
**Abstract**

In discussion in which there participate almost all intellectuals (including the lawyers) who deal with broadly understood social sciences, the sintagma of human rights has been detectable for centuries. Its understanding however has been and still is ideologically conditioned. The present paper was inspired by Jerzy Kolarzowski’s monograph on *Idea praw jednostki w pismach Braci Polskich. U narodzin nowożytniej koncepcji praw człowieka* [The idea of rights of an individual as depicted in the papers of Polish Brethren. The genesis of modern concept of human rights, Warszawa 2009]. The present contribution, apart from presenting the aforementioned study, tries to make a general reflection on the method of conducting legal history research by those who are engaged in seeking the links of “genetic” characters between the legal history phenomena and the phenomena of contemporary law. In other words the researchers that come into play are those who try to arrive at the moments of “concepts” of contemporary legal concepts, as set in history. These researchers try to juxtapose them upon the “genetic principle”.

**Key words:** methodology, the Polish Brethren, human rights

**Słowa klucze:** metodologia, Bracia Polscy, prawa człowieka

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1. Status quaestionis: “Human Rights” and the concept of “Human Rights” in the past and present times

A syntagma “Human Rights” – both in the meaning of “norms of conduct of general character, enacted and guaranteed by a state”, and in the meaning of “rights which one can derive from (aforementioned) formally binding norms” – is commonly regarded as one of the most fundamental notions in Legal Dictionaries and Compendia of Law. The Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly on 10th of December 1948, announces in its Introduction explicite: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The Declaration distinguishes between three types – generations of rights: citizen’s freedoms and political rights (civil and political rights), and social, economic and cultural rights.

In a contemporary discourse, “human rights” are affirmed as an emanation of the inherent dignity of a man and a reflection of moral rights manifests in common moral language, conceivable however – mostly for the reason of indetermination and openness of a regulated matter itself as well as a controversial status of “a right” itself – only due to and only after the existence of democratic procedure. Despite a generally dominant opinion concerning their unique social and political value, as well as a thesis regarding their fundamental, inherent and privileged character, which nota bene makes – as a valid – a claim to their universal legal force, in the same time explaining the possibility of their

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non-justification,6 “human rights” – as a slogan – are quite often used for diverse scopes, not always acceptable from the moral point of view.7 “Human rights” are also rejected nowadays, by means of negation of their existence, critic of their ideology or refusal of their rationality as a proper idea.8 Nevertheless, both as a postulate of a generally noble “matter” or a motto reinforced by a claim of an indispensability of their recognition and a respect for them, as a recognition of fundaments of justice and peace all over the world or a true and real moral value rational and worthy to be realized, “human rights” are undoubtedly one of a main topic of a contemporary ethical, legal and political discourse – a discourse not rarely truly complex and interdisciplinary.9 The Author of a book which constitutes an inspiration for presented remarks, emphasizes that already mentioned issue in his Introduction as a universal dimension of human rights, even describing them as “the most rousing political idea of our times” (p. 7).10

In consequence, it can be certainly declared that “invoking human rights” means invoking something “right and noble”.11 This could be a reason for attempts – continuously undertaken in a modern scholarship – to prove their presence in more or less distant various discourses of the past, namely, an ancient,12 a medieval13

8  As an exemplary opinion, cf. a remark by B. Wolniewicz, O tzw. prawach człowieka [About so-called Human Rights], p. 91: „Rzecz w tym, że człowiek nie ma w ogóle żadnych przyrodzonych ‘praw’; ma tylko przyrodzone obowiązki” [The point is that a man does not have any innate ‘rights’; on the contrary, he has innate obligations”]. Comp., however, J. Henriot, Note sur la date et le sens du mot responsabilité, “Archives de Philosophie de Droit” 1977, vol. 22, p. 45–62, who underlined that a term of “obligation” appeared in the same moment as a term “right”.
13  Cf., quite recently, with reference to concepts of Marsilius of Padua: M. Merlo, Marsilio da Padova: il pensiero della politica come grammatica del mutamento, Milano 2003; Marsilio da Padova (con testo latino del Difensore della pace e traduzione di C. Vasoli), curr. E. Ancona, F. Todescan, Padova 2007; or a study – quoted by the Author – by T. Jasudowicz, Ślądami Ehrlicha: do Pawła Włodkowica po naukę
and a modern one.\textsuperscript{14} It is however, beyond any doubts that not sooner than the epoch of Enlightenment it can be mentioned about the appearance of a technical notion of “human right”, as a result of elaboration of philosophically coherent concept of “human rights” founded on the idea of personal freedom as well as on the postulate of restriction of the power of a state based on the concept of absolutism and as a justification of a recognition of an independence of a state. Considering this process, it must be remembered that some primary attempts of positivisation of rights were already linked with natural law,\textsuperscript{15} even though they were ascribed only to a determined group of people,\textsuperscript{16} and they constituted mostly a considerable form of limited political and legal agreement to address specific political circumstances. In spite of such consciousness and such acceptance of this particular caesura of the “conceptual nature of human rights”,\textsuperscript{17} scholars constantly searched (and still do) for stable and fixed moments of this particular laic humanism of the Siècle des Lumières, in a spiritual infrastructure of the western-European civilization even before the 18th century, being somehow convinced that a human being could never let the idea to develop without restraint. In consequence, he created dogmas or he sought for ontological justification for phenomena regarded as socially needed.

\section*{2. Internal Perspective – the Author: “Rights of an Individual” in a discourse of the Polish Brethren (Arians)}

Accepting the thesis that every right, numbered nowadays among the catalogue of human rights, did not appear \textit{ex nihilo} (p. 8), the Author – as a historian – applied himself a task consisting in extracting from meanders of the history some perpetual tendencies and trains or – as he determined his scopes himself – finding “links of continuation”

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\textsuperscript{17} The Author himself situated a moment of appearance of the concept of human rights in the times of Enlightenment, \textit{ibidem}, p. 8, 10.
binding the past and the present reality. Such attitude must be regarded as a particular one and undoubtedly shows the Author’s consciousness of his mission as a mission of historian, not only as an investigator of the past but also as an analytic of the modernity. Nevertheless, already at present, it should be asked if such a perspective, namely, “to follow the thread to the end” or – using scientific language – to search for genitive relations between today’s phenomena and postulates that could be found in works written in the past, is reasonable and justified in a present case. Perhaps, at least from a scientific point of view for the reason of scholarship correctness, it would be better to fix the objective in order to identify and to determine so-called functional parallels between “human rights” as a component of the contemporary philosophical, ethical or political discourse, and “individual rights” as a moment of reflection of the Polish Brethren in the 16th and 17th century. Undoubtedly, as the Author already proved, claims for a respect of rights and freedoms of an individual, a religious tolerance, a preservation of private property or a determination of reasonable just (i.e. balanced) relations between the state and citizens, constituted truly significant slogans in social and political program of this confession – the Ecclesia Minor or Minor Reformed Church of Poland, a particular “product” of middle-European reformatory movement. Those questions, nota bene, had already been a topic of analysis as the thought of the Polish Brethren phenomenon is regarded – both by Polish and foreign authors20 as a truly particular in comparison to other doctrinal views of Western European thinkers of those times.21 Taking it into account, it seems to be somehow curious that the Author just in the closing part of his book – i.e. in Conclusions (p. 214–216) – mentioned a history of research on the Arians’ thought. One could regard such a catch as an “eristic” trick, which ab initio helps the Author to present himself as the one among researchers who – as the first one – had noticed the aforementioned phenomenon and had put a question about its historical aspect and significance. This impression is justified especially by the fact that only after the whole presentation of the source material and its analysis a reader can reach a set of statements concern-

18 On the subject of such tendencies present in contemporary “sub-legal” history, i.e. romanistics understood as research on ancient Roman law, cf. recently T. Giaro, Cywilizacja prawa rzymskiego i problemy współczesnej romanistyki [Civilization of Roman Law and Problems of Contemporary Romanistica], “Acta Universitatis Wratislaviensis”, Prawo 2008, vol. 305, p. 73: “konceptywolne”.


21 Cf. works written by one of the unquestioned authority in the field of research on presence and position of Poland in Modern Europe, as well as the particularity of the Polish gentry and its culture, i.e. J. Tazbir, those quoted by the Author: p. 228–229; and additionally, Wielka karta polskiej tolerancji [The Great Bill of Polish Tolerance] [in:] idem, Polska na zakrętach dziejów [Poland in the Course of the History], Warszawa 1997, p. 29 f.
ing points of view of a doctrine proposed in the past, before the Author. The same must be said about a passus concerning so-called “justification” of a topic as the topic of research and its formulation which appeared at the very end of the whole book (p. 216). Of course, such position of explanatory remarks does not inflict on the importance of the topic itself because – as it was said above – questions concerning “human rights” belong undoubtedly to the category of “truly important questions” and the problem of a religious freedom or a freedom of speech and views – as it is finally the main point of the Author’s analysis – was and still is a point of controversy in contemporary ethical, social and political discourse undertaken in era of multiculturalism and globalization.22 On the other hand, the internal logic of a composition of the study in whole as well as the logic of the exposition of partial conclusions seems to be disturbed when intentions of a researcher and a problem of necessity and reasonability of such research occur and are discussed altogether with final conclusions.

To provide, however, a description of the book from a perspective of the Author, first of all it must be said that a study is divided into three parts, generally coherent between themselves, even if only thematically. In the first, historical-descriptive part, entitled Dzieje Zboru Braci Polskich w XVI i XVII stuleciu [The History of the Polish Brethren’s Centre in the 16th and 17th century] (p. 14–74) which had unquestionably introductory aim, it can be found a depiction of the history of the Kingdom of Poland in the 16th and 17th centuries, quite often illustrated with quotations of conclusions formulated previously by representatives of Polish history and Polish legal history (e.g. p. 15; p. 18 n. 7; p. 20 n. 10; p. 22 n. 14; p. 30 n. 24; p. 31 n. 28). Such moments in the course of history of the Kingdom of Poland, as the executive movement with its postulates of necessary reforms in the field of religion (e.g. the abolition of a religious jurisdiction over civil citizens) or the beginnings and development of Reformation in Poland in comparison to different reformatory movements started and provided in Western Europe, constituted an important background for consolidation and evolution of the Arians’ thought.23 An internal particularity of the Polish Kingdom in the period mentioned – several times emphasized by the Author (p. 11, 20, 23 etc.) – is particularly noticeable in the context of history of European countries, mostly because of a declared public-law principle of tolerance between dissidentes in religione, formally guaranteed in the Act of the Confederation of Warsaw (1573), annexed to the so-called Bills of Henry. In his narration on a political situation in Europe, the Author mentioned some of representatives of those days, such as the Italian group of Vicenza (p. 25–26), Jewish monotheists active in Russia (p. 24), a Spaniard Michael Servet (p. 27–29), whose lives and opinions could have been influential, at least to a certain degree, on concepts and postulates of the Polish Brethren. On the other hand, it can be asked if – considering all these – every detail referred by the Author of history of the Kingdom of Poland of those times should have been necessarily reminded in the light of a main topic of the research, because quite often some informa-


tion seem to have no connection, even as a background ideas, with a formation of the Arians’ thought. Just as an example, one can formulate such doubts towards a quite extensive description of the (re)Christianization of Lithuania in the 15th century (p. 14–15) of doubtful connection with a main plot of the research, even if a method of introduction of a new religion – nota bene not completely unknown in Lithuania – by Polish authorities undoubtedly proved the absence of a tendency of imposing a religion by force, which can be even more particular if into consideration is taken the way of Christianization of other parts of the Europe, i.e. a religion legitimized by “a fire, a sword and a sign of the Cross”. On the other hand, almost without deeper comment (comp. p. 45), the Author left the set of postulates of representatives of divers confessions different from Catholicism, invoked during a session of the Polish Seym of the Gentry of 1632. Those postulates could be regarded as functional equivalents of rights and freedoms present in the contemporary discourse and placed in the catalogue of human rights, such as: (1) a freedom of confession, a freedom of speech and thought postulated for “all social states and people of every condition”, strengthen with a claim of a need of particular, state’s guarantee in a form of menace of sanction executed by power of the state; or – (2) a laicization of the judicature, which can be regarded as an equivalent of contemporary equal rights to a just trial; or finally – (3) a right to an equal – regardless of confession – access to offices and dignities.

Whereas in this part of the book a reader can find detailed information on circumstances of the foundation of a confession itself as well as a detailed description of the history of the Polish Brethren (p. 46 f). The Author depicted quite properly but without any selection internal disputes between representatives of Polish Arianism – which, however in natural way, concerned mostly fundamental theological questions – as well as splits of the group caused by diversity of views. According to the explanation of the Author, all these controversies constituted causes for breaking the unity of a confession, and as such, were absolutely important and transmissible into “personal religiousness” (p. 46). It seems, however, that from the “external” point of view, being a Trinitarian or Anti- -Trinitarian, tritheist or ditheist, adorant or non-adorant was not of so great importance for a reformative program of the Polish Brethren aiming “individual rights”, since one of fundamental postulates of universal meaning and unquestionable value from a political and social point of view, was a common religious tolerance and its practical reflection as a right of free conscience awarded to every man, regardless of his origin and social status.

In the second part of the book entitled Prawa jednostki ludzkiej w koncepcjach Braci Polskich [Rights of an Individual in Concepts of the Polish Brethren] (p. 75–145), the Author gave a review of particular topics that formed the Arians’ Thought. Nevertheless

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24 Comp. The Second Vatican Council (Vatican II): Declaration Dignitatis humanae (1965) regarded as one of the more controversial of the councilor documents. This Declaration of the Dignity of the Human Person declares a religious freedom, and signifies development of the doctrine of recent popes on the inviolable rights of a human person and the constitutional order of society. Dignitatis Humanae spells out the Church’s support for the protection of religious liberty.

– in the light of the main topic – as the most important concepts should be regarded those
ones which concerned social and political problems, particularly a question of “rights”
and “freedoms” of an individual, a religious tolerance and a postulate of separation of
a confession and a religious life from the state and the state power. From among mat-
ters treated by the Author, some deserve a special attention, like those which could be
regarded as a basis for the later “concept of human rights”. Principally, such postulates
seem to have a “universal” dimension as: the idea of seeking the truth as a derivate of the
cultural and culture-productive trend of humanism, a postulate of freedom of views and
opinions, broadly understood religious tolerance, postulates concerning character and
destination of a private property, a claim of necessity of balanced relations between an
individual and a state. All aforementioned matters have been depicted with illustration
of the source material, somehow curiously mixed with Author’s comments. A narration
constructed in such a way can, however, blur the issue of boundaries between fragments
originated from sources themselves and commentaries given by the Author. It is quite
impossible to find any explicit justification for such unclear narration. Maybe the Author
wanted to escape from an impression of the so-called presentism, named also as the fal-
lacy *nunc pro tunc*.26 It is obvious that an analysis undertaken in such a little distance
from a source, should prevent from a scientifically controversial temptation of judging
past events, facts, opinions and theories from a perspective too modern, which, however,
is quite common in a contemporary research.

An aim of the third part, meaningfully entitled *Kształtowanie się przedoświeceniowej
filozofii prawa człowieka* [A Formation of the pre-Enlightenment Philosophy of Human
Rights] (p. 146–209), was – according to a declaration of the Author in his *Introduction*
(p. 11) – to be a presentation of spectrum of influences of the Arians’ Thought on a for-
mation of philosophical systems of such modern philosophers as Hugo Grotius, Baruch
Spinoza, Gottfried W. Leibniz or Samuel von Pufendorf. Taking this opportunity, the
Author described thoughts and concepts with many details (also those, which – *per se*
fascinating – had nothing in common with a main topic) of aforementioned philosophers.
Even if this part of the book shows precisely in the best way a philosophical culture of
the Author and a description of philosophical concepts accomplishes quite well a claim
of individualism that is indispensable in a scientific discourse, it can be asked if – despite
evident cases of Grotius, Spinoza, Leibniz and Pufendorf, who indeed had connections
with representatives of the Polish Arianism (which can be proved, *e.g.*, with the corre-
spondence presented by the Author) – a singular fact that an exacting thinker from the
past was familiar with a particular opinion, can be a basis for a thesis that such opinion
which influenced him was an inspiration to his own concepts or if a particular con-
cept has been borrowed from one person by another. Of course, each of aforementioned
philosophers had to take into consideration elements of a “scientific air” of which he
breathed and an echo of the Polish Brethren thought without doubts which were present in
the Netherlands in the 16th and 17th centuries where some of the Brethren (as Andrzej
Wiszowaty Sr. or Christopher Sand) found exile after their expulsion from Poland in
1658. Nonetheless it seems that such presumption is too weak to constitute a fundament

for a general thesis of an impact of a particular concept on formation or modification of philosophical ideas. This remark does not aim to negate the possibility of an inspiration or a reception at all (although, the analysis of the Author had, however, proved otherwise, i.e. that each of aforementioned philosophers argued to some extent with concepts presented by the Polish Brethren, or even discarded them: e.g. p. 153 f, 173 f, 176 f, 181 f, 189–195, 198–201, 207–208) but serves to fix the attention on – always problematic and risky – character of the thesis of an influence or a reception of this or that idea, this concept or that institution – which is, however, quite often abused in contemporary scholarship. About a formulation of such thesis by the Author speaks not only a title of this part of the book (cf. retro), but also titles of separate chapters (e.g. Socynianie a pojęcie ekumenizmu Leibniza [Socinians and Leibniz’s notion of ecumenism], and often repeated sentence, namely, “concepts are similar”. In spite of such cases where particular author of a particular view explicite declared, that this or that idea of the Polish Brethren became an inspiration for acceptance of a particular statement, which can be found in memoirs, diaries of letters, or in proper works by such philosopher, it is almost impossible to detect all the factors that could have influenced a process of formulation of a concept present in a history of ideas.

On the other hand, it must be concluded that the Author depicted frequently the possible interactions between the Arians’ thought and the protestant doctrine of Dutch thinkers. Nevertheless, after being expelled from Poland, many Polish Arians emigrated not only to the Netherlands, but also to England (where their works were known by later philosophers such as John Locke and Pierre Bayle27), East Prussia (e.g. Christopher Crell, who, together with his sons, founded new congregations28) and to Transylvania, where the Unitarian Church enjoyed freedom (e.g. Andrzej Wiszowaty Jr., born in Prussia, who became a teacher at the Unitarian College in Cluj-Napoca29). Even though, most of Polish Brethren are sometimes regarded as precursors of Enlightenment, it is also the fact that through their connection to Enlightenment thinkers, their ideas influenced the Founding Fathers of the United States.30 The Author mentioned this latest fact only twice (p. 10, 209), although the Unitarian Christianity was continued precisely in North America, most notably by the Englishman Joseph Priestley,31 who had emigrated to the United States and was a friend of both James Madison and Thomas Jefferson (the latter one

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sometimes attended services at Priestley’s congregation in Philadelphia). Particularly Priestley was very well informed on the earlier developments of the Polish Brethren movement in Poland, especially by his mentions of Socinus and Szymon Budny. One could also expect a deeper analysis of the influences of the Arians’ thoughts in Britain (the Authors mentioned this problem on p. 167, 181, 208 n. 105), even though it was John Locke who was preceded by a few decades by Samuel Przypkowski on tolerance and by Andrzej Wiszowaty on “rational religion”, or Isaak Newton who had met Samuel Crell, son of Johannes Crellius, of the Spinowski family, and he collected many books from the Racovian Academy. Finally, the Englishman John Biddle had translated two works by Przypkowski (Vita Fausti Socini Fausti Socini Senensis descripta vita ab Equite Polono, 1 ed. 1634 – as The Life of F. Socinus, London 1653; Dissertatio de pace et concordia ecclesiae, 1 ed. Amsterdam 1628; Engl. ed. London 165348), as well as the Racovian Catechism49 and a work by Joachim Stegmann, a “Polish Brother” from Germany who was a teacher and rector of the Racovian Academy, and who worked with Andrzej Wiszowaty on the revised edition of the Racovian Catechism of 1605. Biddle’s followers had very close relations with the Polish Socinian family of Crellius (aka Spinowski).40

The book finishes with a short summary (p. 210–211) and a bibliography (s. 218–231), consisting of editions of the sources and other works. In fact, it seems to be


With reference to Priestley as a pioneer of Unitarianism in England, who, inter alia, supported the first Unitarian congregation at Essex Street Church (London) in Britain by his friend Theophilus Lindsey, in his work Letter to a Layman, on the Subject of the Rev. Mr. Lindsey’s Proposal for a Reformed English Church, London 1774, printed for J. Wilkie, cf., e.g. A. Holt, A Life, p. 56–64; F.W. Gibbs, Joseph Priestley, p. 88–89; R.E. Schofield, The Enlightened, p. 26–28, 225, 236–238; From the older literature, cf. in part. J. Toulmin, A biographical tribute to the memory of the Rev. Joseph Priestley, L.L.D.F.R.S. In an address to the congregation of Protestant Dissenters at the New Meeting... 22 April 1804, on occasion of his death, 1804.


useless to prove that any other book or study should be added to this list presented by the Author, even if this is one of the most common and much-loved remark used in reviews—being in fact in opposition to the commonly known principle of charity, recently reminded by Tomasz Giaro in his “Intervention” written against a polemic review by Aleksander Stępkowski, who criticized work of Franciszek Longchamps de Bérier, _Nadużycie prawa w świetle rzymskiego prawa prywatnego_ [The Abuse of Law in the light of Roman Private Law]. On the list of bibliography presented by the Author there can however, be found works, mostly written by Polish authors, on the subjects of legal history, as well as history of religion, history of philosophy or—in general—a history of culture or ideas, written both in past and present perspective.

Generally speaking, the book by Jerzy Kolarzowski on the idea of individual rights in writings of the Polish Brethren, presents itself as a study truly original in its form and its content, and belongs to the group of studies which—with support of archival sources—have an aspiration to give an answer to the question concerning historical roots of contemporary ideas. In other words, authors of this kind of books try to explain in general the incarnation, a development, a continuation and a change of a particular idea in a course of history. Therefore, it is worth to put some questions in reference to the book described. These questions, however, will not concern historical or legal matters, but will go to a problem linked to the content of this study, _i.e._ a methodology of the research in a field of legal history.

### 3. An External Perspective – the Observer: A problem of methodological assumption of the research on legal history

Anyone cannot regard as a pedantry a requirement that a scholar, when undertaking the research based on historical sources, not only informs and forewarns his potential read-

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43 Comp. references in notes: 20, 29.
44 A book by J. Kolarzowski seems to be complete and exhaustive with regard to its source basis. Comp. explanations given by the Author: p. 11–12. Notabene, a postulate according to which it is indispensable to make a proper research in archives when one decides to write about a topic belonged to the field of history or legal history, at least by its implicit obviousness seems to be worth mentioning. A collection of source material, in particular this one from archives, constitute—_nolens volens_—because of its proper nature, a point of depart for every researcher. This postulate has been revised recently by R. Jastrzębski, in his review of a book by M. Paszkowska, _Nauka prawa karnego w środowisku Gazety Sądowej Warszawskiej (1873–1918)_ [A Scholarship of Penal Law in the Circle of the Warsaw Judicial Journal], „Forum Prawnicze” [“The Juridical Forum”] 2012, p. 78–81, in part. p. 81.
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ers about methodological assumptions of such research, but also explains a meaning of notions and technical terms that he is going to use for a description of social facts which, having their place in the past in a similar way as in the present times (especially in a functional sense), still belonged to that particular past. What is more, such an explanation seems to be absolutely the key to reconstruction of historical phenomenology of such phenomena. This observation is not a postulate of fetishizing the investigative method, as well as its aim is not to reject a possible integration of legal scientific disciplines, with simultaneous affirmation of an exact dichotomy of phenomena of legal history and phenomena of legal modernity. The latest approach in some sense would exclude once and for all a sensible “genetic” reflection on “historical moments” of contemporary legal concepts. Such claim makes only up the postulate of “reliability” of a scholar’s workshop.

A lecture of the book which constitutes an inspiration for present remarks, as the matter of settlement, provokes a question as a following one: Did in the past a construction of “human rights” exist at all? The answer “yes” or “no” in this matter is possible only if one establishes how this notion was and is understood. Since one writes about a legal construction of “human rights”, thus about a legal construction worked out in relation to deep transformation of continental legal culture having its place in the epoch of Enlightenment and about a declaration still present in a legal discourse, which assumes that each man is entitled to certain rights of universal, inherent, inalienable, unalterable, natural and indivisible character, and a source of their force is a natural human dignity, one therefore should answer that such construction was undoubtedly unknown in the past. On the other hand, even in ancient Rome, and later, in mediaeval and modern Europe, some particular “rights”, in some sense of analogical function as today’s human rights, were recognized and were accepted, although as ascribed only to particular groups of individuals. In the past, problems which appeared to be solved, were similar to those of nowadays, even if such problems were described differently and their solutions were diverse. In consequence, for this, what in a discourse of the present times belonged to a syntagma “human rights”, in the past it should be seen with different notions, proper for that legal culture, obviously taking into considerations all its elements.

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45 For further reading about the uselessness of dichotomy between the past and the present times, cf. e.g.: T. Giaro, Rzymski zakaz nadużycia praw podmiotowych w świetle nowej jurisprudencji pojęciowej [Roman prohibition of abuse of right in the light of a new jurisprudence of notions], ZP UKSW vol. 6 fasc. 1 (2006), p. 281.


47 Cf. e.g., such declarations of a respect of rights of particular social class, as: Magna Charta Libertatum, originally issued in 1215 (reissued later in the 13th century in modified versions), by King John of England, who proclaimed certain liberties, and accepted that his will was not arbitrary, for example by explicitly accepting that no “free man” (in the sense of non-serf) could be punished except through the law of the land; next, the aforementioned Confederation of Warsaw of 1573, the Petition for Laws of 1628; or English acts, such as: the Habeas Corpus Act of 1679, or the Bill of Rights of 1689.

48 Cf. in particular a definition of a “legal culture” proposed by S. Russocki, Wokół pojęcia kultury prawnej [Around a Notion of Legal Culture], „Przegląd Humanistyczny” 1986, vol. 11–12, p. 16: „Kultura prawna to zespół splecionych ze sobą postaw i zachowań – tak indywidualnych, jak i zbiorowych – a także
It is admitted that only then a vision of a presence of the legal phenomenon is more true and more just. In other words, a holistic composition and a comparison of legal cultures – the past and the present one – is indispensable as well as a determination of discursive functions which mentioned syntagma fulfilled once, and fulfills today.

Such connotation does not exclude, however, a possibility of presentation of a particular legal construction, even as the in statu nascendi one, as well as it does not exclude a possibility of confrontation past and present way of perception of a legal problem, of course only with adequately chosen and justly and properly analyzed source material. In this way, a topic of the research itself can be validated, as a “topic of a legal history domain.”

4. Argumentum: About a usefulness of “anachronical notions” in the research on legal history

Adjusting modern schemas seems to be as less reasonable as “methodological aberration” consisting in a description of modern institutions mainly in categories of past phenomena which one could detect or decode. In a romanistics as a field of the research, such a tendency is described with words “there were ancient Romans who had already done, created, invented etc.”, and, in consequence, it can be observed a quite exhaust-ich rezultatów wobec prawa, czyli powinności, reguł, norm narzucanych, wyposażonych w stosowną sankcję i systematycznie egzekwowanych przez właściwy danej społeczności autorytet, a wynikających z podziela-negro przez tę zbiorowości systemu wartości; rzeczony zespół postaw, zachowań i ich rezultatów, podzialany, przyswajany, a także przekazywany innym pod postacią wzorców, służy zarazem w sposób obiektywny i sym-borahory and behaviors – both individual and collective ones – supplied with results towards the law understood as obligations, rules and norms imposed, sanctioned and systematically executed by an authority proper for a specific community. This corpus iuris resulted from values commonly accepted by such community. The aforementioned set of attitudes and behaviors, accepted, internalized and passed to others in the form of models, serves in the same time – objectively and symbolically – to a transformation of human communities into one particular community, independent and conscious of this level of development.”] As for this question, cf. also: E. Borkowska-Bajer, *O pożytkach badań nad kulturą prawną* [With reference to Profi ts of the Research on a Legal Culture] [in:] Przez tysiąclecia: państwo – prawo – jednostka [Across Millennia: State – Law – Individual], vol. III, Katowice 20001, p. 28–40; A. Rosner, *Badania nad kulturą prawną. Próba zarysowania problematyki* [The Research on a Legal Culture. An Attempt to Delimitation of the Problem], [w:] Z dziejów kultury prawnjej. Studia ofiarowane Profesorowi Juliuszowi Bardachowi w 90-lecie urodzin [From the History of a Legal Culture. Studies dedicated to Professor Juliusz Bardach for the 90th Anniversary], Warsaw 2004, p. 585–597.

tive tendency to derive contemporary legal institutions directly from Roman law, or – what is even more controversial – to prove contemporary utilization of ancient legal institution.\textsuperscript{51} Meanwhile, the most common situation is that \textit{tertium datur}, so it is impossible to speak both about the full identity or a complete lack of correspondence between past and modern institutions. So next, an indirect correspondence, in a form of elements or roots, beginnings or stirrings, or finally, only functional surrogates\textsuperscript{52} can be most commonly observed – which should be rationally found and properly explained. A statement that a perspective of a discussion concerning “personal rights” in the 16th and 17th centuries had to be different – because historically determined – from the contemporary one,\textsuperscript{53} it is a particular truism in such context, at least because of a reason of different ecclesiological consciousness of the people in the past as well as state- or political- determination of religion, characteristic for them or finally, a different concept of the state itself (the latest fact, quite important in the context of the modern and the contemporary theory of the state, has been completely neglected by the Author). These aspects are not clear however, in the light of the Author’s divagations, since he, only in the \textit{Introduction}, employed both terms “individual rights” and “human rights”, using them as synonyms which can be a simple lingual trick or can suggest an attempt to identification of both syntagmas. In such a way appears a problem of “translation” of some social phenomena into categories of legal and jurisprudential language, or – in other words – a problem of choice of use of “anachronic notions” and “legal notions” of contemporarily determined significance.\textsuperscript{54} Before the times of Enlightenment no one had used a category of “human rights”, no one had even known this syntagma as a “technical term”, not mentioning any consistent “theory of human rights”.\textsuperscript{55} The history of ideas – similarly to the history of legal facts – can be seen, according to German philosopher and sociologist, Niclas Luhman\textsuperscript{56} as a continuous process of differentiation of diverse notions, institutions and rules. The reality, however, also the legal one, in general complicates itself, getting as


\textsuperscript{53} Comp. J. Bardach, \textit{Metoda porównawcza… [A Comparative Method]}, p. 127, on theoretical premises in the research on the legal history, which must take into consideration very different historical conditions.

\textsuperscript{54} Comp. A. Berger, \textit{From “ius civile” to “civil law” [in:] Festschrift für G. Kisch}, Stuttgart 1955, p. 141 f.

\textsuperscript{55} Cf., recently, D.P. Visser, \textit{The Legal Historian as Subversive: or Killing the Capitoline Geese [in:] idem, Essays in the History of Law, Cape Town 1989, p. 1–31}, in part. about such – nota bene truly controversial – problem of “too modern” reading of historical sources, with help of “modern categories”, which – for the reason of cultural realities of the period described – not always or not exactly suit to this historical past, just only because of the reason that such notions have meaning not always determined, and quite often temporarily dependent.

a result more and more multiplex every day and full of new, more specialized formulas of acting. In consequence, it seems absolutely rational to accept a relativistic attitude towards the past and the present times, regardless of a possible answer to the question concerning historical forms of the only one phenomenon or different phenomena being in relation, although separated from themselves. A lack of explanation from the part of the Author results with necessity of a question about what exactly was to be elucidated, even if, in the second part of his book, he seemed (for the reason that a reader can find no direct or even indirect explanation of this quite important methodological matter) to adopt a “genetic” view aiming to show the relationship between a set of postulates of the Polish Brethren, which in general could be named “individual rights” and a modern concept called “human rights”. “Human rights”, even if we classify them as a kind of modern phenomenon universally presented in our cultural circle, are to be regarded as a phenomenon connected with a particular historical epoch. The idea of “rights and freedoms” changed itself during the course of history but – as the concept of human rights – appeared in the times of Enlightenment, due to other concepts of this epoch of rationalism, mixed with a necessity of re-definition and re-location of some material goods and old ideas as a solution to problems that occurred in relation to the industrial revolution.57

Still, the aforementioned concept is more a “genetic” product of humanistic thought, condemning the existence of feudalism, with its restrictions coming from the concept of the state itself as the absolute one, a feudal law, a guild-system, an interdiction of a free commerce concerning some sort of goods (e.g. lands), an accumulation of a capital, and finally an impossibility of organization of enterprises and private initiatives. All these blocked for years a proper development of economical and industrial relationships and resulted with “a society without universal rights”. Therefore, all attempts towards “human rights” were closely bounded with a necessity of changes, particularly a recognition of a universal equality between the people,58 especially in the sense of acceptance of a personal freedom, as well as a change of a political, social and legal system as two moments when some “program slogans” appeared and were founded on connection of two notions of ius and libertas.59 These program postulates connected precisely to necessary recognition of a freedom of individual, a private property, the equality in law, as well as a postulate of creation of certain guarantees of their observation. It can be seen that in such postulates there is a return but only in some intellectual sense of some claims which appeared in the past, in embryonic form, however, did not become – because of the factual and legally-logical impossibility of such change, for the reason of “naturalness” of a slavery or a serfdom – legal constructions, and constitutional principles. On the other hand, guaranteeing to citizens general rights, was in accordance with general images of the essence of freedom: French Declaration of Man and Citizen of 1789, declared, inter alia: “[...] natural, inalienable and holy rights of a man, such as freedom, private property, safety and resistance against pressure”. According to the doctrine of human rights,

57 For further reading, cf. K. Opalek, Koncepcja prawnic… [The Concept of Rights…], p. 18 f; I. Szabo, Fondements historiques…, p. 13 f.
59 Comp. M. Villey, Leçons d’histoire de la philosophie du droit, Paris 1962, p. 240 f; about a category of so-called “public personal rights”.
it was not the state who such rights determined and bestowed,60 because rights and freedoms were given by nature or a God,61 but, a contrario, it was a task and a duty of the state to guarantee to an individual an observance of them as a particular emanation of the natural law. The state, by refraining from interference in man’s freedom, should however, in the same time, protect him against a violation of these rights by others, and most notably, by itself as the power or officials as its representatives. Any limitation of such universally understood freedom of an individual was recognized as admissible only in indispensable range for the reason of necessary protection of freedom of other citizens and for the ultimate reason of the state.62 All these observations are not anything new but are based on conclusions well-established in the scientific literature. Therefore, one can require their recognition by any author who wants – as one can presume only after reading a title of the aforementioned book – to write “descriptively” about “individual rights”, “man rights” and the modern concept of “human rights”. As a particular cliché – what, by no means, does not devalue at all already fixed truths63 – it is worth sometimes to remind that the law is a cultural phenomenon, which cannot be separated from a general intellectual culture of a certain epoch. The research on phenomena of the past, such as historical investigations on the legal history, which aim to grasp an idea or an institution in statu nascendi, can be, however, and without any doubts are, of great, especially when creative, importance, but only if they are realized as a value itself,64 and not only as inspired and directed into finding a historical confirmation or a historical exemplification of legal phenomena of the present times.65 It does not seem justified therefore, that

60 Cf. P. Häberle, Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft, Königstein 1980, p. 79 f.; comp., however, a different view: J. Isensee, Wer definiert die Freiheitsrechte?, Karlsruhe 1980; and, most recently rev. R. Sobuński, O Karcie… [About the Charter…], p. 188 f.
61 Cf. studies by such philosophers, as: John Locke, Two Treatises of Government (1689); T. Paine, Rights of Man (1791), Rights of Man, Part the Second, Combining Principle and Practice (1792); comp. the Encyclical of Pius XI: Mit Brennender Sorge (14.03.1937); G. Filibeck, Les droits de l’homme dans l’enseignement de l’Eglise: de Jean XXIII à Jean-Paul II, Cité de Vatican 1992, p. 34 f.; cf. also K. Opalek, Koncepcja praw… [The Concept of Rights…], p. 29 f, who underlined this unethical aspect of attribution of some rights to an individual.
63 Comp. T. Giaro, Cywilizacja prawa rzymskiego… [A Civilization of Roman Law…], p. 69.
65 Comp. A. Watson, The Evolution of Law, Oxford 1985, p. 3: “One cannot understand legal development in general without a new look at the history of individual changes; and that, in turn, a new approach to legal development in general can lead to a more just appreciation of individual legal changes.”; comp. T. Giaro, Cywilizacja prawa rzymskiego… [A Civilization of Roman Law…], p. 77, about such, not always just and justified, attempts of scholars of a contemporary romanistics, founded on a presupposition that the Roman law should be regarded as a “additional value” of a currently binding civil law; comp., however, T. Giaro, Prawo a historia w dobie globalizacji. Nove rozdanie kart [Law and History in the Times of Globalization. A New Play] [in:] Prawo w dobie globalizacji [The Law in the Times of Globalization], ed. T. Giaro, Warsaw 2011, p. 73; about a postulate of necessity of participation of legal historians in contemporary discourse, as well as of a particular necessity of a use modern notions in purpose to describe the past; cf. also, about a phenomenon of “antiquarianism” in historical sciences: D. Heirbaut, Comparative law and Zimmermann’s new ius commune: A life line or death sentence for legal history? Some reflections on the use of legal history for
for different aims, such as for a purpose of justification of a legitimacy of undertaking of the research on legal history topics, a quest of historical truth is replaced with constructions, undoubtedly interesting from the point of view of modern reader, however, a-historical in its proper nature.

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As it was mentioned above, in the discourse of the present times provided by intellectuals representing almost every branch of contemporary broadly understood discipline of the social research, most notably the law as well, there can be found references to “human rights”. It is also worth mentioning that this time there is no need to restrict himself in such discourse into the group of continental countries for the reason that in relation to somehow universal incorporation of the European Convention of Rights of Man and Citizen, finally binding from 1953, into internal legal systems, a real “world trend” for the construct of “human rights” formed, which – as par excellence rights of persons – have their unquestionable position also among Anglo-Saxons authors. It can be also concluded that in consideration of today’s, quite easy noticeable, phenomena of exhausting of traditional elements of the intellectual reality, a crisis or a death, overused by scholars, such “universal life” of this syntagma in scientific discourse is at least truly particular. The Author is therefore correct stating that the presence of “human rights” in the world of ideas is universal and will overcome all cultural crises. The other question is, however, if it is worth to compare the postulates and slogans of the times of Reformation and Contra-reformation – on a “genitive rule” – with today’s categories of the contemporary secularized culture. In the same way Edmund Husserl made postulates towards a philosophical reflection, having declared that a deeper and critical reflection on the past is required, for a purpose of radical “self-understanding”, adding also that

[... ] true understanding of the beginnings is possible in a full way only by parting from a today’s knowledge and giving a careful glimpse into the past, because without understandings of the beginnings any development, as a development of an essence, is blind and speechless.


66 Cf., e.g., J. Finnis, Natural Law and Natural Rights, Oxford 1980; Lord Irvine of Lairg, The Development of Human Rights in Britain under an Incorporated Convention on Human Rights [in:] Public Law, 1998, p. 221–236, in part.: “This Bill will therefore create a more explicitly moral approach to decisions and decision making; will promote both a culture where positive rights and liberties become the focus and concern of legislators, administrators and judges alike; and a culture in judicial decision making where there will be a greater concentration on substance rather than form.”

67 Cf., e.g., E. Husserl, Kryzys nauk europejskich i fenomenologia transcendentalna [A Crisis of European Sciences and a Transcendental Phenomenology], transl. S. Wałęczewska, Toruń 1999.


69 Comp. T. Giaro, Cywilizacja prawa rzymskiego... [A Civilization of Roman Law...], p. 70, with reference to rightness and usefulness of such “genetically determined comparisons”.

70 After: E. Husserl, Kryzys nauk europejskich... [A Crisis of European Sciences...], p. 20.

71 After: ibidem, p. 63–64.
It seems, however, impossible to “understand the beginnings” with modern categories and concepts, especially those in which there can be seen a deep connection with current ideology.