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UNIVERSAL HUMAN RIGHTS?

HISTORICAL AND CONTEMPORARY COMMENTS

ABSTRACT

The concept of human rights, supposedly of universal importance, is usually derived from the tradition referred to as "Western". Although the "classic approaches" – Greek, Roman and Christian, refer to the norms of natural law, making them the basis or limits of the rights of individuals, in modern approaches the relation is reserved, in the manner that rights become primary to norms. Although liberals of the 17th and 18th centuries consider the law of nature as a tool for their protection, starting from the 19th century, the rights (already called human rights) have been increasingly perceived as positive abilities to articulate own, subjective preferences of individuals. This evolution needs to be accounted for in the studies carried out by representatives of various cultures, since the comprehension of an individual (and even a "human person") as an essentially culturally unconditioned one, is its ineradicable element.

Keywords: natural law, law of nature, natural rights, human rights

In the so-called Western cultural circle, the catalogue of widespread convictions includes the claim that all individuals possess rights and freedoms that they deserve. In normative acts called constitutions, which first emerged just over two centuries ago, we can find chapters titled "human rights and liberties" or simply "human rights," rather than "civic rights, freedoms and duties". International law acts reflect attempts to catalogue such rights and/or freedoms, and, much less frequently, duties (which itself poses a question about the party or parties obligated to execute or respect the rights and/or freedoms of every individual, every human, postulatively) which assume that all individuals, despite their setting in a particular culture or religion, possess them and can (or should) use them. The Catholic social teaching, which also provides references to human rights, gives preference to the term "rights of human persons" in order to emphasise both the divine source of their dignity (resulting from their being created by a personal god) and the human dimension of all human persons, distinctive from other species (in fact, the issue of animal rights is broadly discussed today as well).[1] However, it is sometimes claimed that the concept of human rights is set in the "Western traditions," that "the West" is attempting to "impose" it onto other cultures or even "civilisations" (indeed, the struggle, or – in the words of Huntington – the clash of civilisations found within the same species, continues), in principle, building on on the deliberations carried out since the 17th century by the authors of the approach called liberal. It was liberalism that displaced, in the West, the republican approach that emphasised the multitude of variously identified collectivities (political, ethnic, etc.) with their respective "normative orders" (it is enough to mention the reflections of Montesquieu, who, in fact, is also included in the liberal tradition, about various "spirits of the laws" as the basis for many diverse legal projects) that was to propose an approach which, in time, became influential, to the point of dominating Western "colloquiality." When, after 1968, John Rawls developed his "principles of justice" as a basis for a constitution

[1] The Catholics who defend human rights (rights of human persons) claim that rather than protecting the welfare of humans, they define the conditions which allow people being humans, providing them with the ability to determine their actions and limiting the shortcomings of legal positivism. However, when executing their rights, humans should respect both the requirements of the laws made by legislative bodies, not inconsistent with natural law, and the legal and natural requirements of the "moral order". The latter exists in communities and is governed by their laws, but it also possesses a transcendent dimension. Every individual deserves human rights due to the fact of being created by God and possessing dignity connected with his being, however, the use of them is meant to enable him a free execution of his inclinations mentioned by Aristotle and St. Thomas Aquinas. The rights, preceding the ones of the state and its norms, are indeed based on a non-negotiable "human nature", therefore, they are neither a result of an agreement concerning their mutual respecting, nor a cession on the part of a lawgiver. They are to realize the transcendent dimension of human persons seeking to fulfill their beings while enjoying a freedom guaranteed by means of their legal protection. The essence of the problem is, therefore, in the general acceptance of a human's "personal truth" that requires non-infringement on those norms of natural law which protect natural inclinations, rather than natural rights. The welfare of human persons is revealed by the inclinations, which allow for the existence of societies and their members, and the continuity of generations. Thus, the autonomy of the temporal order should be respected, although its validity and legitimacy depend on the execution of the moral order (Paulus VI, *Gaudium et spes*, 41, 59 and 36, Romae 1965).

of a "well-ordered liberal democratic society," he also referred to "rights and freedoms," although not limiting them to a single culture, but developing a project aspiring to being universal.[2] However, it soon turned out that his idea, not unlike the ideas of earlier, 17th and 18th century authors, such as Thomas Hobbes, John Locke, Jean-Jacques Rousseau and Immanuel Kant, from whom he drew inspiration, is based on a anthropologic settlement underlining the possibility to assign rights and freedoms to an individual in an "abstract" manner, identified despite all cultural, religious and national conditions.[3] The growth of trends that, at the turn of the 21st century, were associated with the strengthening of cultural group identities, resulting even in attempts to assign rights to them as communities, demonstrated the importance of "cultural imperialism," that is, attempts to impose "Western style of thinking" about rights and/or freedoms of individuals also to the cultures which have different identities, emphasising, for example, the directing of a subject to God or gods or their being strongly set in collectivities treated as defining the position of an individual and his manner of thinking. The disputes stirred by Rawls' ideas resulted not only in numerous statements concerning the problematic nature of the primacy of the Western project towards other cultural projects (and, with them, the question about the justification of the acceptance of the argument about universally important categories, such as "tolerance"), but also in reservations on the part of a group of authors, referred to as communitarians, who pointed to the fact of sourcing the justification of actions from various community or group cultures; although, in relation to this, the issue of cultural relativism emerges that problematizes the universal quality of good and human rights associated with it, the search for a basis to support them as rights deserved by all human subjects continues.

By highlighting these several important issues, I will attempt to present the course of evolution leading to the shaping of fundamental conclusions in Western political and legal thought in the scope of interest to us. Although it is sometimes assumed that it not until the Declaration of the Rights of Man and of the Citizen of 1789 that the existence of perhaps "eternal" rights and freedoms of individuals as both humans and citizens was unveiled, it is still worth remembering that the process leading to that act includes slightly earlier American acts and considerably earlier propositions to understand the law as a collection of norms on the one hand, and rights as empowerment of individuals on the other. Refraining from an elaborate analysis of the history of law, I am going to nevertheless signal the fact that the approach found in one of the first documents of the French Revolution is considered by many scholars to have been already well-rooted by the 14th century. Although a certain "reversal of relation" between law as a set of norms binding all and a right of individuals to their own actions even despite the non-existence of law was not yet in place at the time, the 14th-century Scotist William of Ockham pointed to the traces leading in two different directions, namely towards the much later legal positivism, and towards the rights or powers of individuals as the areas of their free choices. Ockham, one of the main originators of the

[2] J. Rawls, *A Theory of Justice*, Cambridge, MA 1971.

[3] Idem, *Political Liberalism*, New York 1993.

"nominalist revolution" (and a Christian philosopher, after all), abandoned his realistic position in the dispute over universals, and, contrary to "classic approaches," usually associated with the experiences of ancient Greece and Rome, as well as some earlier Christian projects (partly stemming from the former), in order to thus emphasise the description of the content of norms by the lawgiver's will (not an entirely new approach). Whereas the representatives of "classic concepts of natural law" insisted, on the one hand, that norms of natural law are not created by a lawgiver and they do not change, but are recognised or perceived by human mind, including the mind of the lawgiver, and, on the other hand, that the natural (inherent) rights are secondary to them, Ockham posited that norms of the natural law should be associated with the judgments revealed by God, while individuals should be allowed to make a choice whether they agree or disagree with them.

In the 1st century BC, Cicero, who, in still republican Rome, referred to the approaches of Greek Stoics, insisted on the need to derive law as a set of norms from "rational nature," to spread awareness about natural law being "inscribed in the heart" of every individual, and to act upon it. Norms of reason of identical content were to be present in every individual despite their cultural origins, constituting the basis for determining justified behaviour, as well as negative limits, within which it should be confined if it has to be considered as justified. Over a dozen centuries later, the 13th-century Christian philosopher and theologist drawing from the ideas of Aristotle, St. Thomas Aquinas, addressed natural law as well, however, basing it not on the content already inscribed in the heart and requiring to be made aware of, but on natural inclination inscribed in the human species form, and therefore inherent to every member of the species.[4] According to both the Roman stoic and the Christian Aristotelian, the norms discerned or determined by the inherent human reason preceded the rights or "subjective rights": when making choices, man was to meet the requirements of *logos* as reason or rationality, or to fulfil the inclinational requirements of his species form (essence/nature); his right was inherent to the extent that his choice was not contradictory to reason or inclination set in the form, and thus it was "righteous"; therefore, the right was nothing more than the execution of "righteousness" indicated by the reason or inclination working at the level preceding rational recognition, ruling an individual intending to reach not a particular aim possible to achieve in temporality, but the purpose of human existence achieved outside of it and associated with salvation. Any choice infringing on the "measures of righteousness" could not be treated as just,[5] although the measures drew attention to either the welfare of a community, or to the happiness of a particular individual in an afterlife (the issue differentiating the Greco-Roman and the Christian approaches: the former stressed the prosperity of an individual in the temporal plan within a collectivity finding fulfilment in it, while the latter focused on what transcended the plan and led to God). Individuals acted in a justified

[4] Tomasz z Akwinu, *Suma teologiczna,* I-II, q. 90, t. 1, transl. by P. Bełch OP, Londyn 1986.

[5] Cf. E. Levy, "Natural Law in Roman Thought", *Studia et Documenta Historiae et Iuris*, vol. 15 (1949), p. 7. Also cf. J.W. Jones, *Historical Introduction to the Theory of Law,* Oxford 1940, pp. 100-108.

manner as long as they respected not only the arbitrarily made law, but also natural law, which, in Christian approaches, led to the assumption that the law of a political community should not be inconsistent with "higher law" associated with natural law as a set of norms ordering behaviours of a community's members. The space for justified action of a lawgiver was determined by the norms preceding his will. However, the authors of the earliest Christian concepts of natural law (Irenaeus and Origen of Alexandria, the 2nd and the 3rd century AD), associated natural law inscribed in the hearts of people only with the law revealed by a personal god, referring not exactly to Greek or Roman approaches, but to the approach found in the Old Testament. Indeed, Christ promised not to abolish the law revealed in it, but to fulfil it. That change did not abolish the earlier principle that, when a norm established by man infringes on natural law, then it is not binding (echoes of that approach can be still found in the teaching of the Catholic Church today[6]), even though the human norm is reinforced with a coercive sanction. Prior to the Latin Aristotelians, the approach that seems to have been dominant (often referred to as Augustinian) claimed that an individual learns about natural law by means of Revelation, rather than by means of inherent reason: in the 13th century, William of Auxerre, Alexander of Hales and St Bonaventure claimed, however, that human reason demonstrates its norms that are not inconsistent with the revealed commandments, while St Thomas claimed that actions which are "righteous," not infringing on them, and therefore justified, allow individuals to realise their objectives. However, the Aquinist concluded after Aristotle that in every man (due to his species being devised by God and belonging to the eternal law[7]), four natural inclinations exist, which he can recognise with his natural reason and protect with self-identified norms of natural law.[8]

[6] Paragraph 2242 of the *Catechism of the Catholic Church* from 1992 says: *The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel. Refusing obedience to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community. "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's". "We must obey God rather than men".*

[7] This is the source of one of the reasons of the reservations voiced against the Christian project throughout centuries: if the truth behind the nature of man depends on *the only truth of God's intellect*, if the truth of individual things depends on the truth of all things, then the content of human nature has been established by God. It is a settlement not accepted by atheists and agnostics alike, searching for the basis for legal settlements other than the revealed God's truth or devised by Him and established "human nature". Critics who reject this basic idea are not able to accept the fact that objective order imposes itself upon cognition, shapes the righteousness of mind capable, *in a due manner*, to direct will, and therefore, deals not only with other individuals, but also with the active subject itself (Tomasz z Akwinu, *Suma teologiczna,* I-II, q. 58,3); the order, called law in the meaning of a *plan directing acts towards an end* (Tomasz z Akwinu, *Suma teologiczna,* I-II, q. 93,3), revealing itself to reason in the manner of inherent inclinations setting the basic rules of acting, becomes impressed in it as standardized and measurable, and as such, possesses an important legal quality; the content of that law, if considered in what is subject to standardizing and measuring, becomes, according to the Aquinist, a right.

[8] É. Gilson, *Duch filozofii średniowiecznej,* transl. by J. Rybałt, Warszawa 1958, p. 236. Thomas predicated that if there were many precepts of the natural law, it would follow that there are also many natural laws. Therefore, relatively to natural inclinations (the preservation of its own being, according to its

Soon after Thomas's death, his concept of natural law was negated by Scotists who, again, linked the content of that law to Divine revelation, God's authorative normative act. [9] Contrary to him, Ockham proclaimed that freedom does not affect reason and will, but precedes them and, in some measure, pushes into action, that, as such, it is the basic power of man, assuming the place traditionally reserved for intellect since it allows to choose either learning and wanting or their opposites. Along with the nodal, in the history of ethics, presentation of a new notion of freedom, Ockham postulated an idea important to the history of legal thought: the separation of freedom and nature (and the law of reason) was accompanied by the opposition of individual to society, and of individual rights to the rights of a community; moreover, he postulated to substitute the theological (purposeful) concept emphasising the multitude of actions which led towards the final purpose with the concept claiming that the purpose is crucial merely in a particular, individual action; human action consisted of a number of separate factors, results of a succession of decisions of undirected will of an individual.[10] Even more important to us is the fact that human natural inclinations have been removed outside the nucleus of the free act: not nature, rational, because divine, but the arbitrary will started to decide about submitting to the inclinations leading to the final goal or rejecting them, or even about enduring or negating being. The natural inclinations whose fulfilment, according to Thomas, constituted the substance of a right and the reason of freedom, according to Ockham were preceded by freedom and subjected to arbitrary authority of a free subject.[11]

nature, the preservation of its own species and education of offspring, to know the truth about God, and to live in society), norms of natural law exist which serve the purpose of *preserving human life, and of warding off its obstacles* requiring, for example, *the commingling of male and female,* education of offspring, etc.*,* and requiring a man *to shun ignorance*, and forbidding him to offend *those among whom one has to live*. Precepts of natural law do not require us to know Divine revelation or an act of faith, but only to adequately recognize the fundamental good of mankind and to adjust to it the path established by fundamentally good (as derived from God) natural inclinations. The fact that this path was easy to find, also resulted from the fact that *there is in every man a natural inclination to act according to reason: and this is to act according to virtue. Consequently, considered thus, all acts of virtue are prescribed by the natural law: since each one's reason naturally dictates to him to act virtuously*. (Tomasz z Akwinu, *Suma teologiczna,* I-II, q. 94.3), in order to better reach the pursued goal, to be able to act reasonably and virtuously, rather than out of fear of coercive legal sanction.

9 Cf, e.g. H. Rommen, *Die ewige Wiederkehr des Naturrechts*, München 1947, p. 60, and F. Copleston, *A History of Philosophy. Ockham to Suárez,* Mahwah, N.J.–Tunbridge Wells 1953, vol. 3, p. 51. Also see: A.S. McGrade, "Ockham and the Birth of Individual Rights", in B. Tierney, P. Linehan (eds.), *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann on his Seventieth Birthday*, Cambridge 1980; *idem*, *The Political Thought of William of Ockham. Personal and Institutional Principles,* Cambridge 1974. Different interpretations, presenting Gratian, Gerson or Grotius as the main originators of the new concept, are provided by B. Tierney (*Religion, Law, and the Growth of Constitutional Thought. 1150-1650,* Cambridge 1982), J.N. Figgis (*Studies of Political Thought from Gerson to Grotius. 1414-1625,* Cambridge 1931) and R. Tuck *(Natural Rights Theories. Their Origin and Development,* Cambridge 1979).

10 Cf. S.T. Pinckaers OP, Źródła *moralności chrześcijańskiej. Jej metoda, treść, historia*, transl. by A. Kuryś, Poznań 1994, pp. 228-230.

11 Cf. A.S. McGrade, *Ockham and the Birth...*, p. 150, and M. Villey, "La genèse du droit subjectif chez Guillaume d'Occam", *Archives de Philosophie du Droit*, vol. 9 (1964), pp. 97-127.

For that reason, Ockham is sometimes considered as the originator of the "subjectivist Copernican revolution" in the philosophy of law and political thought. Indeed, a right is no more associated by him with what is "righteous," but becomes a prerogative that can be used in a free manner by a subject which is not yet establishing a legal order protecting the rights possessed by him (since he is to obey revealed law), although already subjected to him.[12] This manner of thinking about rights has been employed in the following centuries by authors of various variants of humanism, in particular of the one proposed by the originators of the "republican breakthrough" usually dated to the 15th/16th century. The earliest of them, Marsilius of Padua (14th c.), recognised community as capable of setting rules for itself for the sake of their usefulness to external peace rather than their conformity with the rational natural law. The issue of the usability of legal adjudications for communities was associated with the concept of sovereignty as law-making exclusivity even then settled by the Roman-law-analysing legists supporting Italian city-states striving to gain independence from the Holy Roman Empire, the Papal State and the neighbouring political communities. Disputes arising from the collapse of the Western Roman Empire only fuelled that trend: political communities which cease to be republics or monarchies and become "states" ruling over particular territories, directing "sovereign power" at the citizens rather than subjects, are increasingly separated from the relation with revealed law, and even with natural law.[13] |Even though concepts of natural law as a set of norms continued to emerge, they were no longer associated with a set of natural inclinations, "external" to human mind, or with *logos* realized by a rational individual (without references to Divine revelation), but with data available to every individual, as if the data were inherent. In some approaches, the precepts of that law of nature (different from the natural law) persist in every mind, initially unconscious, but in certain circumstances, such as due to achieving "intellectual maturity," each mind can become aware of them, articulate them consciously, and even use them in relations with other minds/subjects. In this context, Hugo Grotius is usually mentioned. This Dutch lawyer and philosopher was connected with the unorthodox current in Calvinism (Arminianism), according to which every human subject (despite the cultural or religious context in which he has grown up), can draw constant norms from his own mind. The norms neither protected natural inclinations, so important to the supporters of the Aristotelian tradition, such us Catholic Thomists from the School of Salamanca, nor were they derived from the will of God, but they set the conditions for external peace between individuals. Grotius, who, like Descartes, held the existence/reasoning of a subject as more obvious than the existence of an Absolute, is considered to be the author of the doctrine that possesses the quality of "scientific jurisprudence" as, according to

[12] E. Randi, "A Scotist Way of Distinguishing between God's Absolute and Ordained Powers", in A. Hudson, M. Wilks (eds.), *From Ockham to Wyclif*, Oxford–New York 1987, pp. 46-48; F. Oakley, *The Political Thought of Pierre d'Ailly. The Voluntarist Tradition,* New Haven 1964, and idem, "Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition", *Natural Law Forum*, vol. 6 (1961), pp. 65-83.

[13] See, in particular, A.P. Monahan, *From Personal Duties towards Personal Rights. Late Medieval and Early Modern Political Thought, 1300-1600*, Montreal–Kingston 1994.

him, the precepts of the law of nature are self-evident, *permanent to the extent that even God* is not able to change them.[14] However, it was not exactly the presentation of the four precepts originating from the very "social nature of man," available to every rational individual (unconditioned by culture or religion) and relating him only against others (keeping voluntarily made commitments, respecting private property, compensating for the damage caused, and punishing offenders) that makes Grotius an author important to this discussion. More crucial is the fact that he bestowed upon each individual the rights protected by the norms of the law of nature, rendering them primary to agreements, including an agreement constituting a collectivity. In addition to the norms of the law of nature, the rights protected by them were to be treated as invariable and universal. Moreover, the rights to self-defence, to punish wrongdoers (e.g. those who transgressed law of nature), to property, and the right of majority to make its will prevailing over the will of minority were "a-cultural," not unlike the norms of the law of nature that were to be given by God, indeed, their author.[15] However, an individual could waive the rights possessed prior to the agreement, in a contract aiming to establish peace with others as a prerequisite of the existence of a collectivity.

A similar concept was assumed by John Locke: here, too, the law of nature (reason) was to protect the rights of individuals. However, while according to Grotius, rights related to both the body of a subject as well as to his property, his behaviour towards others, and even to the co-deciding with others, Locke catalogued rights in such a manner that they described the room for free choices of an individual concerning solely his body and property. This change was important, as Locke posited an approach associated with freedom as a space for "sovereign" actions of an individual, which no one else could enter. Rights not only became inalienable. but they were also protected by the only norm of the law of nature (reason) prohibiting to infringe on the rights of others. Therefore, rights were exercised by an individual not only in a collectivity, but prior to joining it as well, while a collectivity – called "civic society" emerging thanks to a contract on its establishment – was to guarantee an impartial and unbiased interpretation of the norm known to every individual and adjudicating according to it as a measure of the correctness of actions of individuals. Another concept aspiring to universality thus emerged: not only such a quality was attributed to a norm of the law of nature, but also to the rights protected by that norm. One more time, an individual was emptied of cultural references, and even from any social references, introducing the already possessed rights to civic society along with the knowledge of the norm protecting them, which should be respected by it as well.

The approaches of Grotius and Locke are critically compared with that of Thomas Hobbes who – while also recognizing the fact that, in the pre-social condition,

[14] H. Grotius, *O prawie wojny i pokoju. Trzy księgi, w których znajdują wyjaśnienie prawo natury i prawo narodów, a także główne zasady prawa publicznego,* vol. 1, ch. I, § X, transl. by R. Bierzanek, Warszawa 1957.

[15] Ibid., *Prolegomena,* § 12-13. This solution also brings Grotius closer to Descartes, who considered God to be the Being which introduces the notion of "Perfect Being" to the mind (the cognitive power of the immaterial human soul.

individuals possess natural right – considered "state" as an entity capable of limiting them by means of self-established norms of the law of nature (reason, including the "state" one). Whereas some, Locke in particular, negated the possibility narrowing the rights by an external entity without the individual's consent, Hobbes contrasted state-originating law with the rights of citizens: although they maintained those rights, but only in a scope allowed by the state. In spite of the differences between the two philosophers, their emphasising either normative prerequisites of safe life of bodies and protection of life (Hobbes), or the areas of free choice of a subject, a scope of his liberty (Locke), in the works of a growing number of thinkers belonging to the "Modern school of the law of nature" a potential conflict emerged of the rights possessed by two parties: the individuals transforming into citizens, because related not to the monarch any more, but to the state, and the state itself. Increasingly, they modelled an individual on an owner of a thing (and even of his body), capable of using it freely, including relinquishing it, or exchanging it for safety, who joins other individuals in order to achieve a stronger protection of his rights: rather than in humanity, the basis of the law of nature was in external peace, which did not violate any rights, and became the main determinant of the law of nature, as well as statutory laws made by man in various (unrestricted) law-giving procedures, non-contradictory with the former.

The quest of French "politicians" and Bodin, Protestant and Catholic writers who, in the face of religious wars resulting from the disintegration of the Western Christian unity, justified the right to resistance against the rules of a different faith, and the thinkers developing liberal approach, such as, in particular, Hobbes and Locke, did not refer to the rights resulting from private-legal fief contracts anymore. It was not about privileges and immunities anymore, but about rights possessed by "individuals as such," independent of the position in the "feudal hierarchy" or in individual corporations exercising separate legal orders. Modern Western state was being born, with citizens possessing natural rights perceived neither as abilities consistent with the norms of the natural law, nor as non-infringing the limits set by them. Individuals were no more viewed in relation to their being placed in a long-shaped collectivity, or as representatives of the same species, equipped with the same species form specifying their inclination. They were now discovered as primary to collectivity, and they were to possess rights prior to joining it, while norms of the law of nature were to be derived from legal mind and protect them, establishing conditions for peaceful coexistence within a collectivity. New approaches, formulated in order to limit the consequences of voluntarism employed by the followers of monarchical absolutism, did not take into consideration the invariable human nature anymore, which, even today, is sometimes treated as a narrative of a dignity of every member of the human kind, for example by the followers of Catholic social science. "Mechanistic rationalism," borrowed by the originators of these approaches from Descartes, in the same vein as the questioning of the judgments originating outside of human mind, the focusing on human individuality, were signs announcing a return to subjectivist, or even solipsistic approaches. However, this return failed to take place soon after the publishing of the ideas of Descartes, who identified the foundation for obviousness in human mind itself. The law of nature (mind) was still widely

referred to as universally binding and constituting a normative context for the exercising of rights by individuals. This way of thinking had a significant impact both on the ideas of at least some of the French revolutionists, and on the American Founding Fathers, who continued to mention *self-evident truths*,[16] targeted at the protection of natural rights rather than at inclinations specific for a species. It is worth stressing here that the relation between law and rights has been reversed in Modern times, since law emerged as secondary to rights, the former "objectivist" concept of natural law was replaced by a new concept emphasising "legitimate possibilities" of every individual executed in the scope of his privacy which should not be breached by any potentially arbitrary lawgiver. An order of a lawgiver (autocrat, representative body or even an entire nation) could no longer breach an individual's rights due to not being their source, and, moreover, the legitimacy of a ruler was sourced from the consent of authorised individuals. Liberties, entitlements and individual rights became (postulatively) inviolable and were to be freely exercised by a subject isolated from others. The subject had rights not as a being similar to other representatives of the species (maintaining his separateness, but respecting universal norms based on human nature), but rather as a particular being, in which everything that was particular justified his free exercising of the rights. The approach situating rights (as an ability of determining own behaviour or requesting certain behaviours from other subjects, therefore, as legally protected liberties or rights in their precise meaning) before law as a set of norms sanctioned by government, replaced the so-far prevailing approach, limiting lawgiver's will not by means of a ban on breaching individual rights, but by means of norms that are Divine, natural or customary (such us the autonomy and privileges of, for example, corporations, universities, towns or religious orders exercised since time immemorial).

The process of multiplication of public and legal norms formulated in a "narrowed" field of activity of any lawgiver was accompanied by the process of multiplying individual liberties and rights, which in an increasingly obvious manner transcended the area acknowledged by Locke. Not only the liberty of using one's body and property was to be protected, but also the "elementary welfare" and cultural diversity. Freedom of religion and worship became a very crucial element of pursuit. It was to be protected by a "neutral" state, striving to establish and maintain conditions of external peace between increasingly versified (not only in terms of property) individuals.[17] The liberal concept of rights as capabilities of individuals, rooted in Ockham's reflection, initially used to set the limits of legislature's activities (since rights preceded its normative role), has been interpreted in a slightly different manner since the 19th century. Immanuel Kant, in the vein of Hobbes and Locke, still emphasised peace among individuals, linking the content of universally applicable law with the need of a merely temporal, and even political nature. Relating to the guiding principles of pure legal-practical mind as "the system of the supreme principles of law," he proclaimed that law cannot be derived from the knowledge of oneself and of the world based on experience, as that is changeable and,

[16] Cf. A.P. d'Entrèves, *Natural Law. An Introduction to Legal Philosophy*, London 1957, p. 49 f.

[17] A. Rand, *Cnota egoizmu. Nowa koncepcja egoizmu*, transl. by J. Łoziński, Poznań 2015, p. 111.

therefore, unreliable. By developing the concept of "law as a truth of reason" characterised by the quality of the ultimate normative-critical criterion, he bound lawgivers and judges by its precepts. That concept was important a priori, therefore, prior the experience, it could not be derived from, for example, positive regulations of individual, numerous lawgivers. Law was to enable external peace among individuals and their coexistence, and the basis of its validation was marked by rationality requiring that freedom of one person and freedom of other individuals are reconcilable,[18] that their rights and liberties are protected by institutions. Montesquieu's critical comments to such an approach, which, in his opinion, ignored cultural diversity of individuals, resulting in the proposition of the multitude of "spirits of laws" specific to different peoples,[19] failed to hinder the trend to enhance the rights and liberties of individuals at the cost of groups of them, or in spite of them. An individual, made "abstract," "isolated" from a group, even a national one, possessing rights and liberties not as a member of a community ruled by a single law based on long-shaping cultural identity, but as a subject able to define his own inclinations within his own resources, could oppose the dominant cultural patterns in his community. This trend, critical also from the perspective of Rousseau, leads to the argument that the source of all *law is in individual, as only he is a real being, free and responsible,* and he creates political society in order to gain, in it, protection of his rights. If an autonomic, arbitrary subject endowed with dignity makes laws not only ultimately legitimising the political system, but also defining the content of the sole normative order meant to bind all citizens of the state and citizens of the states belonging to an international organization, as in the case of the European Union, then the inviolability of the "private sphere" becomes problematic when we analyse the process of the declining and inadequacy of the former approach against the approaches acknowledged by many liberals active in recent 50 years. Their aspirations currently differ from the aspirations of the authors of the theoretical basis of, in particular, the variant of liberalism usually referred to as "invoking laws or rights" of individuals equal in the scope of their laws/rights binding the lawgiver acting in thepublic sphere.

However, in the "progressive liberalism," taking shape since late 1960s, already considering the private as the political, the "moment of equality" weakened the view that protection of inviolable rights of individuals is the task of a lawgiver. As it turned out, legal system had to abolish the causes of inequality of individuals which, as long as they protected themselves in the sphere of privacy, were able to possess positions different from those of other individuals. This resulted, particularly, in the shift in the meaning of the term "dignity," linked to a lesser degree with privacy of an individual (so important, for example, to the survival of a human entity, to the protection of its life), and to a greater degree with its equality with others, and, in time, even with equality of any preferences considered appropriate by a particular individual. This is connected with such issues as the following one: to what extent the category of "human dignity" (and, in the Catholic approach, "dignity of a human person") can be associated with the

[18] See more: O. Höffe, *Immanuel Kant*, transl. by A.M. Kaniowski, Warszawa 1996, pp. 216-219.

[19] Monteskiusz, *O duchu praw*, transl. by T. Boy-Żeleński, Kraków 2016, pp. 173-176.

concept of private sphere, and to what extent the results of the changes in the liberal thought of the last several decades should be taken into consideration.[20]

The problem is not only in a certain "absolutisation" and "abstraction" of individuals, in uprooting them from their community and cultural references, and even – as warned against by the Catholic social teaching – moral ones,[21] but also in such an interpretation of them, as if they were – each of them (perhaps from the very beginning of their existence?) – capable of formulating their own preferences and inclinations in each field in the course of negotiating normative solutions of legal quality with other individuals. From this perspective, community culture and natural or traditional groups constitute a potential threat for the originality of a unique, after all, individual. In the approaches presented by the supporters of the so-called radical (or agonistic) democracy, drawing to a higher degree from Marx than from Locke or Hobbes, the quest for a normative order is not conclusive anymore, and it is performed by individuals guided by their current preferences, seeking ad hoc allies and identifying ad hoc adversaries. In this perspective, the reference to "constant values" (associated not only with the natural law of the representative of classic approaches and the liberals' law of nature, but also with the rights adopted by both these groups) becomes problematic, as it carries potential "threat of exclusion," invalidation of own and original position of an individual. However, the following related question arises: On what basis a common normative order can be strengthened, if everyone, at any time, can contest it as not suitable for his needs or preferences that need to be approached now (and again) as everyone's "subjective rights"? If everyone, at any time, can (and should not be limited in this) oppose the "tools" that enslave him, resulting not only from the moral teaching of various denominations, but also from applicable laws, and even from the dominant language, then for the sake of emancipation, inclusion, as formerly excluded due to intolerable preferences, in a collectivity, it should be assumed that every preference should receive legal protection. This also refers to the preferences formerly considered "immoral" or "unsanctioned" inasmuch as to those departing from the ones currently dominant in a given culture and held inappropriate by it. Law is increasingly regarded as a set of norms or laws co-established by individuals possessing the rights that enable them to freely articulate their current preferences even against dominant cultural patterns, which receive a moral quality. However, are individuals deprived of a common reference point, common rooting and common "moral foundation," following their subjective preferences, capable of negotiating the content of the legal order to bind them? Is this possible,

[20] See more: A. Bryk, *Konstytucjonalizm. Od starożytnego Izraela do liberalnego konstytucjonalizmu amerykańskiego*, Kraków 2013, pp. 608-620, and B. Szlachta, "Aksjologia Konstytucji RP z 1997 roku. Perspektywa badacza myśli politycznej", *Przegląd Sejmowy*, vol. 25, no. 6 (143) (2017), pp. 125-150.

[21] *The inalienable right to life of every innocent human individual is a constitutive element of a civil society and its legislation: "The inalienable rights of the person must be recognized and respected by civil society and the political authority. These human rights depend neither on single individuals nor on parents; nor do they represent a concession made by society and the state; they belong to human nature and are natural in the person by virtue of the creative act from which the person took his origin. Among such fundamental rights one should mention in this regard every human being's right to life and physical integrity from the moment of conception until death."* (Catechism of the Catholic Church, § 2273).

when the courts of the so-called Western world already adjudicate that, in the heart of freedom, stands the right to define one's own notion of existence, its meaning, universe and secret of human existence?[22] The considerations of multiplied human rights already account for strong emotivistic tendencies found in considerations of political ethicists and philosophers who have noticed that the vision that is becoming dominant is the one of a man as an entity which is not being rational, but rather governed by emotions: the "current wants" of each of equal subjects become equally important, and as such, they should be considered in the legislative process (these wants will not be deliberative in the meanings proposed by Habermas or Rawls, but rather "agonistic," since they result from various and changeable, blurred and accidental, difficult to rationalize subjective projects). The point is, however, that the removing of group contexts (objected by the authors which consider cultural groups as analogous to Marxist "social classes") is sometimes accompanied by the proposition that every individual is not only capable to want and express his ambitions with emotions, but also to co-author laws treating them as tools serving the purpose to fight exclusion. Law, formerly meant to protect rights, occasionally referred to as human rights, slowly becomes not just a tool of protection of permanent rights, but a tool of their multiplication and providing protection to newly emerging fields of revealed subjective preferences.

The evolution leading from "classic" approaches, referring to norms which set the basis of or limits to the rights called natural, to "modern" approaches, familiar to the authors of the liberal thought foundations, striving to respect the catalogued rights and to protect them, to contemporary approaches, treating human rights as an ability to articulate own, subjective preferences by a subject (including a "collective" one) in every field of social life, demonstrates the changeability and ambiguity of theoretical constructions justifying the existence of human rights: the rights primary to national or international norms or derived from them, but increasingly independent of moral contexts of universalistic aspirations, associated in the old times as well as today with, for example the legal-natural approach. Keeping in mind the distinct difference between the objective understanding of natural law as a set of norms and the subjective approach to human laws, or rather rights as natural or inherent capabilities, we need to consider the fact that the "Western" approach to human rights disseminates itself in other cultures despite this evolution. The process of its dissemination also includes the perspective endowing human rights with the quality that is not really negative (included in former approaches, aiming at drawing limits of a lawgiver's activity), but rather positive, setting for lawgivers a direction of explorations aiming at abolishing consecutive exclusions, and therefore, at "levelling" those individuals who possess their own, subjective preferences. And the very project should, therefore, be a subject to reflection from the perspective of various culture and multitude of preferences, often conflicting with the notions that are dominant in particular communities, rooted in the cultures which have shaped and developed over a long time. Indeed, both plans, the one which can be called theoretical, and the one which can be called practical, are of a high importance to

[22] See, e.g. *Planned Parenthood v. Casey*, 505 US 833, 1992.

modern studies. They are not only about relating behaviours of individual legislatures and governments to the universal standard of human rights, but also about looking at such a standard from different perspectives...

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