficiary of the feudal proprietary system was the large family rather than the individual. In the context of the controversy between liberals and democrats (socialists) that took place

half a century later, the proprietary postulate from 1789 appeared to be conservative and therefore was replaced from the mentioned revolutionary slogan with that of *fraternité*, which demonstrated egalitarian shift in the mid-19 century political process.

Therefore, the rights, as expressed in the solemn political declarations of rights, became also the main tool of social modernisation for liberal and democratic politics. Even when the rights became integrated into the modern social institutions in the 19th century, and thus their revolutionary potential weakened, by no means vanished. It has been continuously manifested in the operation of the modern institutions to disintegrate traditional social structures. Rights became an institutionalised system of social change. This paradox interplays between the image of rights as providing for protective stabilisation and their real function resulting in social destabilisation, is by no means surprising if we consider some deeper intellectual features of the modernisation process, discussed infra.

5.1. Contradictory Character of Modern Intellectual Categories

In order to understand the destabilising effects of the rights concept for social life one important aspect of the modern intellectual categories must be considered. Modern intellectual culture is based on a contradiction which provides a specific inner dynamism. This contradiction found its fullest expression in the Hegelian dialectics based on the interaction between thesis and antithesis resulting in synthesis which subsequently become new thesis to be contradicted with new antithesis. This intellectual scheme manifests in social dimension as a permanent social change (be it considered evolution or revolution). However, it must be understood, that Hegel did not invent this. Rather, he conceptualised this feature of the modern intellectual culture based on his concept of dialectics rooted in deeper and earlier theological premises.[101] In fact, it is inherent in the modern intellectual culture and already manifested in the writings of modern philosophers prior to Hegel. If we look at the explanation of the reasons for which people had left the state of nature (a literary description of human nature) it will appear that people were unable to live in this natural state – so, living according to a non-social human nature was destructive to man. Therefore, man must deny his (non-social) nature entering the social contract to preserve his existence.

101 In fact, Hegel – being a consequent idealist, thus considering the "idea" or "notion" as the proper being – understood the very essence of the "idea" as "self-differentiating" (*sich zu unterscheiden*) and thus constituting inner self-contradiction. See: Hegel, 1911; Zusätze § 139, p. 321. 'Gedanken (...) welcher nach einem Grunde und nach einer Notwenigkeit verlangt und im Positiven das Negative als selbst wurzelnd auffassen will. (...) der Begriff, oder konkreter gesprochen, die Idee, hat wesentlich das an sich, sich zu unterscheiden und sich negativ zu setzen. Bleibt man bloß beim Positiven, d.h. beim rein Guten stehen, das gut in seiner Ursprünglichkeit sein soll, so ist dies eine leere Bestimmung des Verstandes, der solch Abstraktes und Einseitiges festhält und dadurch, daß er die Frage stellt, dieselbe eben zu einer schwierigen erhebt. Von dem Standpunkte aber des Begriffes aus wird die Positivität so aufgefaßt, daß sie Tätigkeit und Unterscheidung ihrer von sich selbst ist. Das Böse hat also, wie das Gute im Willen seinen Ursprung, und der Wille ist in seinem Begriffe sowohl gut als böse. Der natürliche Wille ist na sich der Wiederspruch.'

This manifests fundamental contradiction included in the individualistic anthropology – living according to human nature (so understood) appears for man to be self-destructive.

This fundamental contradiction finds its expression also in the structure of right. The right, according to wide-spread Hobbesian approach, is the space of freedom determined by coercion provided by statutory law. Thus, it is legitimate to say that subjective right so understood is a composition of freedom and coercion, hence it is based on a contradiction. The same contradiction manifests in the competitive and concurring concepts of rights referring either to naturalistic or positivistic perspectives.

For this very reason, the previously mentioned revolutionary face of rights did by no means disappear, when the concept of rights became implemented as fundamental to modern legal theory. On the one hand, rights granted by the statutory regulations became the construction of the modern social institutions. On the other hand, however, rights in their naturalistic dimension – that requires broadening of the individual autonomy – provided legitimisation for the social critique demanding reconstruction of the existing social order. Moreover, the critical dimension of the rights concept, as providing for social change, is the main one, and the one that determines social development. In this way, the rights-focused modern legal culture has institutionalised ongoing social reconstruction (whether evolutionary or revolutionary) within the framework of the dialectical process that affirms individualistic anthropology.

5.2. The Contradiction in Action

Formal abolition of the feudal system, despite being inspired by the rhetoric of natural rights of man, in fact, did very little to guarantee the freedom and equality of people. Early modernisation of social life was limited to private law and affirmed equality and freedom within the framework of the principle of freedom of contract. Despite (perhaps because of) the absence of the feudal social hierarchy, this led to the emergence of dramatic economic and social inequalities known from the 19th century literature of Dickens, Zola, Hugo or Balzac and others. The legal equality and autonomy of will, as reflected in the principle of freedom of contract, created factual dependency and inequalities comparable to, if not greater than, those of the feudal system, based, as it was, on a formal hierarchy.

Those unprecedented inequalities became the reasons for gradual restrictions imposed on the freedom of contract to protect the weaker of the contractual parties. Gradual departure from the freedom of contract started with the protection of the rights of workers in the late 19th century and continued with the protection of the rights of consumers in the late 20th and early 21st centuries. Laws aimed at correcting modern dysfunctions, however, have proved unsatisfactory in providing protection of equality and freedom (the rights). This led to postmodern transgression, concluding that the reasons for human alienation were not the social structures or economic conditions of life, but man himself and his human identity.

5.3. Beyond Human Identity Towards Posthumanism

Postmodern intellectual culture leads to the conclusion that it is precisely the human identity that prevents man from being truly free and equal (having one's rights protected). Consequently, whereas modern legislation tended to protect human rights through transformation of the social conditions of human life in order to make him free and equal, postmodern legislation, in order to achieve this objective, aims at transforming man himself. Contemporary, rights are gradually becoming the instrument for gradual liberation of an individual from his or her human identity. The advancement of human rights inspires a process by which humanity becomes aware of the limitations that prevent it from achieving full freedom and equality. It also paves the way for overcoming these alienating obstacles.[102] The question, however, remains: whether this quest for total liberation and equality will culminate in a "final solution" (*Endlösung*) for man?

The most spectacular manifestation of this postmodern approach is the political movement to liberate man from sex as represented by the radical feminism and the LGBT political movement. Protection of the progressively understood rights of woman or the rights of sexual minorities is in fact directed towards liberation of man from his sexual identity. This quest began by substituting "sex" with "gender" – an ersatz of sex understood in terms of a social (cultural) construct and not that of natural feature of man. Human sexuality has been transformed into "gender identity," which has subsequently enabled, a politically driven, multidimensional deconstruction of it. The goal of deconstructive policies is to deprive sexual identity of any social importance. The great promise behind this political process is to enable social justice by means of replacing men and women with people of an indeterminate gender identity.[103]

Unexpectedly, this process has been supported by the post Second World War personalistic shift in the individualistic anthropology. The notion of the person appeared (somehow unexpectedly) to be sexually undetermined. The association of legal protection (based upon the concept of rights) with the status of person (not necessary with the status of human being), inspired a divergent development in understanding rights. On the one hand, the concept of the person was understood in terms of the Kantian *homo noumenon*, thus an independent entity capable of making free decisions irrespectively of its physical properties. This allowed one to speak about human relationships irrespective of human sexual identity and the binary distinction between man and woman. Moreover, the theological notion of the "person" – when

102 This tendency inimical to human identity within the progressive development of human rights concept is very well described by Grègor Puppinck in his excellent monograph on human rights: 'Ce "progrès des droits de l'homme"n'est pas seulement celui de leur reconnaissance et application universelle et effective à travers le monde dont parlait la Déclaration universelle. Il est aussi celui de leur contenu. Ces progrès consistent en le processus par lequel l'humanité prendre connaissance de ses propres aliénations et entreprendre des s'en libérer par l'affirmation des droits nouveaux'. Puppinck, 2018, p. 259.

103 Okin, 1989, p. 171: 'Just future would be one without gender. In its social structures and practices, one's sex would have no more relevance than one's eye colour or the length of one's toes. No assumptions would be made about "male" or "female" roles.'

used in the social and political context – allowed for a more inclusive description of the social structures. This led to changes in the meaning of marriage and family based no-longer upon the union of man and woman, but on the union of two persons (although, one might anticipate progressive development as to the number of persons involved). As a result, Western legal culture by using the concept of the "rights of person" tends to replace marriage, understood as a lifelong union of man and woman, with a kind of contractual cohabitation between different persons of an unspecified sex, of an indeterminate number,[104] and – in the predictable future – including those of a non-human identity. Indeed, the concept of person has led to thinking about the rights-holder as one without a sexual identity and a human identity, at all. In the end, the progressive development of rights tends to extend beyond human beings.

5.4. Posthuman Rights

Historically, attributing legal protection in terms of rights to non-human entities, started early in relation to organizational units that had been granted – as legal *persons* – with the status of distinct rights-holders. In contemporary society, a similar – though much more transgressive process – is taking place regarding animals. For some people, it might be confusing, nevertheless, it is consistent with the inner logic of an individualistic social project promoting equality and freedom.[105] This development has become possible with the transgressive breakthrough concerning the conceptual understanding of person, where for a long time, the term "human being" was used as synonym, in legal settings. Certainly, an exception was made for the legal personality of organisational units, but it was considered rather, in terms of the useful legal fiction not affecting the proper meaning of the notion of person.

In contemporary thought, however, the concept of *person* has come to be regarded as a reason to grant legal protection. To this end, the concept has been applied to animals by recognising that they are non-human persons.[106] To achieve this effect, Christian theology has been instrumentalised, as the theological concept of person – understood in terms of a distinct rational substance – has been applied not only to

104 Otter, 2015, pp. 1977–2046.

105 Singer, 1995, pp. 173–174, 'While acknowledging the acceptance of basic principle of equality among all human beings as progressive step, (...) idea of human equality still left most sentient creatures outside the charmed circle. If we are now able to see that the fact that a human being belongs to a different race is not a good reason for giving less consideration to the interests of that being, then why (...) should the fact that a being belongs to a different species be a good reason for doing so? The animal liberation movement demanded that we go beyond a speciesist morality and give equal consideration to the interests of all beings who can feel pleasure or pain, irrespectively of species'.

106 Singer, 1995, p. 182: '(...) the term "person" is no mere descriptive label. It carries with it a certain moral standing. (...) once we recognise a nonhuman animal as a person, we will soon begin to attribute basic rights to animal.' For more detailed account see: Stępkowski, 2014, pp. 98–99.

humans, but also to God and angels.[107] Previously, the Instrumental use of the term *person* was mentioned in the context of "purifying" man of its sexual identity following the Kantian idealistic anthropology associated with the – previously mentioned – notion of *homo noumenon*. This time, however, the shift in the understanding of the *person* was associated with radical materialism (based on atheism). This led to ascribing the quality of the *person,* so understood, to 'an organism possessing the concept of self as a continuing subject of experiences and other mental states, which believes that it is itself such a continuing entity'.[108] In this way, personhood has been associated with the concept of "self-awareness" manifested by the desire to live and make plans for the future. What is essential for the *person,* so understood, is the capacity to envisage one's own future existence.[109] In such a way, fundamental rights (*rights of person* rather than the *human rights*) were attributed to those living entities (including individuals of the species *Homo sapiens,* but without equating a *human being* with a *person*) characterised by certain psychological and physical properties attributed to the artificial understanding of the *person*. Since, such personifying properties could be attributed – at least to some extent – to some of the animals (non-humans), the notion of *person* so understood was attributed also to them. Moreover, no longer are all members of the human species considered as *persons* deserving legal protection, but only those who possess these personifying properties.[110]

Soon, this radical academic theory influenced jurisprudence. On the one hand it denied or created doubt as to the legitimacy of granting protection to humans at the early (prenatal) stage of their development.[111] On the other hand, however, it allowed the extension of rights protection to some animals, which were qualified as *non-human persons*. This transgressive posthuman attitude appeared in the jurisprudence of the South American courts and resulted in the judgement of the Constitutional Court of Ecuador of 2022, which officially granted to the Mona Estrellita monkey,

107 '(...) *at hominis dicimus esse personam, dicimus Dei, dicimus angeli*', see: Boethius, 1918, p. 84. Peter Singer emphasised this in his *Rethinking Life and Death*: Singer, 1995, pp. 180–181. For wider context of transposing theological meaning of the person on the anthropological and ethical level, see: Stępkowski, 2023, pp. 134–142.

108 Tooley, 1972, p. 44.

109 Singer, 1995, p. 197.

110 Ibid., p. 206: 'Not all members of the species Homo sapiens are persons, and not all persons are members of the species Homo sapiens.'

111 *Vo v. France* (Application No. 53924/00) 8 July 2004, § 84: 'the Court observes that there is no consensus on the nature and status of the embryo and/or foetus (...). At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person (emphasis added – A.S.) – enjoying protection under the civil law, (...) require protection in the name of human dignity, without making it a "person" with the "right to life" for the purposes of Article 2.'

legal protection originally reserved to humans.[112] For the moment, this judgment is the most spectacular illustration of the transgressive posthumanist turn to subjective rights that has occurred in contemporary jurisprudence. Given the intellectual condition of contemporary Western culture, however, it seems that further development of constitutional and international jurisprudence in this posthumanist direction will be difficult to prevent. Hence, contemporary legal culture seems to be approaching a profound intellectual shift from the protection of the *human* to the protection of the *person* – not necessarily having any human identity. A predictable development might also extend this tendency to recognise "environmental rights" attributed to trees or other plants.

6. Conclusion

The Chapter demonstrated the emergence and ongoing development of the intellectual (including legal) construction of human rights, or more broadly – the concept of subjective rights (rights of the subject). Primary focus was given to the philosophical background of the concept of rights, which determines its identity and direction of its development. It attempted to demonstrate, how the Western legal culture has changed due to the centrality of rights concept. The paper aimed at explaining the reasons behind, the – oftentimes surprising or even astonishing – development of the notion of rights. However, this surprising course of development, when confronted with reality of social life, is by no means accidental. It is coherent with general intellectual identity of the concept of right.

A proposal was made to consider the *concept of rights as describing in legal terms conditions for development and flourishing of a human being understood as an individual*. Thus, if the main goal of rights is to make an individual as autonomous as possible, then contemporary developments must not be considered as a deviation from an otherwise sound idea of human rights, which can and must be rectified and purified of its exaggerations or errors. Contemporary developments in this respect are by no means a deviation – but rather the consequences that flow from the individualistic nature of the rights concept. Indeed, the trouble-some direction in which the concept of human rights has been developing, requires one to ask, whether the individualistic anthropology upon which all modern and postmodern social institutions have been founded, is the correct one? However, if individualistic anthropology is wrong, what kind of anthropology is correct?

112 Mona Estrellita caso No. 253-20-JH de 27 Janvier 2022 no 75: 'El Derecho en la modernidad ha estado caracterizado por un marcado antropocentrismo, en razón del cual se ha considerado al ser humano como el centro de toda expresión jurídica. Este enfoque ha estado acompañado de un evidente especismo por medio del cual el ser humano ha ido negando, en mayor o menor medida, la valoración y protección de los animales y otras especies de la Naturaleza'. It should be added that this passage was explicitly inspired by the Peter Singer's writings.

Having said that, we must be aware, that we live in a social reality, which has been already determined for a long time by individualism, thus the concept of rights is imposed upon us by the intellectual culture, in which we live, and by which, we are bound. Moreover, as a matter of principle, human rights address real social needs, also because we do not have alternative legal means to address the same. However, no one should be consoled by the fact that the worrisome progressive development of rights affects a relatively small section of society. It is by no means a good reason for optimism, as these problematic developments will inevitably expand over time. Therefore, thinking about an alternative to rights-thinking and rights-language is of utmost importance. Nevertheless, we have to be aware, that such an alternative must not be imposed by some ambitious legislative reforms. The key for change lies in the intellectual culture and the understanding of anthropology, which has been accepted and interiorized by society. Hence, the first step in looking for an alternative is to realise the problematic nature of individualism and to start thinking about man in terms of being endowed with a social nature, whose very existence and development depends on community, not autonomy. This might reveal an alternative framework of providing conditions for satisfactory life, development and human flourishing, that would be based on the principle of the common good and justice, instead of rights and legality. The first change, however, must be in our thinking and perception of social life, which is always determined by the intellectual culture. By no means, can the change be introduced by some innovative legislation, as the very concept of modern legislation is already founded upon individualism.

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