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Philosophical Origins of the Concept of Subjective Right*

Introduction

The concept of subjective right is one of the fundamentals upon which the general doctrine of the legal systems of the civil law family is build. This idea is at least that much (if not in a larger scale) determining for the common law general doctrine as well[1].

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[1] I find it necessary for some essential remarks to be made here. I consider them vital in the context of the ambiguities which the great deal of the concepts within this theme are apt to. The difficulties about the exact rendering of the meaning of the relevant conceptions are not only due to the linguistic differences (mainly between the English and the other languages), but also to the different cultural and legal traditions between the common law and the civil law legal systems. Although this major problem could not be discussed within such a presentation I think it's important to point out that it could be possible to make use of the terms *objective right* and *subjective right* as closest notional alternatives to the words *law* and *right*, respectively. However, this is not what my primary aim would be here. Actually, when I use the term *objective right* I will seek to designate not just *the law*, but rather something that is *objectively right*. Such a stipulation should be also made about the usage of the term *subjective right*, by which I'll try not to express the notion of a single legal capacity, but rather the idea about its *rightness* from an objective point of view.
Besides this, in the particular case, as well as further in the text, I mean only the *capacity*, and not the *obligation*, which could be expected if the term *subjective right* had been used in an isolation and in the civil law tradition only. So in spite of the fact that, the whole presentation is conformed basically with the established propositions of the civil law legal doctrine, it could be misleading for one if he or she adopts a view where the whole theme is closed within the framework of the problems concerning the logical nature or the forms of subjective rights. On the contrary – my primary aim here is to present the philosophical basis of the idea that prompts the existence of a personal, an objectively right and a legally valid capacity, which could be related to a particular legal subject. In the civil law tradition this idea is usually expressed by the usage of the term *subjective right* and in the common law tradition – simply by the usage of the term *right* (often used in plural – "rights").

The next lines are motivated by the desire to reveal the general philosophical genesis of the notion of subjective right as an inviolable personal belonging. In the first section of the text I'll propose a thesis according to which today's concept of subjective right should be conceived of as a result of the process of deposing a certain ancient ideology, which for a long time backed up the idea that law had a monistic and a superhuman character. As a final consequence of this process we now face two separate but equally valuable positions concerning law's philosophical nature. One of them reflects the society's point of view and one – the individual's point of view. In the subsequent sections I'll try to demonstrate and prove this thesis mainly by using chronological and historical approaches. In the course of the presentation I'll refer to the core elements of the Christian ideology and the ideas of the Enlightenment to reach at the end Kant's philosophy, which I consider the real theoretical base of the contemporary concept of subjective right.

The Notions of Objective Right and Subjective Right During the Antiquity and in the Modern Time

One of the main methodological approaches in the continental legal theory refers to the dichotomy between *objective right and subjective right.* The definition "objective right" is frequently related to the idea by which the law is conceived of as something that is objectively right and principally valid towards anyone. Alternatively, the construction "subjective right" is presented as an implication of an understanding for a specific capacity that is valid only towards particular subject of right. Although by offering this dichotomy the scholars usually aim to show two different beings of the law, they actually never try to oppose them one against another, because the collision between them would have seen inappropriate. So the efforts like those in most cases seem to be driven by the desire for overcoming the linguistic ambiguities that most of (if not all of) the "continental languages" are apt to and the manifesting the logical bond between the legal norms and particular legal subjects. Presentations like this however, are based predominantly on the idea about the correlative interrelationship and logical consistency between the terms "objective right" and "subjective right". They never take into account the causes that actually lead us to such a view or inflict the necessity to refer to such a dualistic model of reasoning.

Within the common law doctrine this problem does not exist with such pungency, which is at least partly due to the specifications of the English language. In contrast to the languages used primarily in the civil law world the

English has two different words, by which one could define the idea about a correct rule of conduct – *law and right.* The first one is sometimes translated into the "continental languages" as *objective right* and the second one – as *subjective right*[2]. But to be thorough enough I have to point out that the word *law* is actually closer in meaning to the term *positive law* rather to the term *objective right* or even more strange term *objective law.* The word *right* on the other hand except as a noun, meaning a capacity, can equally serve as an adjective were it will mean something that is rightly from an objective point of view.

It is clear now however, that the issues relevant to the problem of legal dualism could be both put in the context of the civil law and the common law legal doctrines. The main reason why this could be the case, may be reduced in turn to a proposition, according to which that in spite of some considerable linguistic specifications, from an ontological as well as from a methodological point of view *the concept of right (either objective or subjective) is equal to the concept of rightness*[3]. So no matter how we will name our ideas about the correctness of our point of view (law, right, objective or subjective right) they should be in all cases in compliance with the actual criteria by which we could define any behavior as being right or wrong from an objective point of view. These criteria, which I'll call *criteria of rightness*, are of great importance in terms of our understanding about when an idea, that claims a realization of a certain conduct could be called a right. These criteria namely lay at the base of our understanding about the dualistic character of law and they actually made us qualify it as objective or subjective. But this major division of our days had no importance whatsoever for an ancient person.

Today's notion in terms of the standards by which a certain conduct of a human being could be qualified as objectively right relates to the concern about the prosperity of the whole society on the one hand and the individual's well-being on the other. This in turn provokes one general requirement, which demands when a certain conduct is estimated that both points of view – that of the society and that of the particular individual – should be taken into account. In the antiquity however, the second conception was absolutely unacceptable. The foundations of the objectively right conduct (the objective right) was seen as completely monistic, no matter of whether

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[2] For more on this question refer to: E. Pattaro, *The Law and the Right: The Reappraisal of the Reality that Ought to be*, Springer 2007.

[3] That is why it is not possible to call something law (objective right) if it s not right form an objective point of view, i.e. it is not objectively right. It is quite another question that for any actual determination of anything as objectively right we will need a clear and specific criterion to refer to.

they were sought in the mythical and the divine (*dike*) or in the harmony of the nature (*ius naturale*). The individual person under those circumstances was not able to claim any kind of subjective right simply because such a thing did not existed at all[4]. In this sense it will be reasonable to be stated that the modern concept of "subjective right" is a product of a "methodological twist" in the course of the evolution of the legal-philosophical ideas regarding the nature of law. This means that the real difference between the Greek *dike* or the Roman *ius* on the one hand and the English *right* or the Continental *subjective right* on the other hand, lies primarily in the different conceptions about what could be regarded as *objectively correct standard for the accomplishing a right conduct.*

Of course I have to point out that, the individuals in the Antiquity were not completely devoid of the possibility to perform a certain conduct that could be qualified as correct or right. On the contrary they too, just like the modern persons, had particular legal capacities to fulfill such a conduct. This for some serves as a sufficient reason for maintaining that those capacities were actually subjective rights[5]. However if we accept such a view, then we'll be compelled to specify that the holders of those "subjective rights" as it seems, conceived of them more like certain predefined means for accomplishing some kind of "external objective right" (law) rather than something that they had on their own disposal. But this is actually the main philosophical difference, as already stated, between the ancient legal capacity and the modern notion of subjective right. I think that this circumstance is not always taken into account when concepts and institutions with a millennial history are automatically transferred to the contemporary legal doctrines.

The Ancient Philosophy of the Natural Law and its Influences on the Roman Legal Doctrine

The influences of the Ancient Greek culture in the evolution of the Roman Empire are unquestionable. They could be found at all levels in social life, but they are in particular perceivable in the realm of philosophy from where they penetrated into the legal doctrine of the Ancient Rome. Absolutely vital role in this regard is committed to the classical philosophies of Plato and Aristotle, trough which although not explicitly Cicero's and Seneca's philosophies had been formed too. In each of these philosophies the natural law is

[4] G. Herbert, *A Philosophical History of Rights*, New Jersey 2003, p. 49.

[5] F. Miller, *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Springer 2007, p. 158.

the main theme. It was presented as the only possible and objectively right standard for the accomplishing any human behavior.

The natural law discourse is originally introduced in the ancient philosophy by Plato and after that it is taken by Aristotle and his followers so to be eventually carried over into the philosophical thought of the Ancient Rome[6]. Although we could find some considerable divergences in the different philosophical understandings of what the natural law is about, they are not that important in the context of the current presentation. On the contrary, it is actually the opposite stream of thought that I consider useful here because it will lead us to the common core of the natural law discourse and that should be of great importance for us now.

In all of its ancient varieties the natural law was always presented as an ultimate law of the whole universe. This law was relevantly applicable in the physical as well as in the social world and it was always manifested in terms of *ideas about causality and teleology*[7]. Human beings had the ability to choose but this ability was confined to the predetermined virtues of the nature.

By referring to those postulates one should be able to grasp the general ideological framework of the ancient world, where today's difference between the exploration of the physical phenomena and the cognition of the social processes was quite unclear. That is why in all the cases mentioned, the core problems did not lay down in the realm of the political or the legal philosophy as the modern scholar may prefer to say, but rather they were thought of as part of some moral philosophy. In other words not the basic reasons of the political authority was sought to be found in all of these instances, but actually the reasons for the objectively right conduct that human beings needed to refer to. So the question about whether a certain rule of conduct was politically or morally justified didn't have any value. The human person was not perceived as something valuable on its own. It was subjected to the general and superior laws of the universe[8]. Onto this ideological background any discussion about the division between the objective and the subjective right was absolutely superfluous.

The above mentioned understandings of the nature of the law form the basis of the roman legal doctrine too. Romans based their legal propositions

[6] G. Herbert, *op. cit.*, p. 19.

[7] S. Terner, *Cause, the Persistence of Teleology, and the Origins of the Philosophy of Social Science*, Oxford 2003, p. 21.

[8] So for example, in spite of the fact that Aristotle developed a wholesome and a complete political philosophy, based on the natural virtues, he never considered humans as equal beings. In his paradigm the natural virtues were different for the different persons and therefore anyone had to confine to different capacities, respectively – different rights. In such a logical stream, for example, was the idea of slavery reasoned. For more on this see: G. Herbert, *op. cit.*, p. 29.

on their practical philosophy, which they referred to as the *true philosophy* (*philosophia vera*)[9]. On these grounds was also built the primary taxonomy in roman legal doctrine, by which the law was defined with the first order categories like *ius naturale*, *ius gentium* and *ius civile*. None of these definitions however, had any priority against the others. It was actually quite the opposite – all of them were considered equal and all of them were conformed to the general ideas about the existence of inevitable causal determinations about the physical and social being of the human. This is the reason why for example, there could not be anything illogical in the propositions that all people were born equal under the rules of *ius naturale*, but some of them are doomed to be slaves under the rules of *ius gentium*[10].

Christianity as a Precursor of a New Paradigm

The ideas that have been described above dominated in Greece and Rome for a considerably long period of time. With the appearance of the Christianity however, they started to face strong resistance. The Christian philosophy offered an absolute independence for the human persons, although so in an intellectual form. The Christians didn't reject the political power of the roman emperor, but they also didn't accept the divine character of his persona[11]. This new situation delivered strong blow to the view, where the belief about predetermined virtues still dominated.

The spread of the Christianity within the territories of the Roman Empire was one of the maim causes which started the fundamental ideological shift in he official doctrine about the nature of law (the objective right). The great reason about that, on its own turn, was of course due to the new philosophical ideology about the independence of the human spirit from the political power in the society. Although this idea never got out of the philosophical framework of the predetermination of man's being, it for the first time marked a clear borderline between the spiritual and the political spheres for the individual's life. This provoked the liberation of the spiritual substance of man, which turned out to be the first condition which would bring in the idea that rights could be claimed as personal belongings. This condition however, would not be the last, because rights would have to be politically recognized too.

[9] G. Samuel, *The Foundation of Legal Reasoning*, Tilburg 1994, p. 40.
[10] *Ibidem.*
[11] G. Herbert, *op. cit.*, p. 38.

Although the Christian ideology defended the spiritual liberty it actually didn't tolerate the political independence of man. Even in its most institutionalized form the Christian monotheism never undermined the political system of the Ancient Rome. It rather introduced the change in the belief about the divine as a source of authority and shifted this endowment from the emperor's persona to the power that he exercised. That is why to be acquired for real rights would have to be politically realized and eventually gained by the means of arms. Historically those processes had to pass the stages of the construction of the official doctrine of the Christian church and then its rejection in the name of human reason.

The Scholastic Transformation of the Ancient Idea of the Natural Law

St. Thomas Aquinas is usually held to be the founder of the new Natural law theory (the Christian theory of Natural law). His ideas are now considered to be a part of the evolution of the scholastic legal thought during the late middle ages (XII–XIV centuries). Other major representatives of this school were also Duns Scot and William of Ockham. Sometimes one can hear that this doctrine build up the real base of the rights discourse in western legal philosophy. This is probably due to the fact that the scholastic quests revived and refined the ancient theory of Natural Law to make it suitable to the propositions of the medieval Christianity, which as pointed out, had already changed some core principles of the ancient beliefs about the laws that governed man and nature. However, the Christian philosophy never reached the real idea of subjective rights[12]. The main concern of the scholastic scholars was about the integrity of the catholic doctrine, which turned out to be threatened by the spread of the ancient philosophers' writings. In this sense the new natural law thesis was not a thesis about the natural rights (except of Ockham's ideas), but a conception offering a model of the eternal law (*lex aeterna*), which was reasoned by the presence of the divine (*ius divinium*)[13]. This philosophical construction is closer to the ancient model of *ius naturale*, rather to the classical thesis based on the idea about the natural origin of the personal capacities to carry out a correct conduct, which actually grounds

[12] Such a merit is sometimes ascribed to William of Ockham (see: F. Miller, *op. cit.*, p. 160). William of Ockham did indeed reasoned on the thesis of the natural rights (not natural law), but his work was entirely confined by the limits of the canonical law. The concept of subjective right differs from the mere belief of the natural rights by its political nuances. Despite of that Ockham's views were far ahead of his time.

[13] Ц. Торбов, *История на правната наука*, София 2002, p. 45.

the political (hence, the legal) claims about rights. It seems to me clear now that one could not maintain the allegation that the dichotomy between the objective and the subjective right had been taken into account by the representatives of the scholastic legal thought. The importance of this dichotomy had not been realized until Grotius' thesis had been proposed and developed by his followers.

From the Notion of Natural Law to the Concept of Natural Rights

Hugo Grotius first among others proposed the notion of a personal right as something that didn't need a superior reliance. He deduced this idea from the concept of a human consciousness, which was able on its own to recognize the correct from the incorrect. According to Grorius the whole natural law was encoded into the consciousness of man and so the standard of a right conduct could be reached by means of logical operations. This kind of reasoning was sometimes compared to the mathematical reasoning, by which this school received its distinctive appellation – *mos geometricus* (geometrical method)[14].

The theory of Hugo Grotius reflects the crucial evolution of the European civilization that developed from the XVI century onwards. The Reformation provoked by the crisis of the confidence in the canonical Catholicism opened the gates for a new social model, where the absolute authority of *ius divinium* would be put into question. From a social-political point of view this process would lead to the decline of the long established political balance, which in turn will give start to the "chain reaction" of the European bourgeois-democratic revolutions that shaped the new social order.

The sabotage of the monistic view about the origins of the objective right (the law) had become possible because the idea about the autonomy of the human person was imposed as a sufficient condition in terms of the possibility of following an objectively right and truly correct rule of conduct. The right of the person was not anymore conceived of as something derivative but as something basic and primary on its own. The personal claims didn't anymore face the necessity to be justified with whatever sort of external and superior source, needed for securing the objectivity and the truth of the legal norms. The spiritual liberation of man was now combined with his physical and hence – his political liberation.

[14] G. Samuel, *op. cit.*, p. 52.

Although that some of those propositions may seem somehow unclear, they actually lead us to quite opposite models of reasoning about rights. In the first place this new idea imposed the view that if someone has the rational ability to understand the natural law principles (which any person must have) he or she would be able to acquire both rights and duties (subsequently the question about their relationship would become of great importance). In the second place, the idea about possessing rights leads to the possibility for their holders to dispose of them. If we use the terminology of the Roman legal doctrine we could say that this new conception had coincided the categories *ius* and *dominium*[15] (lit., virtue and disposition).

This kind of reasoning could bring to us the idea that rights can be ascribed to someone else or need to be restored if someone else violated them. In a political sense such an affiliation would justify claims against any political authority which tends to infringe any rights. This thesis mainly was grounded in the French "Declaration for the rights of man and citizen" and is now developed in the modern constitutions and all the universal and regional acts relevant to the human rights law[16].

Although those ideas built up the bases of the intellectual changes in the time of modernism, most of the issues would yet to begin the initiation of a serious talk. It is however unquestionable now that his new attitude towards status of man was a major turnover in the course of the social and political development in Europe. From a philosophical-theoretical point of view this conclusions led to extraordinary complications of the discussions of the general conceptions about law. The disintegration of the ideological model of the canonical society provoked a severe need for completely new criteria in terms of objectivity and truth. They in all cases had to be deprived of the mythical nature of *ius divinium* and the only possible solution under these circumstances was seen in its natural antipode – *human rationality*. So the rational examination of reality turned out to be the major priority for the modern science during the centuries that followed.

The Dilemmas of the Enlightenment and the New Social Model

The epoch of Enlightenment is now referred to as a period of total transformation in the "civilized world". That transformation ran at all levels of man's being but two were the major spheres by which the new model of society was

[15] *Ibidem*, p. 54.
[16] *Ibidem*, p. 55.

actually recognized. Those were the spheres of the politics and knowledge. The first one demanded a solution in terms of division and exercise of political power and through the second one such a solution had to be proposed.

Under those circumstances the new political theory faced the great challenge to substitute the core of the long-established postulates of the canonical doctrine and to justify the substantial parameters of a new law which had to serve both as a rational standard for a particular rule of conduct and as a valid program ensuring the right development of the whole society. The ancient and the medieval philosophy had never confronted with such a dilemma. The defenders of that philosophy extracted the notion of law (the objective right) from a specific idea, according to which a predetermined and a superior will existed and stood as external both towards the "biological" and the "social" man. By rejecting the predeterminism however, the criteria about what was objectively right (i.e. what was the objective right) became controversial. Then the new political science fell into a situation, in which it had to propose an answer to an insurmountable question: *What could be regarded as an objectively right both for the society and for man*? The endeavors to satisfy the answer to this question actually led to the formation of two separate dimensions about the idea of objective right – the objective right towards society and the objective right towards man[17]. The aspiration for unifying those two dimensions is in the core base of the political and legal order of the contemporary world.

From the knowledge perspective the free man of the enlightenment was confronted with another dilemma. The formalism of the scholastic doctrine was replaced by a practical empiricism and the unquestioned confidence in

[17] Because in most of the European languages the meanings of those separate dimensions collided in the word right (consider for example these instances: French – *droit*; German – *recht*; Russian and Bulgarian – *право*), a specific explanation had to be added. That is why the terms *objective* and *subjective* had to be imposed in the legal-theoretical language in the next few centuries, so the great demands of the new legal theory were satisfied. And as it now well known probably the pick of this discourse could be found in the European theory of nineteenth and early twentieth century when the meanings of those conceptions were explored in great depth. Those discourses however never got out of the monistic paradigm about law, which I think is still predominant in the continental (probably not that much in the Anglo-Saxon) doctrinal beliefs. According to those beliefs the objective right and subjective rights are different but interrelated and correlative components of one and the same thing. In English, however those ambiguities are not that sharp as in the other European languages. Probably this is one of the reasons why that kind of legal dualism is not considered that important in the common law legal doctrine. The term *law* there comes from the old English and means *something that is laid down* (see E. Pattaro, *op cit.*). This meaning is closer to the term *positive law*, rather than the term *objective law*. So that is why in the common law tradition we could find a *rights discourse* but not a *subjective – objective right* discourse.

the providence by an unlimited rationalism[18]. This imposed an understanding that anything observable could be examined and hence explained in its real, natural and ultimate state. This idea gave birth to a new scientific paradigm according to which the objective world manifested itself as a mechanical system, which was subject to investigation, description and realization by means of practical observation and rational criticism[19]. Within the social knowledge framework this conception created the idea for the *natural state of society*, by understanding of which one would be able to reveal the true objective right (what is right from an objective point of view).

The Enlightenment dilemmas created the real rights discourse, but although that it provoked an intellectual debate in all the European societies their historical as well as institutional specifications modified it to produced relatively different consequences. The Continental Europe took the course of a political radicalism and an ultimate rationalism. By contrast British philosophy developed a practical utilitarianism, liberalism and moderate empiricism. All this created considerable differences within the political and legal theories which in turn, reflected on the legal doctrine of the modern legal systems.

The Rights Foundations in the Idea of the Social Contract

The paradigm of the natural state of society in its own turn created the whole new discourse in the framework of the political philosophy – the *social contract discourse.* This theme was thoroughly investigated both in the Anglo-Saxon as well as in the Continental political thought. The first proponents of the social contract theories in England were Thomas Hobbes and John Locke and their successor and modifier at the continent was mainly Jean-Jacques Rousseau followed by Immanuel Kant. In all of their instances the social contract theories strived to reveal the true and initial state of man and the origins of his necessity to live in a society.

Both for Hobbes and Locke the social contract had to confine the unlimited and egoistic aspirations of biological man. So they conceive of rights as negative freedoms which any person had on his disposal after the social contract had been validated. This conception of rights is absolutely vital in the common law tradition. It was later embraced by Thomas Pain under whose

[18] In the legal-philosophical discourse this dichotomy later gave birth to the debate between legal positivism and the new theory of natural law.

[19] This paradigm is now frequently seen as produced by Descartes', Galileo's and Newton's theories. See: F. Beiser, *The Enlightenment and Idealism*, [in:] *Cambridge Companion to German Idealism*, Cambridge 2006, p. 19.

influence it had been taken into USA and built in into the American Constitution[20]. In a certain sense the *negative freedoms* idea is the true alternative to the continental concept of subjective right.

Unlike his English antecedents Rousseau didn't see man in an egoistic light. Rather he was convinced of the idea of the *virtuous man*. He thought that the natural state of man is a state of "love towards oneself" and "charity [towards others]"[21]. According to him the social contract didn't have to be validated for the limitation of man's aspirations. On the contrary – it had to create the practical possibility man's virtues to be materialized. Under this kind of reasoning rights were seen as possibilities or means for accomplishing certain ends within the social prosperity. Later on in the context of codification and within the process of the "official reception" of the roman private law Savigny and Iering would bring up the problem about the reasons of such possibilities. This is how the debate between the *will theory and the interest theory* would come into being.

From a formal perspective both the English and the Continental theories of social contract adopted similar approaches in terms of rights reasoning. When it comes to their functions however, large differences are revealing to us. The practicability of the English philosophical thought and the strong connection of the common law with the English traditions restrained the heavy wave of the total changes which blasted the Continental Europe during the Enlightenment. The Common Law didn't need a new perspective for its future. It was living enough so to continue with the regulation of the social relations such as they were. On the contrary – the strong influence of *ius canonici* in the continental legal systems raised a radicalism, which led to the necessity of overall renovation of the existing legal model. Those divergences in the Common Law and in the Civil Law discourse resulted in different doctrinal conceptions about rights. In the Common Law doctrine the idea of a right is still relevant to the idea of not-intervention in the legal subject's personal sphere, by which the boundaries of its freedom are marked. In the civil law doctrine on the other hand, the concept of a right refers to the concepts such as possibility or power, which give the legal subject a capacity for accomplishing a certain future goal by upholding a certain affiliated interest.

[20] T. Campbell, *op. cit.*, p. 7.

[21] С. Йотов, *Въведение във философия на правото*, София 1995, p. 58.

Kant's Ideas as a Philosophical Base of the Theoretical Concept of Subjective Right

Kant's philosophy is often presented as a "last resort" for the failing scientific project of the Enlightenment. But to make it such so, Kant had to reject everything that his antecedents accomplished in their works and to start literary from the very beginning. From a political-theoretical perspective this means that Kant had to find completely new standards about man's natural state so to be able to propose a satisfying explanation of his social being. The previous attempts on this always failed because their outcome definitions faced the criticism in terms of the validity standards about their propositions. Aware of that danger Kant created a strategy, by which he wanted to prevent his proposals from the inevitable skepticism of the modern science. In the very core of this strategy Kant put the idea about a *constant of the human mind*, which had to guide him when building his moral and political philosophy.

In this way the concepts of the *pure reason* and the *practical reason* were invented. By the first one Kant defined the initial and the primary ability of human mind to percept and perceive and by the second one – the initial and the primary ability of human mind to follow a certain rule of conduct. The real constant was the pure reason upon which a perfect and a complete philosophical system had been constructed. The idea of the practical reason however, Kant put in the core of his moral philosophy, which in turn gave the origins of his political philosophy.

By exploring the idea of the practical reason Kant invented another basic conception of his system, which he called a *categorical imperative*. The categorical imperative represents itself as a universal moral principle governing the behavior of every rational being, having a capacity to percept and perceive. This behavioral standard never referred to any metaphysical ideas like virtue or justice. It was simply a formal criterion by which Kant proposed an explanation of the necessity that pushed man into his social being. The explanation for Kant was simple – for to be able to live in a society man had to confine his free will (which was unlimited in his natural state) with others' free wills. The categorical imperative gave an answer to the question why this free wills confinement was inevitable. It was inevitable not because man was egoistic or virtuous (as Hobbes or Rousseau believed) but because a practical necessity imposed a primary duty towards others. Such a duty according to Kant formed the core base in every single society.

I think it is clear now that in the very base of his moral, hence political philosophy Kant grounded the concept of a duty. This concept actually

made it possible any other substantive relations between men to be further reasoned. This is especially of great importance when it comes to the idea about rights.

As probably already noticed Kant gave a great weight in his philosophy to the idea *of free will*. The limitation of the free will is actually what made man a social being. The state of the unlimited will however, also had a certain definition and this definition was *freedom*.

The idea of freedom similarly to the free will idea had a great importance in Kant's philosophical system. It actually had two relatively different discourses there. The first one qualified it as an opposite of the limited will of the presocial man and the other one – as a certain and an affiliated capacity within the political union that had been already constructed my means of the categorical imperative[22]. That second dimension of freedom is however essential in the context of the rights discourse. Just like most of the other ideas in Kant's philosophy the idea of freedom had a formal nature too. Kant defined it as *a limitation of the possibility to be bound by someone else's choice*[23]. This simple definition is probably the best representation of an idea that gave birth to a whole set of theories striving to explain the substantial character of man's political – hence legal freedom. That understanding became an elegant theoretical base for the modern concept of subjective right.

Concluding Remarks

The concept of subjective right still takes a considerable part in present day legal philosophy. This unfading interest had been mainly modified by Immanuel Kant's philosophy. But although his elegant ideas refined most of the findings of his antecedents they never got out from the conceptual framework of rationalism which main focus had always been on the reasoning of the external world trough the idea of the natural state of the mind. By following this fascinating idea the political theories of the Enlightenment created the natural rights movement, which main proponents put all of their efforts to impose an understanding of the law (the objective right) as a human creation. In that great endeavor they unquestionably succeeded. The rationalism of the Enlightenment liberated man from the idea of the predeterminism. By that however it never satisfied the problem of the practical standards to allow an objective but external estimation of a human behavior. So the rational project

[22] F. Rauscher, *Social and Political Philosophy*, [in:] *Stanford Encyclopedia of Philosophy*, www.plato.stanford.edu/entries/kant-social-political.

[23] *Ibidem*.

of the enlightenment failed to satisfy the practical requirements of a possible political model. This is the main reason why the positivism succeeded in the next stage of the evolution of the European social and political ideas.

Abstrakt
Filozoficzne źródła koncepcji prawa podmiotowego

Pojęcie prawa podmiotowego jest jednym z fundamentów, na których powstała ogólna nauka o systemach prawnych prawa cywilnego. Na początku postawiono tezę, że dzisiejsza koncepcja prawa podmiotowego powinna być pojmowana jako wynik procesu. W końcowym etapie tego procesu należy porównać dwie koncepcje filozoficznej natury prawniczej. Pierwsza odzwierciedla punkt widzenia społeczeństwa, a druga – indywidualny. W rozważaniach wzięto pod uwagę podstawowe elementy ideologii chrześcijańskiej, idee oświecenia oraz koncepcję I. Kanta, które uznano za prawdziwą podstawę współczesnej koncepcji prawa podmiotowego.

Literature

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