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Paulina Święcicka
(Jagiellonian University)

Libertas scribendi – libertas philosophandi. Some remarks on the method of research in the field of legal history in relation to a book by Jerzy Kolarzowski, *Idea praw jednostki w pismach Braci Polskich. U narodzin nowożytnej koncepcji praw człowieka* [*The Idea of Individual Rights in the Writings of the Polish Brethren. Birth of the Concept of Human Rights*, Warsaw University Press, Warsaw 2009][1]

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 Kolarzewski'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

[1] Text published also in Polish language: *Libertas scribendi – libertas philosophandi. Uwagi o metodzie badań historyczno-prawnych* (w związku z rozprawą Jerzego Kolarzowskiego, *Idea praw jednostki w pismach Braci Polskich. U narodzin nowożytnej koncepcji praw człowieka*, Wydawnictwa Uniwersytetu Warszawskiego, Warszawa 2009, s. 241), "Czasopismo Prawno-Historyczne" 2012, t. 64 fasc. 1, p. 223–239.

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Transporter dans des siècles reculés toutes les idéses du siècle où l'on vit,
c'est des sources de l'erreur celle qui est la plus féconde.
Montesquieu, *L'Esprit des Lois* XXX, ch. 14

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"[2] – 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.[3]

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,[4] 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.[5] 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

[2] With reference to possible meanings and possible dimensions of "human rights", cf. A. Łopatka, *Prawo człowieka – refleksje wokół pojęcia* [*A Human Right – Reflections around the Meaning of a Term*] [in:] AA. VV., *Teoria prawa. Filozofia prawa. Współczesne prawo i prawoznawstwo* [*Legal Theory. Legal Philosophy. Contemporary Law and Jurisprudence*], Toruń 1998, p. 139.

[3] For further reading, cf., *inter alia*: K. Opałek, *Koncepcja praw, wolności i obowiązków człowieka i obywatela. Jej geneza i charakter* [*The Concept of Rights, Freedoms and Obligations of Man and of Citizen. Its Genesis and Characteristics*] [in:] *Prawa i obowiązki obywatelskie w Polsce i na świecie* [*Civil Rights and Obligations in Poland and over the World*], Warsaw 1978, p. 18 f; T. Włudyka, *Ekonomiczne prawa człowieka – mit czy rzeczywistość* [*Economic Rights of Man – a Myth or a Reality*] [in:] *Studia z filozofii prawa* [*Studies on the Philosophy of Law*], ed. J. Stelmach, Cracow 2001, p. 259–268; about so-called group (collective) rights, cf., *e.g.*: A. Michalska, *Podstawowe prawa człowieka w prawie wewnętrznym a pakty praw człowieka* [*Elementary Human Rights in a Proper Legal System of a Country and Bills of Human Rights*], Warsaw 1976, p. 204 f.; and G. Cohen-Jonathan, *René Cassin et la conception des droits de l'homme*, 1985, "Revue des droits de l'homme" t. 12, p. 83 f.

[4] Cf., in part. M. Ossowska, *Normy moralne w obronie godności człowieka* [*Moral Norms as Protective for a Human Dignity*], „Etyka" ["Ethics"] 1969, vol. 5, p. 12 f; M. Piechowiak, *Godność jako fundament powinności prawa wobec godności człowieka* [*A Dignity as a Fundament of a Duty of Law towards a Human Dignity*] [in:] *Urzeczywistnienie praw człowieka w XXI wieku* [*Realization of Human Rights in the 21st century*], eds. P. Morciniec, S.L. Stadniczeńko, Opole 2004, p. 33–54.

[5] Cf. J. Habermas, *Die Einbeziehung des Anderen. Studien zur politischen Theorie*, Frankfurt a.M. 1996, p. 301 f.; *idem*, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Frankfurt a.M. 1992, Chapter III.

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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 medieval[13]

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[6] Cf. W. Osiatyński, *Wprowadzenie do pojęcia praw człowieka* [Introduction to a Notion of Human Rights], Warsaw 1998, p. 4.

[7] Cf. B. Wolniewicz, *O tzw. prawach człowieka* [*About so-called Human Rights*] [in:] Z. Musiał, B. Wolniewicz, *Ksenofobia i wspólnota* [*Xenophobia and Community*], Cracow 2003, p. 92: "Tak zwane 'prawa człowieka' są pewną fikcją prawną, dla jakichś celów i dążeń politycznych najwyraźniej propagandowo użyteczną." [So called 'human rights' are a kind of legal fiction, evidently useful for some political scopes and needs."]; cf. also remarks on p. 93, 94; comp. P. Bała, A. Wielomski, *Prawa człowieka i ich krytyka. Przyczynek do studiów o ideologii czasów ponowożytnych* [*Human Rights and their Critics. An Introduction to Studies on Ideology of Post-Modern Times*], Warsaw 2008, p. 114 f.

[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".

[9] Comp. V. Grementieri, *Comparative Law and Human Rights* [in:] *European Legal Tradition and Israel*, ed. A.M. Rabello, Jerusalem 1994, p. 369–376.

[10] Comp. E. Brems, *Human Rights. Universality and Diversity*, The Hague–Boston–London 2001.

[11] Cf. D.C.H. Broussard, *Prologo ai diritti dell'uomo* [in:] *Tra diritto e storia. Studi in onore di L. Berlinguer promossi delle Università di Siena e Sassari*, T. I, Catanzaro 2008, p. 613–643; cf. aussi E. Messer, *Anthropology and Human Rights*, "Annual Review of Anthropology" 1993, vol. 22, p. 221–249; E. Le Roy, *Les droits de l'homme entre un universalisme hâtif et le ghetto des particularismes* [in:] *L'effectivité des droits fondamentaux dans les pays de la communauté francophone*, Montréal 1994, p. 59–74.

[12] Cf. AA.VV., *Human rights in ancient Rome*, ed. R. Bauman, London–New York 2000; with a critic by: M. Talamanca, *L'antichità e i 'diritto dell'uomo'* [in:] *Convenzione del Consiglio d'Europa per la protezione dei diritti umani e delle libertà fondamentali. Atti del Convegni Lincei* 174, Roma 2001, p. 51 f.; comp. however, *in plus* of a possibility of finding "human rights" in the Roman antiquity: T. Honoré, *Ulpian: pioneer of human rights*, 2nd ed., Oxford 2005; G. Giliberti, *'Omnium una libertas'. Alle origini dell'idea di diritti umani* [in:] *Tradizione romanistica e Costituzione*, a cura di L. Labruna, curr. M.P. Baccari-C. Cascione, vol. I, t. 2, Napoli 2006, p. 1992 f.; and recently S. Tafaro, *Centralità dell'uomo (persona)* [in:] *Studi per G. Nicosia*, vol. 8, Milano 2007, p. 97 f; *idem*, *Ius hominum causa constitutum. Un diritto a misura d'uomo*, Napoli 2009.

[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, *Śladami Ehrlicha: do Pawła Włodkowica po naukę*

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and a modern one.[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,[15] even though they were ascribed only to a determined group of people,[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",[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.

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 *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"

o prawach człowieka [*After Ehrlich: towards Paul Wlodkowic for the Concept of Human Rights*], Toruń 1995. Comp. also, a recent study by M. Piechowiak, *Klasyczna koncepcja osoby jako podstawa pojmowania praw człowieka. Wokół św. Tomasza z Akwinu i Immanuela Kanta propozycji ugruntowania godności człowieka* [*The Classical Concept of a Person as a Basis of Understanding of Human Rights. Around a Postulate of Enrooting of the Men' Dignity, proposed by Saint Thomas Aquinus and Immanuel Kant*] [in:] AA.VV. *Prawo naturalne – natura prawa* [*Natural Law – a Nature of Law*], eds. P. Dardziński, ks. F. Longchamps de Bérier, K. Szczucki, Warszawa 2011, p. 1–20.

[14] Cf. studies quoted by the Author: p. 221–231.

[15] Comp. U. Wesel, *Geschichte des Rechts. Von den Frühformen bis zur Gegenwart*, München 2002, p. 74 f., 407 f.; G. Stourzh, *Naturrechtslehre, leges fundamentales und die Anfänge des Vorrangs der Verfassung* [in:] *Rangordnung der Gesetze: 7 Symposion der Kommission „Die Funktion des Gesetzes in Geschichte und Gegenwart" am 22–23 April 1994*, Hg. Chr. Starck, Göttingen 1995, p. 13 f.

[16] Cf. I. Szabo, *Fondements historiques et développement des droits de l'homme* [in:] *Les dimensions internationales des droits de l'homme*, réd. K. Vasak, Paris 1978, p. 13 f.; M. Villey, *Le droit et les droits de l'homme*, Paris 1983; comp. also F.W. Wieacker, *Foundations of European Legal Culture*, "The American Journal of Comparative Law" 1990, vol. 38 fasc. 1, p. 1–29; and quite recently rev. E. Sobański, *O Karcie Praw Podstawowych UE* [*With reference to the Charter of Fundamental Rights of the European Union*] [in:] *Zmagania początku tysiąclecia* [*Struggled of the Beginnings of Millennium*], eds. M. Gierycz, J. Grosfeld, Warsaw 2012, p. 185 f.

[17] The Author himself situated a moment of appearance of the concept of human rights in the times of Enlightenment, *ibidem*, p. 8, 10.

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binding the past and the present reality.[18] 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.[19] 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 authors[20] – 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 Romanistics*], "Acta Universitatis Vratislaviensis", Prawo 2008, vol. 305, p. 73: „koncepcje wpływologiczne" ["influentive concepts"].

[19] Comp. J. Łojek, *Obrachunki metodologiczne* [*Accounts with a Methodology*] [in:] *idem*, *Wokół sporów i polemik. Publicystyka historyczna* [Around Disputes and Polemics], Lublin 1991, p. 6 f; cf. also S. Amsterdamski, *Między historią a metodą. Spory o racjonalność nauki* [Between History and Method], Warsaw 1983, p. 19 f., 42 f; *idem*, *Etos uczonych: kilka pytań* [*The Scholars' Ethos: Some Questions*] [in:] *idem*, *Tertium non datur? Szkice i polemiki* [*Terium non datur. Studies and Polemics*], Warsaw 1994, p. 147 f; comp. also F. Znaniecki, *The Social Role of Men of Knowledge*, New York 1968, p. 45 f.

[20] From foreign authors writing about the Polish Brethren, cf. in part. E.M. Wilbur, *A History of Unitarianism: Socinianism and Its Antecedents*, Harvard 1945; G.H. Williams, *The Polish Brethren: Documentation of the History and Thought of Unitarianism in the Polish-Lithuanian Commonwealth and in the Diaspora 1601–1685*, Atlanta GA 1980; and, more recently, P. Hewett, *Racovia: An Early Liberal Religious Community*, Providence 2004.

[21] Cf. works written by one of the unquestioned authority in the field of the 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.

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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-

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[22] Cf., *e.g.*, W. Benedek, K. De Feyter, F. Marrella, *Economic Globalization and Human Rights: EIUC Studies on Human Rights and Democratization* (European Inter–University Centre for Human Rights and Democratization), Cambridge 2007; AA. VV., *The Tension Between Group Rights and Human Rights: A Multidisciplinary Approach* (*Human Rights Law in Perspective*), eds. K. De Feyter, G. Pavlakos, Oxford 2008.

[23] For a general view, cf. in part. H.J. Berman, *Law and Revolution*. II. *The Impact of the Protestant Reformations on the Western Legal Tradition*, Cambridge–Massachusetts–London 2003, *passim*.

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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",[24] 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;[25] 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.

[25] Cf. studies published in a volume: *Sąd dla obywatela. Opracowanie Zespołu ds. Poprawy Funkcjonowania Sądownictwa Stowarzyszenia Sędziów Polskich "Iustitia"* [*A Court for a Citizen. A Collaborative Study of the Group for Improvement of Functioning of the Judicature of the Association of Polish Judges "Iustitia"*], ed. J. Przygucki, Warsaw 2009.

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– 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 matters 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 fallacy *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 formation 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 correspondence 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 concept 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

[26] For further reading, cf. D.H. Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought*, New York 1970, p. 131 f: Chapter 5: *Fallacies on Narration*.

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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 memoires, 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 Bayle[27]), East Prussia (*e.g*. Christopher Crell, who, together with his sons, founded new congregations[28]) 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-Napoca[29]). 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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[27] Cf., *e.g*. *The Correspondence of John Locke*, in 8 volumes, ed. E.S. de Beer, Oxford 1981, vol. 6, 1981, p. 459 f; for a general view, cf., *e.g*. H.J. McLachlan *Socinianism in seventeenth-century England*, Oxford 1951, p. 290 f; cf. also *New Schaff-Herzog Encyclopedia of Religious Knowledge*, ed. S.M. Jackson, Michigan 1953, vol. X: Reutsch – Son, p. 490, *s.v*. *Socinus*.

[28] Cf. in part. W. Munk, entry for: *Christopher Crell MD* [in:] *Munk's Roll*, Royal College of Physicians of London, vol. 1, London 1861, p. 428.

[29] L. Chmaj *Andrzej Wiszowaty jako działacz i myśliciel religijny* [*Andrzej Wiszowaty as an Activist and a Thinker*] [in:] *idem*, *Bracia Polscy. Ludzie – idee – wpływy* [*The Polish Brethren. People – Ideas – Influences*], Warsaw 1957, p. 350–356.

[30] For a general view see: G.W. Cooke, *Unitarianism in America: a History of its Origin and Development*, Boston 1902; E.M. Wilbur, *A History of Unitarianism: Socinianism and Its Antecedents*, Harvard 1945.

[31] Cf., in part.: T.E. Thorpe, *Joseph Priestley*, London 1906, p. 106–108; A. Holt, *A Life of Joseph Priestley*, London 1931, p. 133–139; F.W. Gibbs, *Joseph Priestley: Adventurer in Science and Champion of Truth*, London 1965, p. 249 f; M. Philip, *Rational Religion and Political Radicalism*, "Enlightenment and Dissent" 1985, vol. 4, p. 35–46; R.E. Schofield, *The Enlightened Joseph Priestley: A Study of His Life and Work from 1773 to 1804*, Pennsylvania 2004, p. 216–223; cf. also: E.F. Smith, *Priestley in America,*

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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.[32] 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",[33] or Isaak Newton who had met Samuel Crell, son of Johannes Crellius,[34] of the Spinowski family,[35] and he collected many books from the Racovian Academy.[36] Finally, the Englishman John Biddle[37] 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 1653[38]), as well as the Racovian Catechism[39] 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

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1794–1804, Philadelphia 1920; S. Johnson, *The Invention of Air: A Story of Science, Faith, Revolution, and the Birth of America*, New York 2008.

[32] 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.

[33] Cf. *Andreae Wissowatii – Religio rationalis, seu de Rationis judicio in controversiis, etiam theologicis ac religiosis*, published posthumously in 1685.

[34] Cf. an opinion of H. Hallam, *Introduction to the Literature of Europe in the Fifteenth, Sixteenth and Seventeenth Centuries*, repr. 2005, Part. 2, p. 417: "Crellius was, perhaps, the most eminent of the Racovian school in this century". For a general view cf. S. Mortimer, *Reason and Religion in the English Revolution: The Challenge of Socinianism*, Cambridge 2010.

[35] Cf. Friedrich Wilhelm Bautz, *s.v. Samuel Crellius* [in:] *Biographisch-Bibliographisches Kirchenlexikon*, Bd. 1: *Aalders–Faustus v. Byzanz*, Hamm 1975, 2 Aufl. 1990, Spalte 1158.

[36] Cf. in part. S.D. Snobelen, *Isaac Newton, heretic: the strategies of a Nicodemite*, "British Journal for the History of Science" 1999, vol. 32, p. 381–419.

[37] The principal source of information respecting Biddle is the *Life* by Joshua Toulmin (a noted English theologian and a serial dissenting minister of Presbyterian: 1761–1764, Baptist: 1765–1803, and then Unitarian: 1804–1815 congregations) published in London 1789, which analyzes all his writings, including several translations. Cf. also, more "modern" biographies: J.H. Allen, *Historical Sketch of the Unitarian Movement*, New York 1894, p. 131–135; W. Lloyd, *Bicentenary of Barton Street Dissenting Meeting House*, Gloucester 1899, p. 40–50.

[38] Cf. *Bibliografia Literatury Polskiej – Nowy Korbut* [Bibliography of Polish Literature], t. 3: Piśmiennictwo Staropolskie [Old-Polish Writings], Warsaw 1965, p. 140–143.

[39] Ch. Hill, *Milton and the English Revolution*, New York 1977, p. 294.

[40] For a general information, cf., in part. Ch. Hill, *Change and Continuity in Seventeenth-Century England*, London 1974, p. 267 f.; *idem*, *Milton*, p. 290 f.; *idem*, *A Nation of Change and Novelty: Radical Politics, Religion and Literature in Seventeenth-Century England*, London 1990, p. 189 f.

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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,[41] 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*].[42] On the list of bibliography presented by the Author there can however, be found works, mostly written by Polish authors,[43] 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[44] – 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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[41] O.R. Schulz, *Verstehen und Rationalität*, Frankfurt a.M. 1999, p. 31 f, 88 f.

[42] It is worth to recall a discussion that took part in a forum of the Polish journal „Zeszyty Prawnicze Uniwersytetu Kardynała Stefana Wyszyńskiego" [" The Law Journal of the Cardinal Stefan Wyszyński University" hereafter: ZP UKSW] between authors: A. Stępkowski [ZP UKSW 2005, vol. 5 fasc. 1, p. 255–274; ZP UKSW 2006, vol. 6 fasc. 2, p. 189–219] and T. Giaro [ZP UKSW 2006, vol. 6 fasc. 1, p. 279–300; ZP UKSW 2007, vol. 7 fasc. 1, p. 273–291], for which a direct impulse were controversies that arose around a book by F. Longchamps de Bérier, entitled *Nadużycie prawa w świetle rzymskiego prawa prywatnego* [*The Abuse of Law in the light of Roman Private Law*], 1st ed. Wrocław 2004, 2nd ed. Warsaw. Aforementioned discussion concerned exactly methodological problems of providing the research in legal history.

[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 reminded 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.[45] 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,[46] 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.[47] 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.[48]

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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 jurysprudencji 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.

[46] For further reading, cf. *e.g.* A. Łopatka, *Prawo człowieka…* [*A Human Right...*], p. 140–142; for some skeptical views, cf., however F.J. Wenz, *Die Würde des Menschen – Ein Phantom?*, "Archiv für Rechts- und Sozialphilosophie" 2001, Bd. 87, p. 311–327; J. Isensee, *Menschenwürde: die säkulare Gesellschaft auf des Suche nach dem Absoluten*, "Archiv des öffentlichen Rechts" 2006, Bd. 131, p. 173 f., 194–199.

[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 "freeman" (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

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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[49] 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.*",[50] and, in consequence, it can be observed a quite exhaus-

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ich rezultatów wobec prawa, czyli powinności, reguł, norm narzucanych, wyposażonych w stosowną sankcję i systematycznie egzekwowanych przez właściwy danej społeczności autorytet, a wynikających z podzielanego przez tę zbiorowość systemu wartości; rzeczony zespół postaw, zachowań i ich rezultatów, podzielany, przyswajany, a także przekazywany innym pod postacią wzorów, służy zarazem w sposób obiektywny i symboliczny do przekształcania zbiorowości ludzkich w odrębną, świadomą tego stanu rzeczy społeczność." ["A 'legal culture' is a set of connected between themselves attitudes 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-Bagieńska, *O pożytkach badań nad kulturą prawną* [*With reference to Profits 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 prawnej. 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.

[49] Comp. M. Graziadei, *Comparative Law, Legal History and the Holistic Approach to Legal Cultures*, "Zeitschrift für Europäische Privatrecht" 1999, p. 531–543; cf. also previously published studies concerning problems with application of a comparative method in the field of history, in particular, legal history: A. Aymard, *L'évolution des methods de la recherché historique* [in:] *L'Encyclopédie française*, Paris 1959, vol. 20, p. 4 f; J. Bardach, *Metoda porównawcza w zastosowaniu do powszechnej historii państwa i prawa* [*A Comparative Method in use of the History of Law and State*] [in:] *idem*, *Themis a Clio czyli Prawo a Historia* [*Themis and Clio, means Law and History*], Warsaw 2001, p. 99 f.

[50] For more detailed description of so-called *praesumptio similitudinis* of Roman and modern institutions, cf. K. Zweigert, *Die "praesumptio similitudinis" als Grundsatzvermutung rechtsvergleichender Methode* [in:] *Inchieste di diritto comparato*, a cura di M. Rotondi, vol. 2, Padova 1973, p. 737 f.; for a critical

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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.[51] Meanwhile, the most common situation is that *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[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,[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 *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.[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".[55] The history of ideas – similarly to the history of legal facts – can be seen, according to German philosopher and sociologist, Niclas Luhman[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

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view, cf., *inter alia*, R. Munday, *A counting for an encounter* [in:] *Comparative Legal Studies: Traditions and Transitions*, eds. P. Legrand, R. Munday, Cambridge 2005, p. 3–28, in part. p. 12–14.

[51] Cf., *e.g.*, quite recently published book concerning this problem: R. Zimmermann, *Rechtsgeschichte und Privatrechtsdogmatik*, Karlsruhe 2000; cf. also G. Samuel, *Epistemology, propaganda and Roman law: some reflections on the history of the subjective right*, "The Journal of Legal History" 1989, vol. 10, fasc. 2, p. 161–179; comp. also H.-C. Grigoleit, *Das historische Argument in der geltendrechtlichen Privatrechtsdogmatik*, "Zeitschrift für Neuere Rechtsgeschichte" 2008, Bd. 30, fasc. 3–4, p. 259–271.

[52] T. Giaro, *Rzymski zakaz nadużycia praw podmiotowych w świetle nowej jurysprudencji pojęciowej* [*Roman Interdiction of Abuse of Personal Rights in the Light of the Current Jurisprudence of Notions*], ZP UKSW 2006, vol. 6 fasc. 1, p. 282–283.

[53] Comp. J. Bardach, *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.

[54] Comp. A. Berger, *From "ius civile" to "civil law"* [in:] *Festschrift für G. Kisch*, Stuttgart 1955, p. 141 f.

[55] Cf., recently, D.P. Visser, *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.

[56] N. Luhmann, *Ausdifferenzierung des Rechts. Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt a.M. 1981, p. 11 f.

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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,

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[57] For further reading, cf. K. Opałek, *Koncepcja praw…* [*The Concept of Rights...*], p. 18 f; I. Szabo, *Fondements historiques…*, p. 13 f.

[58] Comp. M. Bedjaoui [in:] *Universalité des droits de l'homme dans un Monde Pluraliste*, Conseil de l'Europe 1990, p. 42.

[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".

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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 truths[63] – 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

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[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. Sobański, *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'enseigmenent de l'Eglise: de Jean XXIII à Jean-Paul II*, Cité de Vatican 1992, p. 34 f.; cf. also K. Opałek, *Koncepcja praw…* [*The Concept of Rights...*], p. 29 f, who underlined this unethical aspect of attribution of some rights to an individual.

[62] Comp. T. van Boven, *Les critères de distinction des droits de l'homme* [in:] *Les dimensions*, cit., p. 46 f., about this so-called « inviolable core of human rights »; comp. also A. Łopatka, *Prawo człowieka…* [*A Human Right...*], p. 143–144.

[63] Comp. T. Giaro, *Cywilizacja prawa rzymskiego…* [*A Civilization of Roman Law...*], p. 69.

[64] Comp. G. Crifò, *Some Reflections on History and Dogma as Jurists' Tools* [in:] *Critical Studies in Ancient Law, Comparative Law and Legal History*, ed. J.W. Cairns, O. Robinson, Oxford–Portland Oregon 2001, p. 37 f., p. 39.

[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. Nowe 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*

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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 intellectualists 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.[66] 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[67] or a death,[68] 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"[69] – 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",[70] 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.[71]

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comparative law and vice versa [in:] *Ex Iusta Causa Traditum: Essays in Honour of E. H. Pool*, ed. H. Van den Bergh, Pretoria 2005, p. 139 f.

[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 transcedentalna* [*A Crisis of European Sciences and a Transcendental Phenomenology*], transl. S. Walczewska, Toruń 1999.

[68] Cf., *e.g.*: F. Fukuyama, *Koniec historii* [*The End of the History*], transl. T. Bieroń, M. Wichrowski, Poznań 1996 (2nd ed. 2000); D. Kuspit, *Koniec sztuki* [*The End of the Art*], transl. J. Borowski, Gdańsk 2006; AA.VV., *Koniec mitu niewinności* [*The End of a Myth of Innocence*], ed. L. Kopciewicz, E. Zierkiewicz, Warsaw 2009.

[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.

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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.

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