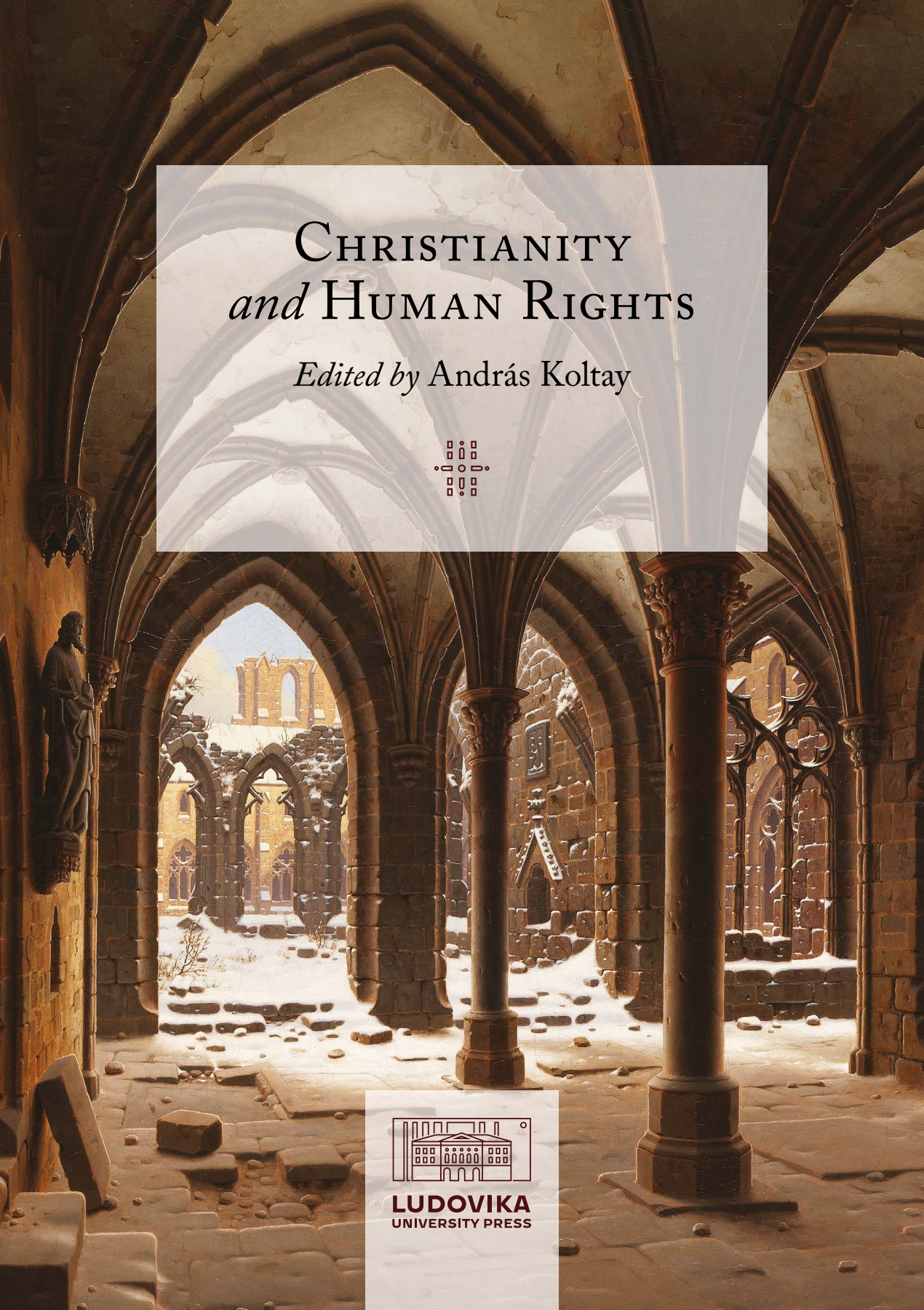
Christianity *and* Human Rights

Edited by András Koltay



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Perspectives from Hungary

Edited by

András Koltay

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Contents

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Introduction

In Europe, Christianity played a crucial role in the development of the concept of freedom. However, the creation of the human rights construct has primarily been formulated as an achievement of the Enlightenment, viewing the ideals of Christianity as a spiritual current and social organising force that restricts the freedom of the individual. It may be worth considering the question of whether individual freedom and the interests of the community, the ideas of 'liberal freedom' and 'Christian freedom', are indeed opposites, as they are often portrayed in public debates. While recognising the importance of Christianity, Europe's constitutional systems operate on the principle of religious neutrality. The religious neutrality of the state is an indisputable achievement of recent constitutional development, on the basis of which the state sphere and churches operate separately. The state does not favour any particular religion or worldview, but respects the various diverging beliefs within society, by ensuring the equal status of the churches and allowing individuals to practice their religion freely, thus securing the freedom of its citizens and the communities they create. This is a self-evident feature of modern democracies, which are built on guaranteeing fundamental human rights.

In general, the state cannot and may not be value-neutral: When it promotes culture, maintains public service media, prescribes the celebration of certain historical events or organises public education, it decides on its content, and always applies certain values. These decisions are not made on a 'neutral' basis, regardless of their religious content. If we completely banish religious-based considerations from the values taken into account by the state, we will ultimately reduce the pluralism and diversity of the values represented in public life, thus narrowing the choices of the individual. Prohibiting religious beliefs from the public sphere as a whole is not possible and would seriously damage the foundations of modern constitutionality. According to the philosopher János Kis:

> The modern, secular philosophy of morality was created in no small part as a translation of the Judeo-Christian religious tradition into secular language, as a secular interpretation and critique of it. Thus, if a religious statement fails in the filter of the accessibility test [which thinks non-believers can be accepted], it is not because of its religious nature *per se,* but because of some other characteristic that is not necessarily related to, but not alien to, religiosity.[1]

Some authors hold that the foundations of human rights and the recognition of the equal dignity of all men are rooted not only in the ideas of the Enlightenment but also in Christianity and the teachings of Jesus Christ. Recently, a number of definitive works have also been published that find the foundation of human rights

[1] János Kis, 'Az állam semlegessége. Újabb nekifutás', *Fundamentum* no 3 (2011), 18.

in Christian doctrines.[2] Larry Siedentop argues that the central idea of human rights, of the individual as a value, stemmed from Christianity, and it is no coincidence that reverence for it spread only in the Western world, which is traditionally Christian.[3] In his posthumous book, the self-declared atheist Ronald Dworkin expressed the idea that religiosity is possible even without faith in God and that acceptance of the basic values of religious belief is independent of what we think of God.[4] We might add that no matter what we think of these interpretations, we can conclude that there is no need for a constant clash between religious beliefs and secular arguments, and in fact, modern secular democracy and fundamental rights concepts often overlap with arguments based on Christianity.

In the 2004 debate on the Treaty establishing a Constitution for Europe (which was to remain unratified), the European Union decided not to include a reference to Christianity in the preamble to the document, and a similar reference in the Fundamental Law of Hungary of 2011 generated vociferous European debates. However, in 2015, in *SAS v France,* the European Court of Human Rights considered the norms of Europeans living together to be the criteria that may justify the restriction of fundamental rights, even if it may restrict the religious freedom of Muslims, while in 2019, Ursula von der Leyen, the then newly-appointed President of the European Commission, created the portfolio of Commissioner in charge of 'protecting the European way of life'. These norms of 'living together' are in many respects determined by Christian culture, and the representation of the Christian order of values can hardly be left out of such an imagined catalogue of the elements of the 'European way of life'. In any case, as a result of criticism, the name of the portfolio was immediately changed to 'For Promoting the European Way of Life'. However, it is questionable whether Christianity is a prominent part of the officially acknowledged European way of life today, and if so, in what respect (religious, political or cultural).

The essays collected in this volume clearly show that the intertwining of culture, values, law and religion, especially Christianity, constitutes a special area of legal studies, and this is a research field which requires much fuller exploration. Although the authors each analysed this very complex correlation from their own points of view, it can be said that most of the papers focus on the legal questions raised by liberties, such as the right to human dignity and to the freedom of expression, religion and thought. The very first essay, by András Lánczi, is a comparison of the ancient and modern concepts of freedom, and the modern tendency towards totalising politics. He argues that the ancient solution to the problem of how to reconcile the command of Law and freedom of man was based on the classical concept of Nature, and that freedom was derived from man's accommodation

[2] Michael J Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge: Cambridge University Press, 2006).

[3] Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (London: Allen Lane, 2014).

[4] Ronald Dworkin, *Religion Without God* (Cambridge, MA: Harvard University Press, 2013).

to the laws of nature, while the Christian theory rested on the free will of man and the fight against sin, whereas the modern idea is founded on the political rights of man, ensured by supranational conventions and treaties. The ancient and Christian understanding regarded the Law as absolute, while the modern concept removed first God, then natural laws from the concept of freedom, and subjected it to constant political debates.

Still applying the method of historical comparison but focusing more on Christianity, Ádám Rixer's essay examines the notion of Christian liberty. After cataloguing its traditional legal and theological aspects, he formulates a more dynamic, process-like concept, showing that this new legal notion of Christian liberty is established on a sociological basis that refers not only to legal norms or decisions but also to the practices of different authorities beyond those legal sources. The first part of Balázs Schanda's paper provides insight into the evolution of the doctrine of the Catholic Church on the freedom of religion, while the second section outlines the chances of a culture originating from Christianity in an age when this faith is diminishing in society. The Biblical vision of the human person has determined the Western world: Man and woman were created in the image of God, and their free will had a unique dignity. Although traditionally the rationale of the State was to serve the common good, the content of this doctrine has evolved over time: Nowadays we regard human rights and especially religious freedom as inherent parts of the common good. Zsolt P Balogh argues that the system of human rights is similar to a system of religious beliefs and that they belong together as the basis of human rights originates in the freedom given by God. Human dignity is embedded in all rights, and the Christian idea of freedom supports human rights, which are naturally inseparable from individuals. After investigating privacy and the rights relating to personality, and dealing with the problem of equality, he concludes that human rights must also cover some social rights, based on the Christian approach. Lóránt Csink analyses Christian liberty from the view-point of the Bible, and constitutional liberty from the perspective of classical liberal doctrines, not presenting either the liberal or the biblical standpoint of human nature in its entirety, but comparing the source, content and aims of liberty.

The next group concentrates on the problem of conscience. Gergely Deli explores the question of the grounds on which a Christian may sue in his own interest, and whether it would not be better to mildly renounce that right. He addresses this problem with the help of the instruments of the evening examination of conscience, and outlines an 'emotional', intent-oriented constitutionalism, founded on human salvation and focusing on vices, instead of mainstream, individualistic, consequence-based and rational constitutionalism. Zoltán Balázs underlines that the doctrine of human rights is not a moral or philosophical but a political issue. After introducing the concept of political doctrine, he traces how this doctrine was formed within specific political contexts. He argues that this 'right' has long been firmly connected to specific (mostly ecclesiastical) institutional forms (universities,

legal processes), and that during the robust democratisation of the Western world, individuals have become the institutional 'forms' of these rights. The massive political power of human rights defence movements and organisations confirms the political nature of their underlying ideological commitments.

Some more specific issues of human rights are elaborated by Tamás Nyirkos and Ferenc Hörcher. Nyirkos investigates the notion of human rights as an object of faith, religion and secular religion. While the extraordinary vagueness of all such claims and the terms contained therein make it impossible to draw any analogy with religion in general, several features of the theory of human rights show similarities to those of certain traditions which are usually called religious, and mostly Christian. Hörcher's essay aims to introduce the proposal of Pierre Manent to reconstruct natural law, mainly in his book on *Natural Law and Human Rights*. Hörcher demonstrates how Manent starts out from the obvious contrast between the human rights discourse in a European and a non-European context, then historically reconstructs the early modern rise of the human rights discourse. Manent's proposal introduces his view of politics, based on the dialectic of command and obedience (pleasure, use and honesty). Hörcher supports Manent's proposal to revive the Aristotelian–Thomistic practical wisdom and the reasoning based on common good, confining the political use of human rights discourse to its proper territory.

Embarking on a slightly different trajectory, Attila K Molnár focuses on the emergence of the notion of disobedience not as a political or moral opportunity but as a moral duty. The post-war political and moral imagination has emphasised – alongside the notion of natural law – the moral (and even legal) duty of disobedience when confronted with an unjust law or order. Although in political thinking, the mainstream problem was how to cope with the rebel as an eternal danger for the political community, the history of Christian moral thinking, centred on the idea of conscience, produced the opposing notion of the duty of disobedience. Norbert Kis sketches how pre-Christian people met the Christian religion, then suggests the causes of the weakening of Christianity. While Christian freedom remained a constructive power in the age of the Enlightenment, the first attempts at secularisation that had started by that time have disrupted the organic tissues of Western culture for the last two centuries. He argues that, after a desperate two-hundred-year-long period of 'quest', the revitalisation of the Christian religion could provide a counterforce to the disruption of Western communities. Gyula Bándi, focusing on the teaching of the Catholic Church, highlights that the international community in the past decades has been struggling to establish the right to environment officially into the body of human rights, either on its own or in constituents. Although environmental protection is the basis and condition of everything – including human rights – it is also deeply based in Christianity and has been part of the message of the Church for decades. It was also inevitable that human rights and the environment should come together in the same teaching. As János Frivaldszky explains, at the time when the Universal Declaration of Human Rights was drafted, it seemed neither possible nor

necessary to establish a philosophical anthropological definition of the human person whose rights were proclaimed by the Declaration; nowadays this is inevitable. The Catholic natural law tradition has always proved to be an effective aid in this process, when, through upholding rights, the human person needs to be protected in ever new bioethical situations.

The final part of the volume sheds more light on Christian values. András Zs Varga provides an overview of the basic international human rights instruments on marriage and family. He reviews the extent to which marriage and the family can be seen as essential components of European culture: Starting from the conception of marriage in the Old Testament, Jewish and Roman imperial law, he presents the contemporary universal and domestic ecclesiastical conception after reviewing the rules of the Catholic Church, which conveys these values. Defending human rights and common values can be difficult, however. Kálmán Pócza's study identifies the causes that led to one of the greatest crises in the history of the German Federal Constitutional Court, and explains why the position of the Court was (temporarily) destabilised by the issue of the Crucifix in the classroom and the question of freedom of religion despite the fact that this institution and its decisions enjoy a high level of public and political support among German citizens and the members of the political elite. Finally, as András Koltay puts it, expressions of religious beliefs are simultaneously protected by the right to freedom of religion and expression. Furthermore, freedom of expression also includes the right to remain silent. The question of whether making a cake constitutes speech and whether the baker may refuse to do so on the grounds of freedom of religion has been raised before several courts. This very complex problem involves issues including freedom of religion and expression, ensuring equal treatment, protection of human dignity, freedom of expression and religion.

In our opinion, the careful examination of the issues raised briefly above is necessary, not only to understand the past but also to make well-informed decisions for the future, in any European country or in the European Union operating as a community of nations. Enriching the discussion on human rights is the most important mission of the Hungarian law journal *Acta Humana*. We have devoted two volumes (3 and 4 of 2020) to articles examining the relationship between Christianity and human rights. During the editing process, after reading the manuscripts, we decided that the texts submitted for inclusion in the journal were suitable for contributing to a broader scientific discourse outside Hungary. In the spirit of this, we are launching this volume, trusting that the readers will find in it writings that are of interest to them, and will, we hope, simultaneously stimulate them to engage in the debate.

Budapest, 31 January 2021

András Koltay
Editor

Freedom and Law

The Law of the Ancient, the Rights of the Modern

András Lánczi

The concept of freedom, like many other concepts and ideas, was developed or invented by modern liberals. Anyone may attempt to appropriate or absolutise an idea, yet it will not be theirs. Every concept and idea about something will always have rivals and critics. There were such opponents in the past, just as there are today. Ideas of freedom have been formulated within ancient Greek, Roman and Christian philosophies as well as modern human rights doctrines. They are, in part or in whole, in dispute with each other, they always have been, because freedom, like other concepts, needs a point of reference: It may be God, Nature, or individual human reason. Ultimately, even the simplest human questions are surrounded by the totality of existence; that is, one cannot be answered unless the respondent, openly or implicitly, takes a stand on the simplest or first questions that man has always asked himself. Today, many profess to believe what modern, that is empirically based, science says. It is as if modern science and truth are in complete conformity.

Modern science, however, has consciously renounced two things: One is the requirement to be guided solely by truth, instead it may be guided by usefulness or by an ideology, and the other is the ineradicable link between knowledge and the morality of human coexistence. Because of this, modern science has abandoned its understanding of the whole, relativised knowledge, shattered the whole or the completeness and politicised human coexistence by minimising, if not downright eliminating, private life by turning all human phenomena, actions and thoughts into public matters. Despite the idea of modern freedom being tied to the individual, in fact the freedom of the individual, in a moral sense, as opposed to the rights of political or physical freedom, is narrowing, while liberals seek to expand the scope of political freedom in very particular directions, such as gender rights, the naming of desire-driven or purely subjective legal bases, or the rights of natural objects. Man lives in a social mass, mass democracy, mass production, mass culture, in the all-politicising-propagandist-ideological (non-truth-seeking) framework of modern democracy, as well as in the omnipotent hope of technology.

In the midst of these conditions, the individual no longer reigns over his own world; moreover, it is not even desirable any more. More specifically, the freedom

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of the individual is formal, in the sense of content – because of the omnipotence of science and democratic propaganda – while in fact, the individual has become a mere tool of the public. I call this set of circumstances a modern totalising trend. No matter what modern political system we are talking about – Soviet or American – we can talk about a mutually exclusive version of the totalising trends. The main tool of the totalising trend is the idea of modern law, both politically and in terms of social organisation and administration. As for the rule of law in politics, it is the same model as that of managerial governance in the economy and administration. There is no need for a leader in either sphere, only controllers following algorithms. We live in 1984, whether we like it or not. When we talk about freedom today, we are thinking almost exclusively of a totalising political freedom that promises and provides comfort and boredom rather than freedom. It is in the light of these thoughts that I will examine the concepts of laws, law and freedom.

I Freedom ancient and modern

As the idea of the modern state evolved, of the state as the ultimate safeguard, guarantee, protector and distributor, privacy became increasingly distorted, moving toward its destruction. Increasingly, the public envisage freedom as something guaranteed by the state, rather than based on individual decisions. It is as if the nature of freedom is inherently political and not metaphysical or transcendental. It was at this point that the two paths of modernity diverged sharply: The modern materialist, anti-metaphysical idea of human rights and the classical (antique and Christian or religious in general) concept, which takes order, God and Nature as the starting points to determine man's position, opportunities and objectives. No compromise is possible between the two perceptions, at best a short-term pragmatic coexistence or a stalemate. Modern democracy is said to be able to accommodate these two completely opposing ideas. Certain trends in the modern conservative position serve this purpose, but it does not equate to the overall conservative view. This attempt at consensus currently legitimises the rule of modern Western civilisation worldwide. The globalising or westernising civilisation of today is, in fact, the testbed of American historical experimentation: Is it possible at last to eradicate political differences arising from ethnic, as Americans say, racial, religious and cultural affiliations? This has not been the case to date; in fact, economic expansion and the greater convenience that comes with it hold the American historical experiment together.

According to the ancient Greek and Roman views, it is not realistically conceivable to eliminate the differences between people: Men and women, lords and servants, leaders and followers exist by nature. No-one can change this. This is the basis of the political philosophy of both Plato and Aristotle. Another basic premise of theirs is that man is an intermediate being; that is, he is able to perceive

the divine, he is able to reason and think, but at the same time, man has animalistic, instinctive qualities that are difficult to control by reason. The third precondition of human life is that man is a communal being; therefore, all human life is regulated by communal customs and regulations – legal and moral norms – that determine the way of life that a community lives. Whatever lifestyle a community leads, it attempts to build inner peace, which is hampered by the origin-, belief-, customs-, wealth- and interest-based relations within the community and by individual beliefs that constantly produce fractures and cracks in the community. Forging community cohesion is therefore a constant task within the community. The community needs to have self-awareness, purpose and a system of mechanisms, as it selects its leaders and makes its decisions.

If these conditions are laid out, the antique notion of freedom becomes immediately understandable. Freedom is never of a political nature but is a matter of metaphysical and moral perfection and the inner perfection of the individual ('the deficiencies of nature are what art and education seek to fill up'),[1] which allows the internal unity of the community, its goodness and the possibility of a good life to develop. It is not the political system that validates a person; it cannot ensure that he leads a good life, but, inversely, a virtuous person will be able to form a good community. The opposite is true of today's perception: If the political system is good, then the life of the individual will be good, whatever the concept of good means here. The ancients made education one of the most important tasks of the state, because the character of the state depends on the education of its citizens or subjects. There are as many forms of state, as there are lifestyles, depending on the nature (democratic, aristocratic and so on) of the education the people receive.

It is no different with Plato; there are only differences in emphasis, methods and tools. While Aristotle's aim was the good life, for Plato justice was the main goal when seeking the best political order. Because Aristotle's approach was more realistic, the main goal for him was to create and maintain peace; for Plato, it was the development of fair laws, whether it be in the best existing state *(The Republic)* or in the best possible state *(Laws).* Of course, according to both views, the greatest goal of political action is to make good laws, which requires a political philosophy. The two perceptions also share the belief that freedom is not political in nature. Freedom is a private matter, because it is based on self-control and not on the nature of public power; according to Plato, even in the fairest state, there are rulers and the ruled, so everyone has to live a life according to their nature, which implies that in doing so someone's life will be the most satisfied. Is this freedom? Today's view would answer this with a definite no, but the ancients answered in the affirmative, although they would not use the word 'freedom' here at all.

[1] Aristotle, *Politics.* Transl. by Benjamin Jowett (Oxford: Clarendon, 1885), 1337a.

According to the ancients, the greatest freedom is to defeat ourselves, to resist the destructive forces of our own nature. Freedom was never an abstract concept for the ancients. It is not freedom that is the starting condition for a good life, but a virtuous life, one which can be achieved through education, because everything that exists must be viewed from the perspective of its purpose. An excellent example is the relationship between virtue and freedom in Aristotle's concept of 'leisure'. All life, Aristotle argued, takes place in choices between goals:

> [T]he actions of the naturally better principle are to be preferred by those who have it in their power to attain to both or to all, for that is always to every one the most eligible which is the highest attainable by him. The whole of life is further divided into two parts, business and leisure, war and peace, and all actions into those which are necessary and useful, and those which are honourable. . . . [T]here must be war for the sake of peace, business for the sake of leisure, things useful and necessary for the sake of things honourable.[2]

Peace and relaxation, tranquillity and leisure. In Greek, the word *'scholē' (σχολή)* is used (see Josef Pieper),[3] which denotes the time that one uses at one's discretion. A free life is the opposite of that of a slave, who has no spare time. One who lives for others in every minute of their life cannot be free. However, in a community like the human community, we are constantly living, acting and thinking for other people, because we are moral beings. Of course, the extent to which we do so is by no means irrelevant. The slave has hardly any spare time, the free man can have essentially any length of it. It cannot be denied that most people would not only choose the latter but would be willing to sacrifice the spare time of others for their own at any time.

According to the ancient concept, nothing is for itself, everything is for something else: Woman is for man, the servant is for the lord, war is for peace, the cause for the effect and man is for the gods. Modernity began when the original meaning of nature *(physis, φύσις)* was replaced by a new concept of nature, the idea of purpose-causality was gradually replaced by analysis, the methodology of fragmentation of the whole (René Descartes, *Discourse on Method*), which had culminated by the twentieth century in deconstructivism. There is no whole, no justification for philosophy, and theology is an internal affair for religious people. The scientific focus was directed at the cause-and-effect relationship. There is a reason for all of this; the effect or the effecting cause replaced the purpose-cause. Behind this, a huge intellectual rearrangement took place. Slowly but surely, the classical conception of nature was classified as obsolete, replaced by the principles of the new science – empirical observation, a material approach, mathematical modelling, the prioritising of logical constructions over rhetorical approaches.

[2] Ibid. 1333a.

[3] Josef Pieper, *Leisure. The Basis of Culture* (San Francisco: Ignatius, 2009).

The idea of modern freedom was made possible by a radical transformation of the concept of nature: The conditions for the idea of modern freedom were economic development (Blaise Pascal did not waste a single word on the economy in the seventeenth century), which began with John Locke's justification of unlimited acquisition (that is, there is no objective argument to justify how much material wealth one deems necessary to sustain one's life), the detachment of law from the concept of laws whereby truth and justice were deliberately separated from each other and human law (positive laws) became a source of legitimacy and rights, as opposed to divine and natural law. The greatest influence of the French Revolution can be understood as this. In short, the source of freedom is neither divine, nor transcendental, but depends on the decision and support of members of the human community. Human rights are what human rationality can legislate, backed by the power of the democratic majority. The essence of freedom is political rather than divine or natural. This holds true, even if the early modern conception of freedom was rooted in modern natural law by Thomas Hobbes, Locke, Jean-Jacques Rousseau, in part by Georg WF Hegel, and least of all, Immanuel Kant.

It has long been noted that proponents of modern human rights teaching are simply unwilling to deal with earlier concepts of freedom and classical human rights. They are already 'beyond' these old things. Conversely, those who profess the classical sense of natural law typically make systematic attempts to address modern concepts of human rights and freedom, as they see a challenge in them. This could be termed *progressive asymmetry,* but the point is that modernist concepts are constantly striving for a radical transformation of a culture that ends in self-abandonment and a form of universalism in which there is only one dogma (positivist human rights) and its logical protection. The essential difference between these two concepts has been known and reflected on for quite some time.

Pál Kecskés's concise paper, *Természetjog,*[4] describes the difference between classical natural law and modern common law, thinking with such conceptual precision that it is still a compulsory reading even today. Kecskés's succinct formulation identifies the different perceptions of the relationship between law and morality in natural law approaches and modern human rights thinking, the current interrelationships between freedom and law, the conflicts between individual and community rights, and the philosophical depths of this permanent and volatile difference. The classical unity of thought encompassing laws, the law and freedom disintegrated with the advent of modernity. The hierarchy of laws gradually evolved into a focus in natural law on eternal and divine laws, then slowly, after the French Revolution, the concept of natural law also weakened, and positive law became the expression of laws. While the eternal and divine laws are one, natural law already entails natural laws, and today the number of laws is, in principle, infinite. From the one God many, many religion-substituting gods emerged; the concepts of laws

[4] Pál Kecskés, 'Természetjog', *Magyar Szemle* (May 1940), 321–328.

and the law, the law and morality, and politics and morality have diverged; a gap appeared between past and future, virtues were replaced by values, and man or the person became an individual in modern understanding. All of this has been seen as a positive sign of progression.

How was the ideal of modern rights (plural) created from the classic *jus* (singular)? Answering this question is the key to understanding the difference between the old and modern conceptions of freedom. The process of divergence can be traced from the mediaeval Franciscan debates on the nature of property to the arguments against the natural justification of private property, which culminated in Pierre-Joseph Proudhon's and Karl Marx's philosophy of the abolition of private property (in practical terms, of course, the timescale extends to the communist regimes of the twentieth century). The seriousness of this issue demands an examination of the philosophical-Christian judgement of free will, the focus of which is on Augustine of Hippo's writing on free will, Thomas Aquinas's *Summa Theologiae,* and Pope Leo XIII's encyclical on freedom which will be drawn upon for examples. The classical definition of freedom can be traced back to ancient philosophy; the Christian concept evolved from this, first absorbing the thoughts of Aristotle, and second the thoughts of the Stoics. Saint Thomas's constant references to Aristotle are known even to the less philosophically educated, but perhaps it is less known that there was a correspondence between Saint Paul and Seneca.[5] That there indeed was such a dialogue reinforces the need for an intellectual connection between the Stoic law and the Christian concept of freedom, which means that it is justified, along with other arguments, to show the continuity between the ancient and the Christian concept of freedom.

Law or *rights* – this difference between singular and plural reveals the fundamental difference between classical European (ancient and Christian) rule-making and the concept of freedom, as well as the tension and even conflict between them. In other words, it encapsulates the contradiction and sometimes struggle between the classical and modern concepts of Law – natural law and positive law. All sources of controversy arise from differences between judgements of the concept of rules. In European culture, as in any other culture, the concepts of rules or the right way describe what can and must be done if we want to stay alive or if we want to live well. It is only in the European culture that the concepts of 'how one must live' and 'how one ought to live' have divided. The 'ought' expresses that human rationality is able to shape what is given by nature, or to deviate from the experience we have lived so far, which may be full of trouble, war, insecurity, poverty, or as the Greeks expressed it, the condition of *statis* (in ancient Greek, *στάσις*) threatens,[6] a kind of chaos that people cannot control, even though it is caused by people.

[5] Claude W Barlow (ed.), *Epistolae Senecae ad Paulum et Pauli ad Senecam* (Rome: American Academy in Rome, 1938).

[6] For a detailed description of the phenomenon, see Thucydides, *The History of the Peloponnesian War* (London: Penguin, 1972), Book III.

II Saint Augustine on free will

The philosophical starting point for all later Christian concepts of freedom is Saint Augustine's book on free will, from which branched Pelagius's discussion with Saint Augustine. The Augustine–Pelagius debate is the first metaphysical debate on freedom. This was followed by a debate later, toward the end of the eighteenth century, between Edmund Burke and Thomas Paine on law, freedom and the limits or infinity of human rationality. In the third part of Saint Augustine's book, he compared the nature of a stone and the will. A stone cannot prevent itself from falling downwards, but there is nothing to prevent the will from following higher things, and it will only love lower things if it so wills. In other words, 'the movement of the stone is natural, but the movement of the mind is voluntary'.[7] The movement of the will is controlled by man, that is, a free being.

The Christian concept of freedom is the very first question of Christian philosophy, and may be examined within the question of free will. The concept of metaphysical and/or religious freedom differs from most modern notions of freedom, in that its starting point is different: For the modern man the basis of thought or rationality is the individual, while in the metaphysical-Christian concept, it is God. These two are in irreconcilable contradiction, although this does not mean that the two concepts can always and in all cases be clearly separated. This is because both God ('Why, Lord, do you stand far off? Why do you hide yourself in times of trouble?')[8] and Evil are hidden (since this is their nature); they do not show themselves to earthbound human nature. The Fall expresses the real existence of evil; it also refers to the free will of man, which makes man a moral being, one who can choose good or evil. The basis of all freedom, metaphysical and political, is the free will of man *(arbitrium liberum),* however, its classical-Christian bed-stone is the evil or bad.

Saint Augustine began his paper on free will *(De libero arbitrio),* written in dialogues, with the following sentences: 'Evodius: Please tell me whether god is not the author of evil. Augustine: I shall tell you if you make it plain what kind of evil you are asking about. We usually speak of "evil" in two ways, namely when someone has (a) done evil; (b) suffered something evil.'[9] The opposite of evil is good. According to Saint Augustine, the source of this is God. If one accepts that God is good, (what else could He be?), a field of thought emerges in which the relationship between evil and good forms the basis of the first or metaphysical opposition. God cannot want evil – yet there is evil in the human world. How can this be? Saint Augustine turns to circumstantial evidence: One can only cause

[7] Augustine, *On the Free Choice of the Will.* Ed. and transl. by Peter King (Cambridge: Cambridge University Press, 2010), 74.

[8] Psalm 10:1.

[9] Augustine, *On the Free Choice,* 3.

evil if one does not learn to be good. The concept of learning becomes a central argument. Here, of course, we do not see a foreshadowing of the principle of modern Enlightenment, but the problem that knowing good presupposes that good is absolute. Without knowing God, the possibility of avoiding evil becomes very uncertain.

At this point, Saint Augustine introduces the concepts of temporal and eternal law. In his argument, he shows that human laws are volatile and therefore unable to provide guidance on absolute issues. Laws limited by time – temporal laws – are variable; eternal law is singular, that is, it cannot be plural, as opposed to human laws, which occur in the plural, and furthermore, it is constant and unchanging. Saint Augustine began his writing of free will by clarifying the nature of law, because the human will can nurture many kinds of disordered desires that can easily go astray, and so the good provided by Divine law – as a command – could not help the individual's decisions. It goes beyond question that a human decision to avoid evil is a prerequisite for being able to distinguish between temporal and eternal law. The second important condition is that man, as opposed to animals, is a sentient being, and as such is able to understand the eternal law, and is capable of directing his decisions for good against evil. It follows that while human law can be unjust, eternal law can only be just. Although this is a metaphysical approach to freedom, Saint Augustine cited realistic and typical cases to show that human law often conflicts with eternal law. For example, when a man kills a bandit to save his own life, or when a commander orders his soldier to kill an enemy, but the soldier refuses to do so, for which the soldier must be punished under existing human laws. According to Saint Augustine, a law must be fair, otherwise it is not a law.

In another part of the Augustinian work on free will, the author raises the question of '*why* god gave human beings free choice of the will'.[10] The answer starts from the existential situation of man: If it is the case that there is good and bad, and man is able to recognise this with his mind, then free will obviously serves this cause, which is why man received it from God to 'live rightly'. For otherwise he would not be allowed to choose to commit evil instead of living a good life, because without choice the punishment would be unfair, for which he would be punished for committing evil! At the same time, Saint Augustine summarised three additional issues related to free will: (1) Why is it obvious that God exists?; (2) Do all good things come from God? and (3) Can there be such a thing as free will? This is followed by Saint Augustine's epistemological explanations, which are interesting in that free will can be derived from what is not variable, that is, from God and the eternal law, as opposed to changeable material things.

Saint Augustine included the human mind among changeable things: '[R]eason is surely proved to be itself changeable when at one time it strives to reach the

[10] Ibid. 30.

truth and at another it does not, and at one time it reaches truth and at another it fails.'[11] This finding clearly contrasts Saint Augustine's conception with the modern rationalist use of reason: Free will cannot arise from reason because it is volatile, and its relation to truth is uncertain. Consequently, it is not rational thinking but a deeper knowledge of objective truth or reality that can lead to freedom. In other words, God is higher than reason. The material world is diverse, consisting of many parts, so it is volatile. In contrast, the highest good can be recognised in truth, which may be called wisdom. Moreover, as Saint Augustine explained at length, this wisdom is available to anyone because it is common to all; no one can say that it is exclusively his. Furthermore, '[o]ur freedom is this: To submit to this truth, which is our God'.[12]

The truth is unchanging; it cannot desire evil, it ensures the security of cognition, as opposed to volatile things that may necessarily be shaped. However, no volatile thing can shape itself. In addition to the objective good, in the existence of God, it is important to see the will, which the author calls 'intermediate good' when directed to the unchanging good, is a good in common, not belonging to a single individual; that is, it constructs human existence as a communal existence. Anyone who has virtues can choose to do good, but virtues are not community goods, they must be shaped by each person for himself. When one aspires to more menial (volatile) things of his own will, they will also be selfish, as they will seek their own good. 'Do not hesitate to attribute to God as its Maker everything in which you see number and measure and order. Once you remove these things entirely, absolutely nothing will be left.'[13]

Surprisingly, in the third part of Saint Augustine's book, he brought up suicide as a further interpretation of free will. First, however, Saint Augustine sought to clarify the nature of divine foresight. If God is the supreme good, His existence is necessary and stands above human reason, and then God must also know what will happen in the future. But how does divine foresight relate to the free choice of our will? Saint Augustine resolved the contradiction by saying that God presupposes human will and that man has the power to want. Whatever man chooses, whatever he wants, he fits into the divine omniscience from the outset, because He knows that man has free will. God also knows that an individual can want to commit evil. If one chooses evil, then one can also be sure that one will not escape punishment: This is included in Divine foresight. Although Saint Augustine only dealt with it in passing, it is important: 'Reason and utility evaluate matters differently.'[14] Reason judges in the light of truth, while habit easily becomes lost, as it is not necessarily guided by higher things.

[11] Ibid. 42.
[12] Ibid. 59.
[13] Ibid. 71.
[14] Ibid. 85.

Saint Augustine's metaphysical mind-set is, again, reinforced by realistic elements: Children come to accept sooner that a person dies than when their favourite bird does, which, of course, adults say can be corrected by education. Every person wants to be happy, and if this is not possible, they would even rather die. The juxtaposition of unhappiness and existence introduces the theme of suicide into Saint Augustine's line of thought. If one were to die rather than live unhappily, one loses the essence of human choice, namely that the choice between higher and lower things constantly characterises human life. The choice of non-existence is not a choice of 'something' but of 'nothing'. '[T]he whole of his pursuit in the wish for death is not meant so that the person who dies is not, but rather so that he is at rest.'[15] There is an order of existence, a hierarchical order that the will must follow.

This supports the claim that all nature is either corruptible or not. Non-corruptible nature is good. What is nature? Often referred to as 'substance', all substance is either God or comes from God. All good is either God Himself or comes from Him. In this way – referring back to the whole question of where evil comes from – evil comes from the corrupted will, when one uses one's free will in a distorted way. The main question, then, is not whether man has free will, but why he misuses his will. The answer, according to Saint Augustine, is that he is a free being, in a metaphysical sense, and this is not a political, legal, or, as they would say today, social issue.

Pelagius's discussion with Saint Augustine echoes the essence of later conflicts between modern liberals and conservatives: As a kind of liberal, Pelagius denied the notion of original sin.[16] At birth, man is neither good nor bad; that is, sin is not an inherent part of human nature. In fact, bad habits make a person bad, so habits must be broken by the power of the will. In institutional terms, this debate ended with the Council of Orange of 529, which clearly took a position on Saint Augustine's view. At the same time, again using later concepts, it was a position against anthropological pessimism over anthropological optimism. Without assuming original sin, it is not possible to give a coherent explanation for human sin or evil. This was to determine the path of Christian classical philosophy.

As can be seen, the issue of freedom is closely related to the description of the status of law, rights and human existence (or human nature). According to Saint Thomas, the definition of freedom is essentially an integrated repetition of the Aristotelian and Augustinian definitions: '*The free is that which is its own cause:* and so the free has the aspect of that which is of itself.'[17] In Saint Thomas's main work (*Summa Theologiae,* I Question 68) it is easy to realise that he reproduced Saint Augustine's argument, even by repeating the fall of the stone and the difference attributable to human free will. While certainly not underestimating

[15] Ibid. 90.

[16] See *Pelagius's Commentary on St Paul's Epistle to the Romans* (Oxford: Clarendon, 1993).

[17] Thomas Aquinas, *The Summa Contra Gentiles* (London: Burns, Oats and Washbourne, 1924), 161.

Saint Thomas's thoughts, it is not necessary to analyse his argument separately from the point of view of the current topic – the difference between classical and modern freedom. It is certainly possible to integrate Aristotelian and Christian philosophy, but, from the point of view of the history of ancient and Christian medieval European philosophy, the real fault-line lies not between the former two, but between the ancient and Christian classical notions of freedom and justice on the one hand and the modern notions of freedom and justice on the other hand. This holds true even if it can be shown that there is a mediating channel of thought between classical and modern natural law, because there could not be a complete cut-off between the classical and modern worlds.

However, modern natural law teachings and concepts have also made a break with classical natural law teachings within this intellectual field. The classicist based his argument on the concept of Law being identical to the laws, while the modern separated the doctrine of law and the laws, and even rights. Laws are no longer necessarily commands, and the law is meant to guarantee the well-being and political security of the individual or individuals from that point onwards and for as long as the majority human opinion can be lined up behind it. Modern thinking, after all, openly or covertly aims to influence the opinion of the majority in order to maintain the idea of modern rights. One of the most important constructivist works to have been written on the modern conception of law is by John Rawls *(A Theory of Justice).* The following sentence clearly articulates the essence of modern freedom, which distinguishes it from earlier concepts of freedom: 'Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines.'[18] This means that freedom is constructed by equality, which, through the totality of rights (in the plural), forms a system, and individuals and groups live by it (or not) in their own moral perception.

We do not know where the idea of equality as an axiom comes from, but it is clear that it is a constructed system, which neither God nor Nature has anything to do with, because, according to the modern conception, the individual or mind left to itself does not need them. This is because the essence of the modern conception of freedom is to discover and focus on the European individual. Benjamin Constant's notable work on the difference between freedom in antiquity and modernity clarifies this point: 'Individual liberty, I repeat, is the true modern liberty. Political liberty is its guarantee, consequently political liberty is indispensable.'[19]

[18] John Rawls, *A Theory of Justice* (London: Belknap, 1971), 204.

[19] Benjamin Constant, 'The Liberty of Ancients Compared with that of Moderns', in Benjamin Constant, *Political Writings*. Ed. and transl. by Biancamaria Fontana (Cambridge: Cambridge University Press, 1819), 323. See also Michael Rosen and Jonathan Wolff (eds), *Political Thought* (Oxford: Oxford University Press, 1999), 123.

III Natural law, law of nature

The modern understanding of freedom consists of two main elements: One is the new concept of nature, and the other is the transformation of freedom into a political interpretation. Consequently, modern natural law broke not only with the notion of classical law (eternal law and Divine law), but also with classical natural law, since classical natural law has metaphysical roots while the modern version takes a materialist approach. Therefore, it may be questioned anew whether or not the image of nature of the materialist Hobbes, or the atheist Baruch Spinoza or Rousseau still has a metaphysical basis, or whether the French deists' concept of God did not feed exclusively on new science. Modern natural law was nourished by the modern conception of nature and gave freedom a political interpretation by separating law from the laws and by pluralising it to the individual, in that modern natural law thinkers began to speak of rights.

Classical natural law assumes the hierarchical nature of the world, while the idea of modern rights is based on the principle of equality. Although classical natural law also had its own conceptual political implications such as the idea of a mixed form of state, the virtue-centredness of citizenship or linking, the characteristics of a statesman greatness, the concept of freedom remained within the metaphysical sphere of interpretation. In contrast, modern natural law has founded freedom on the legitimacy of human communities based on human rationality. The point is that everyone enjoys freedom from birth – based on the application of the principle of individuality – and loses it only because of a bad political arrangement. Rousseau's thinking in this direction was indeed a breakthrough: The concept of nature, in Rousseau's interpretation, became the framework notion of an inherently innocent, morally good individual, as in the state of Eden before politics. But because man had left his pre-original state for obscure reasons, men's relationships with each other deteriorated, and a solution thus had to be found by means of politics. Contract theory, which paved the way for written constitutions, also transformed freedom into a political problem. Just as the modern concept of nature made God an epistemological question, contract theory deprived freedom of its metaphysical dimension.

Although there are many interpretations of nature, they can be grouped into roughly two basic types. One asserts that nature expresses 'the nature of things', while for the other it expresses 'the things of nature'. The first view was mainly emphasised by the ancient authors, according to which we can identify a thing on the basis of what internal force operates it or drives it – what makes a thing what it is. Accordingly, we speak of the nature of a plant, animal, or man. In contrast, the second interpretation reflects the concept of nature commonly used today, grass, tree, flower, sea, fox, land, and so on. Modern natural sciences start from the latter notion of nature; all scientific discoveries are directed at the things of nature, and this is considered to take precedence over the notion of the nature of things. Technology

has now reached the point where it is able to create a virtual reality that has its own world, is able to fill the realm of human mentality and imagination, and creates rules that users are willing to keep voluntarily, even by sacrificing their freedom. It can be said that this is not a change of level, but a shift in focus. So far, we have looked at the trees and said it is 'nature', but now we observe still and moving images. Perhaps, from now on, this new virtual world will be 'nature'.

In the eighteenth century, Voltaire composed a brief conversation between the philosopher and Nature in his dictionary of philosophy. The philosopher is constantly bombarding Nature with the question of who he really is. Nature ultimately surprises the philosopher, revealing that he is in fact a creature, not the ultimate source of things, although this seems to be the case. Nature poses a question: 'Since I am the whole being, how is it possible for a being like you, who is a tiny part of me, to comprehend it all?' My suspicion is that, because modern man considers himself the lord of everything, he really thinks he can do everything. He can change the climate; even human decisions can be replaced with robots.

Overcoming or dominating nature would mean that man is able to overcome his own nature. But who will overcome it? Obviously a select group of people – which in turn raises serious power and political issues. These revolve around the problem that there will be a select circle of people who know things, and there will be a multitude that will be forced to follow, and to accept the decisions of the chosen elite. One might be tempted to remark that this has anyway been the case throughout history. It did not claim, however, to be either liberal democracy, the rule of law or the inviolability of human rights. The conceptual and practical aspect of power can never be eliminated because it cannot be technicalised; it cannot be made to appear neutral, much less independent. So far, Communism has been the only publicly acting political force that has sought to achieve domination over history in a practical way. It is a sad realisation that Communism is not the only aspirant in modernity.

IV Paine's discussion with Burke on freedom

The second half of the eighteenth century, especially the period of the French Revolution, was characterised by an intense clash between intellectual positions which had formed gradually over previous decades. It is impossible to summarise briefly the elements of the diversified European intellectual movement, collectively referred to as 'the Enlightenment', although its essence is best understood by examining the items of debate between the 'old', or the ancient, and the 'new', or modern. The point of the debate is who is right when seeking answers to one's most basic questions: The old or the new? The most important argument of the new, that is, the modern, was (and still is) that the present takes precedence over all that is past; that is, the past does not bind the decisions of the people living today and the present does not have to be influenced by its decisions, opinions, experiences

and perception. The past does not help the living; on the contrary, it hinders the formation of their own decisions. Translated into the language of freedom, our decisions should not be motivated by avoiding evil, as Saint Augustine had written about free will, but by anything else: prosperity, justice, scientific truth contradicting religion. Given the longer-term impact, it is worth recalling at this point Paine's opinions of Burke's views condemning the French Revolution.

When, in 1790, Burke published his book entitled *Reflections on the Revolution in France,* his compatriot, Paine, who had already emigrated and settled in the United States, published a number of articles that preceded his paper written in response to Burke *(Rights of Man).* In 1776, Paine wrote a pamphlet entitled *Common Sense,* which came out in favour of the American Revolution based on the argument that the past must be completely ditched. What is more, every government is evil in itself, as opposed to the innocent society: 'Society in every state is a blessing, but Government, even in its best state, is but a necessary evil; in its worst state an intolerable one.'[20] Paine claimed no less than that the state, government and politics are the source of evil. Clearly – right from the beginning of his writing – Paine blamed the government itself, politics, making it the source of evil. Paine was not talking about the natural state, but about 'society', which will be the people in later rhetoric, as opposed to the holders of corrupt power who run the state. There is therefore no metaphysical, that is, presumably unchangeable, cause of evil, but it is to be sought in human institutions. In this way, evil can be eliminated: It is up to man, human reason, to make it happen.

The establishment of the American political state signposts a direct, accessible path to this plan or goal. Paine became so committed a believer in the American Revolution that he was happy to communicate its principles and deeds to the French revolutionaries, travelling to France to intervene in the course of their revolution. In parallel, Burke's work appeared, to which Paine reacted in early 1791 by writing his *Rights of Man*. When intellectual and practical events pile up or overlap, at least in time, it is very difficult to distinguish an argument, or even related events, from the person making the argument or opinion. In fact, the great friend of the French Revolution, Paine, was nearly executed by the internal logic of the French Revolution. The good English atheist spent a year in prison in France, then escaped execution only by a comic coincidence, and the intervention of the American Government saved the hearty political activist from the revolutionary meat-mincer. Whatever happened to Paine did not prevent him from continuing to expand on his earlier views: The past must not only be enclosed in brackets, but also explained in a philosophical sense *(Rights of Man),* and religion must be treated with the deepest contempt (*The Age of Reason*, 1793).

[20] Thomas Paine, 'Common Sense', in Thomas Paine, *Common Sense, The Rights of Man, and Other Essential Writings* (New York: Penguin, 1984), 24.

At the beginning of his book, Paine stated that '[e]very age and generation must be as free to act for itself in all cases as the age and generations which preceded it'.[21] What's more, Paine considers it the greatest tyranny for anyone to 'govern [the living] beyond the grave'. Paine claimed to argue for the rights of the living, while, according to him, Burke argued for the rights of those who have already died. This question of principle also translates into English history: Whether the 1688 Parliament would bind later generations, and perhaps forever. According to Paine, Burke created a kind of political Adam, who would forever bind all who lived later. The past, insisted Paine, does not politically bind the present. In other words, the question is: How does a law that dictates relate to the human laws that the parliament adopts? 'Immortal power is not a human right, and therefore cannot be a right of parliament.'[22] According to Paine, no right can be derived from anything other than human rationality. He saw human reason as the only acceptable church, as he wrote in his *Age of Reason:*

> I do not believe in the creed professed by the Jewish church, by the Roman church, by the Greek church, by the Turkish church, by the Protestant church, nor by any church that I know of. My own mind is my own church. All national institutions of churches, whether Jewish, Christian, or Turkish, appear to me no other than human inventions, set up to terrify and enslave mankind, and monopolize power and profit.[23]

Paine argued that any human reason on its own is sufficient to create the best ways and tools for man to achieve happiness. Marx's statement that 'religion is the opium of the people', framing it as a force which serves to mislead the people while the holders of power exploit those deprived of power, was essentially already present in Paine's conception. It does not do much to refine this radical concept that Paine also stated that 'I believe in a single God'; that is, he wanted to contrast faith in God with the churches, rather than undermining faith. What contrasts with religion is modern science – the whole argument relies on modern science to question religious theorems, carrying Spinoza's critical method of reading the Bible on from the seventeenth century. He raised the new political system in the United States above all else because it separated the activities of government and the churches. The political revolution must be followed by a religious revolution, by which he meant the transformation of the political-social role of religion.

Since religion cannot have a say in politics, the interpretation of and debate with Burke's arguments for natural law were conducted in the name of human rights; that is, on principles developed by individual reason. First, Paine claimed, Burke conflated people and principles. Politics must be pursued on the basis of

[21] Thomas Paine, *Rights of Man* (New York: Penguin, 1984), 41.

[22] Ibid. 44.

[23] Thomas Paine, 'Age of Reason', in Moncure D Conway (ed.), *The Writings of Thomas Paine* (New York: GP Putman's Sons, 1908), 22.

principles, not from the point of view of individuals, otherwise, as Burke did, it merely venerates powers not principles.[24] The French Revolution, criticised by Burke, was based on a rational understanding of human rights, in an ultimately tense situation with armed power on one side and a mass of unarmed citizens on the other, with the choice left: Freedom or servitude? Second, Paine targeted Burke's precedents from antiquity, usually the significance of previous examples. The problem Paine found with Burke's argument, and with likeminded thinkers, is precisely that 'they do not go far enough into antiquity'.[25] Antiquity cannot be considered an authority at all, since at one time antiquity was 'modern', as every later age was new in its own time. According to Paine, it is a mistake to consider any epoch an authority, because – due to the limitation of infinite regression – we eventually reach God, and the man He created, who is nothing else and nothing more than man; that is, his only title. It is not difficult to trace this argument back to the approach of eighteenth century French *philosophs* (Burke's word) and its political expression: All people are born equal, all other titles and differences are formed only by the relationships between people. The most important theme of modern natural law is to emphasise the arguments in favour of human equality, from which the establishment of individual human rights as an institution is the justifying meaning of modern written constitutions. Stressing the role of rights implies that the ultimate political issues can be made legal in modernity; moreover, they must be made that way. Ultimately, it is not politicians but lawyers who are the leaders, or at least they are the constructors and guarantors of modern freedom. Freedom is a legal issue, the terms of which are provided by politics, enforced by lawyers. As digital medicine has become one of the guardians of health today, so has the lawyer become a sentinel of freedom – supposedly. Third, Paine placed the principle of freedom in the social contract, but derived its starting point from the organic connection between natural rights and civil rights. He defined natural rights as the rights that every human being is entitled to by birth. These may be rights related to the human intellect, while others may be natural rights to human comfort and happiness. Civil rights, in contrast, grow out of natural rights.[26] Ultimately, these rights allow people to contract with each other to create the state. According to Paine, 'this is the only mode in which governments have a right to arise';[27] all other pleas in law are illegitimate. Fourth, aristocratic power, it follows from the above, is unjustified; moreover, the mere existence of the aristocracy is 'against every law of nature'.[28] The aristocracy is perpetuated by 'family tyranny and injustice', as evidenced by the institution of primogeniture, that is, that it is always inherited

[24] Paine, *Rights of Man,* 49.
[25] Ibid. 65.
[26] Ibid. 69.
[27] Ibid. 70.
[28] Ibid. 82.

only by the first-born child – which is why the new French constitution abolished this right immediately.

In summary, all of Paine's arguments and claims against Burke were the product of a radical reinterpretation of the law and the right. Its starting point is a person torn from the order of creation (an individual – it is no coincidence that, while people who lived earlier were called *man,* as he came to his own era, he used the word 'individual' more and more often), who as such is innocent and has natural rights by birth. Paine could call them natural, because the concept of nature he uses is already a concept of nature deprived of the metaphysics of modern science, so modern natural law practically falls under the category of man-made positive law, only nominally preserving the classical name of natural law. The guarantor of this idea of positive law rights is the modern constitution established by contract; in other words, the interpretation and management of freedom has become the competence of politics, thus achieving the replacement of the *classical-metaphysical conception of freedom* with the *modern conception of the freedom of the mind*. The paradox of this development is that in this way Paine himself subjected power as such to constant criticism and critique, as he raised the possibility of a complete and radical abolition of power and political leadership itself. Another paradox is that if power is owned by those who are distrustful of power, there is no particular problem with power. For one seeking the roots of modern totalitarianism, there is a good chance that Paine could be of great help, which he would have marvelled at.

V Pope Leo XIII's two encyclicals on freedom

Pope Leo XIII served as head of the church for twenty-five years (1878–1903) in the late nineteenth century. Of his many encyclicals, two are particularly worth considering for our present subject, as both are passionate about the concepts of modern philosophy, the Christian religion and classical law, together with the ideas of freedom that had developed by the end of the nineteenth century. John Stuart Mill, a celebrated liberal thinker of the age, expressed theoretical objections not only to religion but also to the concept of nature;[29] casting doubt even on the reference to modern natural law – although the concept of modern reasoning and modern freedom surrounded by human rights remained. In this intellectual milieu, Leo XIII sought to criticise modernity and defend the classical-Christian concept of freedom.

[29] John S Mill, *Three Essays on Religion: Nature, the Utility of Religion, and Theism* (London: Longmans, Green, Reader, and Dyer, 1874). For a more detailed discussion, see András Lánczi, 'Az utópia sosem halott', *Korunk* (February 2019), 3–10.

The *Immortale Dei* (1885)[30] and the *Libertas, praestantissimum naturae bonum*[31] encyclicals are both resolutions on the Christian concept of freedom and specific critiques of the emerging modern notion of freedom. In the simplest terms, the difference between the classical-Christian and modern conceptions of freedom is succinctly captured in one of the biblical quotations from the *Immortale Dei:* 'We must obey God rather than human beings.' (12; Acts 5:29) The first question of freedom is *who* the man obeys rather than what he can do. Man ultimately obeys the laws, but the concept of law is not clear. According to the ancient-Christian conception, Law is Divine and natural, and thus the law or justice can and must be derived from it; according to the modern concept, the law is human, and the rights derived from it are enjoyed by the individual. Consequently, the ancients obeyed Divine and/or natural law, accepting it as the ultimate framework of their moral existence. In contrast, proponents of modern freedom argue that the individual obeys laws established on the basis of political agreements between people, so morality has no other guarantee than human agreement; that is, man obeys man rather than man being a wolf to his fellow man.

Whether there is a God is secondary; negligible in terms of law and rights, a private matter at best, not even a private matter at worst (cf. the Hungarian history of Communism). To put it another way, while in ancient times, freedom was ultimately a matter of the relationship between man and God and for Nature, for the modern age it is up to the regulation of the relationship between man and man to decide what they accept as the criterion of freedom. Therefore, we have reached the point again where freedom is a metaphysical-moral issue according to the old or classical understanding and a political-legal one according to the new or modern concept, and a moral issue derived from it. The measure of the former is independent of human will, while the latter depends solely on the struggle of human will. For this reason, the modern concept relativises the law from the outset and politicises everything, leading to a blurring of the line between public and private lives.

With this in mind, it is very clear why the two encyclicals complement each other and why they can be read as summaries of the Christian concept of freedom. The initial idea of *Immortale Dei* is that all power ultimately belongs to God, from which everything springs. This is especially important when regulations and institutions arising from divine power conflict with secular power (for example, regulating trade, receiving ambassadors, appointing and so on). Ecclesiastical and secular power coexist, but ultimate power belongs to God. The Almighty has given man two kinds of powers, ecclesiastical and secular. However, the new concept of freedom has turned everything upside down: '[I]n these latter days a novel conception of law has begun here and there to gain increase and influence, the outcome, as it is

[30] Pope Leo XIII, *Immortale Dei,* 1885.
[31] Pope Leo XIII, *Libertas, praestantissimum naturae bonum,* 1888.

maintained, of an age arrived at full stature, and the result of progressive liberty.'[32] Moreover, Leo XIII noted, it is increasingly being said that ecclesiastical power is the cause of several problems for the state. Although ecclesiastical power has never questioned the legitimacy of secular power, it has also always asserted that it does not favour any form of state. Any may be appropriate. The question is how they relate to each other as a unity of soul and body – if the two are not in harmony, worldly power will not be able to achieve peace either, because the goal of governance can be nothing more than to ensure peace and freedom. Leo XIII wrote: 'In political affairs, and all matters civil, the laws aim at securing the common good, and are not framed according to the delusive caprices and opinions of the mass of the people.'[33] Secular power is endowed with the same sacrament as ecclesiastical power, and it cannot deviate from the path of the fulfilment of duty, nor go beyond the limits of legitimate or lawful authority.

Even so, a political system based on popular sovereignty excludes ecclesiastical power and is counterproductive: 'The sovereignty of the people, however, and this without any reference to God, is held to reside in the multitude; which is doubtless a doctrine exceedingly well calculated to flatter and to inflame many passions, but which lacks all reasonable proof, and all power of insuring public safety and preserving order.'[34] After this, it is no wonder that the encyclical launches a direct and radical attack on all rights arising from the new notion of power and law, including the right to freedom of expression: Unrestricted speech and press freedom are 'fountain-head and origin of many evils. Liberty is a power perfecting man';[35] and as such, the development of human character, good and truth, cannot be changed at will – that is, in modern secular endeavours, he sees the destructive work of relativisation. Only a well-spent life leads to heaven, and if the secular power or state opposes divine and natural laws, the people's education will be led astray. Leo XIII defended the ecclesiastical concept of Christian freedom very strongly. His argument in *Immortale Dei* is clear, but defensive, in spite of the fact that the exclusion of the Church from life, laws, child-raising and the private world was a 'grave and fatal error', the encyclical had yet to explain Christian freedom in more detail.

This explanation was to come in his encyclical published three years later, entitled *On the Nature of Human Liberty*. The opening sentence of this reads: 'Liberty, the highest of natural endowments, being the portion only of intellectual or rational natures, confers on man this dignity – that he is "in the hand of his counsel" and has power over his actions.' If *Immortale Dei* contained a critique of the modern notion of freedom then the *Libertas, praestantissimum naturae bonum* represented a positive expression of Christian freedom. The opening statement

[32] Pope Leo XIII, *Immortale Dei,* 2.
[33] Ibid. 18.
[34] Ibid. 31.
[35] Ibid. 32.

is a concise explanation of the classical concept of freedom: Freedom is first and foremost a matter of man's self-presence and metaphysical place in the world. It is not a political question, but a metaphysical and moral one: Is there a law, who guarantees the law, who should I obey, and why should I exercise self-control? Pope Leo XIII's argument draws on the arguments and sources he has studied before, primarily on Saint Augustine's work on free will. In practice, the encyclical uses the views of Saint Augustine when presenting the theological-philosophical expression of the will.

Leaving aside the analysis of the relevant part of the encyclical, it is worth briefly recalling how the encyclical views modern freedom, which differs from the more radical rhetoric of the earlier encyclical. Indulgence here is not theoretical, but realistic in nature. In this encyclical, the Pope clearly identified his intellectual opponents on the question of freedom: 'What *naturalists* or *rationalists* aim at in philosophy, that the supporters of liberalism, carrying out the principles laid down by naturalism, are attempting in the domain of morality and politics.'[36] The part of liberal ideology that is unacceptable to him is that: '[T]hese followers of liberalism deny the existence of any divine authority to which obedience is due, and proclaim that every man is the law to himself; from which arises that ethical system which they style independent morality, and which, under the guise of liberty, exonerates man from any obedience to the commands of God, and substitutes a boundless license.'[37] Indeed, the term 'every man is the law to himself' captures the essence of the difference between Christian and modern freedom. The differences lies in the fact, that if the source of the law is removed, namely God, there is nothing left but each individual's own mind and judgement of what he accepts and what he does not.

If that happens, obedience, duty and order, which are prerequisites for peace and truth, will disappear. If everyone has their own law, what will hold us together? The encyclical states: 'But many there are who follow in the footsteps of Lucifer, and adopt as their own his rebellious cry, "I will not serve"; and consequently substitute for true liberty what is sheer and most foolish license.'[38] The problem with the modern notion of freedom is not merely that it encourages freedom, but that it does not actually recognise any law, so one does not have to obey. The encyclical then describes the practical situation of modern freedoms – freedom of religion, freedom of speech and the press, freedom of education, freedom of conscience – so, unlike the previous encyclical, it is not satisfied with blanket rejection, but argues in specifics. On freedom of expression and the press, it is no longer completely negative, but it emphasises that this right cannot be unlimited, because then lies will also have unlimited dissemination.

[36] Pope Leo XIII, *Libertas,* 15.
[37] Ibid.
[38] Ibid. 14.

VI Christian freedom in practice and its two aspects

The cornerstone of any concept of freedom is how it is realised. Because the law commands rather than requests, its validity is unconditional. However, man also has free will; that is, he can and must weigh decisions rationally, since man must respect not only divine commandments but also secular or human laws. It can be stated that Christian freedom can be interpreted in its full extent only among believers in God. This is one aspect of Christian freedom; that is, the question as to whether any other person can exercise power over a person's conscience. The answer to that question is negative, since the revealed law and its keeping in practical life is the duty and responsibility of the individual. The Bible discusses the dilemmas of exercising Christian freedom in several places (for example, Matthew 15:1, 23; 1 Corinthians 8–10; Romans 14 and the entire book of Galatians).

Paul commented on the tension between the law, keeping the commandments and free will, among other things: "'I have the right to do anything," you say – but not everything is beneficial. "I have the right to do anything" – but not everything is constructive.'"[39] Christian freedom causes the believer to make a constant intellectual effort; that is, the tension between the command of the law and the freedom of the individual can only be resolved by the personal intellectual effort of every believer. The law is absolute; the decision is always concrete. What is right is determined by the law; what someone decides to do under certain circumstances will be their choice. Of course, the law not only commands but also interprets; it seeks to help us make real decisions. Freedom is also a matter of conscience; however, if one deviates from what is required by law, the individual must be able to formulate appropriate arguments for himself.

As is well known, a multitude of dilemmas stem from the fact that secular or positive laws can contain much that is contrary to the commandments prescribed for the believer. 'Thou shalt not commit adultery!' The command says, while in everyday life both the believer and the unbeliever are endlessly challenged. Sexual freedom has gradually transformed the relationship between man and woman since the 1960s with the introduction of birth control pills for anyone who wants them. Whether the relationship between the two sexes also needs to be morally transformed is another question. Modern technology and the managerial perception that trails in its wake suggest that moral issues can be resolved scientifically and administratively. This is one of the greatest mistakes of the modern conception, because every scientific and technological innovation has moral content from the outset. Not all technological innovations alleviate moral dilemmas but may deepen them and increase their number. As a result, the internal tensions of Christian freedom are growing, but they cannot be resolved by external means; that is, we must continue to study the previously formulated dilemmas of Christian freedom as thoroughly as possible and cling to their original wisdom.

[39] 1 Corinthians 10:23.

The issue arises as to whether the notion and concept of Christian freedom can say anything to non-believers. Albeit with some difficulty, though instinctively, a non-believer can be influenced by the faith in God condemned to death by modernity and by the power of the cultural bonds that flow from it. The tensions of the internal dilemmas that already arise from the Christian idea of freedom may also develop in the non-believer as if he were also a believer. It all depends on the role that the first questions of human existence will play in the worldview of a non-believer. If the answer to this is that it is up to modern science to deal with them, and therefore the progress of science is the solution, then the answer is that this can be true if man is able to overcome nature; that is, no unexpected – independent of human intellect – impact can affect humanity. In other words, is there a limit to human rationality and the development of technology?

Man is currently working to be able to create meaning beyond his own rationality by creating and developing artificial intelligence. Perhaps he will succeed in these efforts. First, it will allow for the development of the greatest tyranny ever seen, as only a very narrow circle of people will be able to understand and control the tools of newer and newer technology. The more advanced the technology, the deeper the moral tension, because the relationship between man and man will become increasingly opaque. Second, what is the guarantee that the artificial intellect will not be in a position of dominion over man? This could happen all too easily, which would be the ultimate paradox of human existence.

To address the above dilemmas, European philosophy has a deepening understanding of the problems recommended from the outset. Constant questioning and deliberation is the only way forward for the European man. One of the sustaining cultural and existential elements of this is the concept of Christian freedom. No one and nothing has absolute power, not even modernity's concept of law and freedom. Philosophy can be eliminated, religious faith can be ridiculed but even the most cynical believer in modernity cannot succeed in putting freedom under his own intellectual domination, because freedom presupposes itself in a metaphysical sense and does not require modern guardians. The positive legal idea of modernity in relation to the protection of freedom is valid and supportable only insofar as individual rights do not conflict with and, above all, do not seek to destroy the basic tenet of the classical concept of freedom: the law commands – it does not merely recommend or suggest.

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The Legal and Theological Concepts of Christian Liberty

Ádám Rixer

I Introduction

In this paper, I attempt to define the legal and theological concept of Christian liberty. I do this by offering a stable, traditional model of Christian liberty incorporating both law and theology, as well as a more dynamic, and in our view more useful and complete working concept of it. The reader may wonder why it is not enough to select only one of these concepts; that is, what additional knowledge can be derived from a dual approach? One certain part of the answer to that is to state that, although there will never be a so-called super conception of Christian liberty, that is, an academic construct combining the results of several disciplines, the conceptual elements of each field – as we will see – still have a great influence on each other, shaping and influencing each other's definitions. This is why the first section of this paper is going to immediately catalogue the fields of academic study that are most relevant to the topic, highlighting their starting points, popular sub-topics and even the aspects of them which come into contact with *other* areas. Thus, in addition to legal and theological approaches, I will also present key expressions of the image of political freedom drawn from political science, social psychology and religious studies in the narrow sense – although the analysis in the detailed and separate sections will only be made for the first two approaches.

This work is intended as basic research; in addition to the Bible and the various relevant sources of law, it relies primarily on the sources of the scholarly literature, focusing on the possibilities of grouping, and on finding grouping criteria, drawing conclusions from them and developing a conceptual network. The legal examples are mainly Hungarian, but where the broader context was also justified, the products of the legislation and application of the law of other entities and the results of the international literature also appear.

II Fields that also examine the phenomena of Christian liberty

This section will not analyse the theological and legal aspects of Christian liberty but will consider the question of what Christian liberty is. The representatives of

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two fields, law and theology, are most qualified to answer this question. On the one hand, as with all other social phenomena, the facts relating to Christianity are most easily assimilated through the legal route (that is, a legal type of answer to a practical Christian question will produce a widely applicable *preliminary* definition). On the other hand, it is indisputable that the basic document of a given religion, in this case, the entire Scripture (the Bible), and its explanations constitute the other important – indeed, unavoidable – and most accurate starting point when asking religious questions.

A The attraction of Christian liberty for politics and political science

It is no coincidence that the first substantive element of our analysis is the examination of political contexts: The key Christian liberty-related question of the twentieth century was the dilemma of the *liberation movement,* namely the extent to which the Christian message can be realised or transformed into a political action. The partial autonomy and mixing of political approaches with theology is particularly evident through the processes that have taken place within the Catholic Church. For centuries, the Christian tradition has dealt with the freedom of the human will, including the choice between good and evil, sin and its consequences, and the relationship between grace and free will.[1] However, in the wake of the Enlightenment, which prioritised freedoms, the Catholic Church began to open itself, as a result of a longer process, to a secular, social interpretation of freedom, an interpretation that does not accept existing social relations as systemically immutable endowments.

> The decisive breakthrough was brought about by the Second Vatican Council (1962–1965) by redefining the mission of the Church. It has been made clear that the evangelising task of the Church is not merely to proclaim and present otherworldly salvation in history. It must also care for man's worldly prosperity, as Pope John XXIII had already stated emphatically when the Council was proclaimed.
> The Pope drew attention to another new aspect in this regard: The Church must study the 'signs of the times'! (Matthew 16:3). The Church lives in history, not by preaching the gospel in a vacuum. Theology must know the age in which it lives so that it can address the people of its age and share destiny with them. In this way, the concept of the 'signs of the times' was given a significant role in twentieth century theology.[2]

The Extraordinary Synod convened on the occasion of the twentieth anniversary of the conclusion of the Council later mentions advocacy for the poor as one of the most important topics of the Synod: 'In the wake of the Second Vatican Council,

[1] László Lukács, 'A keresztény szabadság politikai dimenziói a felszabadítási teológia tükrében', *Sapientiana* 7, no 2 (2014), 1–31, 1.
[2] Ibid. 2.

the Church has become more aware of its mission to serve the poor, the oppressed and the marginalised. . . . The Church must prophetically condemn all forms of poverty and oppression and protect and promote the fundamental and inalienable rights of the human person everywhere.'[3] Advocating for the poor became a movement, and its teachings, which developed rapidly and then confronted issues even faster, became known as 'liberation theology'.

The second ordinary episcopal Synod in 1971, in addition to priestly ministry, dealt specifically with the subject of 'justice in the world'. The document published following the Synod of Bishops, entitled *Justice in the World,* emphasised: 'In order for the Church to make the case for justice credibly, it must also appear within the Church. We therefore need to review our actions, our possessions, our lifestyles, and our human rights within the Church.'[4] However, some of the approaches already went beyond this position, for example, the preliminary draft submitted to the Synod by the Peruvian Episcopal Faculty stated:

> The commitment of many Christians is encouraged by a theology that regards this reality as a sinful state that hinders the realisation of God's plans; this situation sparks a commitment to liberation, simply in response to the call of the Lord, who called us to shape our history ourselves. The Church discovers that by its presence it is inevitably entangled in politics and that in this situation of oppression it cannot preach the gospel without shaking consciences with the message of Christ the Saviour.[5]

However, the Franciscan theologian Leonardo Boff (who was banned from teaching theology in 1985) surpassed the radicalism of the Peruvian position in the evolution of opinions in this field, when he and his brother Clodovis Boff addressed an open letter to Cardinal Joseph Ratzinger (the future Pope), arguing that: 'There are situations in which the Christian conscience is forced to expose the oppressive socio-economic system and, seeing no other way out, will ultimately take up arms to overthrow the illegitimate power.'[6] Ratzinger responded to this issue as follows: 'As I have already commented on the crisis of morality, "liberation" is also the major theme in the rich societies of North America and Western Europe: This is how they want to get rid of religious morality, and with it the boundaries of man. . . . Finally, "liberation" is also sought in South America, primarily in social, economic and political terms.'[7] He added that, in parallel with this change, 'the word soteriology; that is, the question of salvation, or as they prefer to say today, *"liberation",* has become the focus of theological thinking'.[8] In his view:

[3] Walter Kasper (ed.), *Zukunft aus der Kraft des Konzils. Die ausserordentliche Synode '85* (Freiburg: Herder, 1986), 43, cited by Lukács, 'A keresztény szabadság', 3.

[4] Cited by Lukács, ibid. 7.

[5] Ibid.

[6] Cited by Lukács, ibid. 18–19.

[7] Joseph Ratzinger, *Beszélgetés a hitről Vittorio Messorival* (Budapest: Vigilia, 1990), 150.

[8] Ibid.

> This came from the fact that theology wants to respond to the most burning problems of the world today, namely that man, despite all his efforts, is not saved *en bloc,* is not free *en bloc,* and he is even part of some growing alienation. . . . However, some theology came under the influence of the secularist program of liberation; they influence these theologies with their own immanent and exclusively earthly aspects. However, these programmes do not and cannot see that, from a Christian point of view, 'liberation' mainly and above all means liberation from the fundamental bondage of sin, which the 'world' does not even understand, and even goes so far as to deny it.[9]

Ratzinger specifically points out that this approach is often accompanied by an arbitrary treatment of biblical texts.[10] For the sake of completeness, we should also note that, over the past two decades, the novelty and desirability of *liberation theology* has been considerably eroded within the Catholic Church also[11] – while other means of caring for the poor have come to the fore. Summarising the above, it is clear that a significant proportion of the liberation approaches have one *possible result* (greater respect for human rights and their guaranteed enforcement) and that ultimately their achievement becomes an *end in itself* – detached from the basic, directly *biblical* spiritual goals, related to *salvation*. This was the dangerous direction in which Jesus' disciples also began to envision Jesus as the ruler of a worldly, mundane state: Seeing his miracles and aspirations as tools in the process of seizing power. However, ignoring the figurative speech, Jesus made it abundantly clear that his struggle was not to gain secular power, to fight battles of a political or purely military nature, but to have a spiritual, donation-focused, entirely self-surrendering lifestyle and mission.[12]

Although the theological and ecclesiastical aspects of liberation movements have been highlighted above, to illustrate this very peculiar connection between politics and theology, all of these phenomena have naturally gained a library of literature in political science in particular, especially in the South American

[9] Ibid. 151.

[10] Ibid. 164.

[11] Réka Lánszki, 'A felszabadítási teológia ideje lejárt?', *Credo* 5, no 3–4 (1999), 69–75.

[12] See Ephesians 6:12: 'For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms'; furthermore, as the clearest example: 'Then the mother of Zebedee's sons came to Jesus with her sons and, kneeling down, asked a favour of him. "What is it you want?", he asked. She said, "Grant that one of these two sons of mine may sit at your right and the other at your left in your kingdom". "You do not know what you are asking", Jesus said to them. "Can you drink the cup I am going to drink?" "We can", they answered. Jesus said to them, "You will indeed drink from my cup, but to sit at my right or left is not for me to grant. These places belong to those for whom they have been prepared by my Father". When the ten heard about this, they were indignant with the two brothers; Jesus called them together and said, "You know that the rulers of the Gentiles lord it over them, and their high officials exercise authority over them. Not so with you. Instead, whoever wants to become great among you must be your servant, and whoever wants to be first must be your slave – just as the Son of Man did not come to be served, but to serve, and to give his life as a ransom for many"' (Matthew 20:20–28).

continent.[13] Incidentally, it is also exciting to witness how intensely theological writings and documents partly intended for specialists and partly for the general public become suited for the analysis of political, legal and sometimes specifically *democracy theory* context, addressing them to an increasing degree, while also reducing the gap between theology and political science. However, even without a detailed assessment of the biblical validity or other appropriateness of these positions, it is clear that the logic of liberation, that is, the political dimension of Christian liberty, has become an increasingly important, independent direction of public policy-making. Moreover, as we will see below, new elements of the political dimensions of Christian liberty have also appeared in Hungarian public policy, separate from the liberation movements.

In his speech in Tusnádfürdő in 2019, Prime Minister Viktor Orbán first used the term 'Christian liberty', specifically in the following context: 'No matter how I turn and think, I cannot give a better definition because the sense of illiberal politics is nothing more than Christian liberty. Christian liberty and defending Christian liberty. The policy of working for illiberal, Christian liberty seeks to preserve everything that liberals neglect, forget and despise.'[14] The emergence of the concept of Christian liberty can be logically linked to what Orbán said for the first time in his radio interview on 4 May 2018, after winning a third election victory with a two-thirds majority, that his political goal is now to build an 'old-fashioned Christian democracy'.[15]

In addition to statements of a political nature, one of the tangible signs of these efforts is the new Paragraph 4 of Article R), following the Seventh Amendment to the Fundamental Law (Hungary's constitution): 'The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State', of which Balázs Schanda notes that '[t]he Fundamental Law does not tie the Hungarian state to the Christian religion, nor to Christian culture in general, but expressly orders the protection of Hungary's culture as a Christian culture. The constitutional goal was undoubtedly to give a stronger emphasis and protection to the country's cultural identity; that is, to add to the Christian heritage called for in the National Creed.'[16] He also adds that '[t]he Fundamental Law does not institutionalise the state religion; it emphasises the obligation to

[13] Arturo Escobar highlights the dual process that is taking place in South America which is also relevant to our topic, consisting of a modernisation crisis that has lasted for five hundred years and a crisis of the neoliberal model of modernisation. Arturo Escobar, 'Latin America at a Crossroads: Alternative Modernisations, Post-Liberalism, or Post-Development?', *Cultural Studies* 24, no 1 (2010), 1–65, 7.

[14] Barna Borbás, '"Trón és oltár": míg a keresztény szabadságon rágódunk, kiürülnek a templomaink', *Válasz Online,* 24 October 2019.

[15] Ibid.

[16] Balázs Schanda, 'Magyarország keresztény kultúrájáról', *Pázmány Law Working Papers* no 8 (2018), 1–4, 1.

value it while maintaining the religious and ideological neutrality of the state. The Seventh Amendment to the Fundamental Law brings a change in this regard, with the obligation to protect Christian culture (but still not the Christian faith or religion).'[17] He later clarified his position by explaining that the protection of Hungary's Christian culture is not a command to create a Christian culture but rather an obligation to protect an existing culture with Christian roots, especially given the fact that many institutions are assumed to be subject to this wide concept of Christian culture, in connection to which it is clearly visible that 'there is a gap between the Christian ideal and social practice'.[18]

The main instrument of this policy – elevated to the rank of official practice and thus establishing a *neoconservative ideology* – is to strengthen the foundations of Christian morality, both indirectly in education and directly with the support of some of the established churches. According to its critics, the proclamation of Christian values and Christian liberty is merely a slogan for government actors – without proclaiming the biblical limits of Christian liberty and making them part of public morality or political morality and without ultimately eliminating a 'society without consequences'.[19] However, regardless of the approach or political sympathy behind it, it is a fact that an important element of this political construction is 'a conscious *construction of the past,* which also includes the creation and continuous amendment of the Fundamental Law of Hungary'.[20]

B Socio-psychological, religious psychological and other religious science approaches

In exploring the concept of Christian liberty, sociological, social psychological and specifically religious psychological approaches form an additional, independent group, with their results often appearing as the results of a kind of religious science detached from theology. What they have in common is that they aim to realise the concept of Christianity and Christian liberty primarily by mapping *gaps* and *defects* and *deviations* from the healthy, getting closer to the subject matter of the study by creating negative concepts. Topics such as conformism, deviance and extremism appear as subjects for examination in this literature. The issue of the most common *religious extremes* in both domestic and international literature is

[17] Ibid. 2.
[18] Ibid. 3.
[19] Ádám Rixer, 'A civil társadalom helyzete Magyarországon, különös tekintettel a populizmus térnyerésére', *Glossa Iuridica* 6, nos 3–4 (2019), 43–72, 67.
[20] Ádám Rixer, 'A történeti alkotmány vívmányai: Utazás a múltba vagy út a jövőbe?', in Judit Balogh et al. (eds), *65 Studia in honorem István Stipta* (Budapest: KGRE ÁJK, 2017), 365–375, 366.

mainly present in the form of religious fanaticism,[21] various forms of terrorism[22] and various readings of the 'traditional' issue of sects. However, little work has attempted to devise a sophisticated set of criteria and, in the wake of the latter, an exhaustive typology beyond the definition of extremism and its main practical implementations. In a previous paper of mine,[23] I showed that, with regard to the concept of religious extremism, both a *negative* and a *positive* definition are possible: The negative definition indicates the phenomena that, although they may come into contact with religion or even institutional religion, are or may be linked to it but which are not considered to be 'extremism' of a religious origin or nature, while the positive definition attempts to list the possible main types of extremism in the framework of an exhaustive list.

Within the scope of the *negative* definition of religious extremism must fall, for example, those offences that do not result from the teachings of a particular religion but which, where appropriate, presuppose a human omission in the form of an annex that has not been attached during a registration procedure. In the same way, a theft committed at a religious event, for example, cannot be regarded as religious extremism, for example, insofar as this is not generally considered to be a phenomenon that can be generalised, or to arise from the essence of a given community. It is also problematic when we infer from the greater or lesser weaknesses of the functioning or teaching of the leaders of a particular (Christian) congregation or a larger religious community consisting of several local congregations that it is of a *generally* extreme nature, that is, no 'bad' or 'guilty' leader or faulty leadership practice may result *by itself* in 'religious extremism'. In this context, it should also be emphasised that the mere fact that a narrow group norm, based on religion and acknowledged by society but not followed by the majority, may be logically linked to specific violations, (for example, sexual offences) does not necessarily mean that the religious community itself is considered 'extreme', especially if, as the example above shows, the group norm is not an element belonging to the essence of the set of religious beliefs, and the religious community in question takes significant action against the harmful implications of the given institution or the specific abusive phenomenon.[24]

[21] Sam Cherribi, '*Bad Faith: The Danger of Religious Extremism* by Neil J Kressel', *Political Psychology* 30, no 2 (2009), 319–323; Laurence R Iannaccone, 'Religious Extremism: Origins and Consequences', *Contemporary Jewry* 20, no 1 (1999), 8–29.

[22] Julia V Tuskhova, 'ISIS and Al-Qaeda as the Determinants of Religious Extremism in the UK', *Society: Politics, Economics, Law* 14, no 8 (2017), 1–4.

[23] Ádám Rixer, 'A vallási szélsőségek tipológiája Magyarországon', *Vallástudományi Szemle* 14, no 4 (2018), 15–30.

[24] In the Catholic Church, there have been several waves of confrontation with and facing this phenomenon. An international meeting was held in Rome from 6 to 9 February 2012 with the participation of bishops and monastic leaders from various dioceses around the world, on action to combat child sexual abuse by church officials and assistance to victims. For this,

With regard to the positive definition, it follows from the above that it is worth noting that *extensive, generalisable practices* and *phenomena* can be considered to be the most *extreme;* it is generally not worth classifying isolated, sporadic and individual-related practices that cannot be inferred from the teachings of a particular religion (religious trend within a religion) in this circle. Aspects that can facilitate the grouping of extreme phenomena may be:

- the *type of norm,* accepted and professed by the majority society that has been affected by extremism (whether it is a violation of a legal or other social norm type)
- whether the 'extreme' behaviour has effects *outside the given religious environment*, *outside the community* or, indeed, it *decisively* remains harmful within it, or
- whether, in the criminal law sense, it is *violent* in nature.

These criteria are also relevant to our narrower topic, insofar as they can be a useful starting point as limitations and threats to Christian liberty in the broadest sense.

The other concept that also often appears in this discourse is *deviance*. This becomes a practical and at the same time academic topic when a religious community (a Christian community) comes into confrontation with its religious environment or its wider social environment and becomes 'deviant'. The birth of different religions and the emergence of new Christian communities are often linked to such crises. This is how the Reformation came into being, and this is how new Christian churches have been born ever since. This is also why Wolfgang Lipp was able to state that the problem of conformism is a problem in the history of religion, from which it became independent due to sociology and social psychology.[25]

According to Lajos Pressing, the tension outlined above can be resolved in three ways. On the one hand, religion adapts to the institutional and value system of society, and resolves contradictions through cognitive aversion, especially ideological training and rationalisation. On the other hand, a given religion may also choose to create individual opportunities in some socially institutionalised form by partially isolating itself from the rest of society, thus minimising its 'harmful' impact. Finally, as a third option, religion may also seek to transform society as a whole in such a way that social institutions promote a way of life in

see Stephen J Rosetti, 'Bátor szembenézés: hatékony fellépés a gyermekek szexuális kihasználóival szemben', *Korunk* 23, no 4 (2012), 99–106, transl. into Hungarian by Zsuzsa Szigeti-Cseke. For the practice of each country (member churches), see furthermore Jo R Formicola, 'Recalibrating US Catholic Church – State Relations: The effects of Clerical Sexual Abuse', *Journal of Church and State* 58, no 2 (2016), 307–330; Kathleen McPhillips, 'The Church, The Commission and the Truth: Inside the NSW Special Inquiry into Child Sexual Abuse', *Journal for the Academic Study of Religion* 29, no 1 (2016), 30–51. The starting point of these writings is – in almost all cases – that in addition to church leaders, the state authorities also played a key role in covering up the affairs for decades.

[25] Enikő Tajti, *Otthon a világban. A konformizmus és non-konformizmus teológiai értelmezése Róma 12:1–2 és János 4. rész értelmében* [PhD dissertation] (Budapest: Baptista Teológiai Akadémia, 2018), 37.

accordance with its religious values and norms. An example of the latter is Islamic fundamentalism, while Christian churches usually follow one of the first two paths.[26] In addition to deviance, the most widespread religious studies use the principle of unprincipled adaptation to the existing ruling system as a concept of *conformism,* even if these forms of 'innovative deviance' prevail against conformism, when an incorrect practice is built on a practical interpretation of a rule of religion and it is actually deviant behaviour that restores (or attempts to restore) the original meaning of the rule.[27]

III The legal concept of Christian liberty

This section will attempt to define the legal concept of Christian liberty on classical grounds, based on today's fashionable legal positivism, and to raise the possibility of introducing an alternative concept using a sociological approach, while arguing for the inadequacy of the former concept. The 'traditional' approach, not only for defining the specific phenomenon of Christian freedom but also for all other issues, is one that draws on the international practices of the period within a particular group of states (for example, the European Union or South America) or within a given country by means of an analysis of the norm text and the contours produced by 'scanning' the decisions of internal judicial or constitutional courts or international fora. The professional and scholarly tools of this method are the lists and analyses of the main contemporary topics and problematic provisions that need to be interpreted, as well as the description of the current conceptual and interpretive network of individual decisions, indicating where this network began to break down and which are the delicate, uncertain or 'dangerous' points. In order to gain an accurate picture of these, in practice it is enough to study the decisions of state and international bodies thoroughly, if we want to make predictions about the legal scope of freedom.

At this point, it is necessary to provide an explanation as to why all this is not enough when looking for the special domains and content of the legal concept of Christian liberty in Hungary. As will be demonstrated below by a few examples, there is a correlation in the field under consideration that if we consider law as the rules actually followed and used as such, we may be surprised that, in some situations, some of the legislation does not apply, but because it also benefits the stakeholders (in our case, religious entities) – at least in part – the implications of which will not appear in official decisions or in the various public forums. If the law is not applied, there is no 'case' either, and it may seem that there is no problem

[26] Lajos Pressing, 'A deviancia és a vallás kapcsolata', in Iván Münnich and Ferenc Moksony (eds), *Devianciák Magyarországon* (Budapest: Közélet, 1994), 201–222, cited by Tajti, *Otthon a világban,* 37.
[27] Tajti, *Otthon a világban,* 37.

either – while the law is not enforced in the pre-determined, assumed way. I will therefore show, in a nutshell, the elements, domestic practices and so on, that partly expand (may expand) and partly narrow (may narrow) the concept of Christian liberty in Hungary – in the hope that the proposed model will be able to reflect the actual conditions better.

A The traditional concept

(i) General preliminary questions

I am free, in a traditional, legal approach, to do everything that the law in force explicitly allows, protects, and in many respects that which it does not explicitly prohibit. In order to grasp the legal concept of Christian liberty, we must also take into account the fact that the law created by the state already precedes certain religious beliefs or peculiarities in some respects, even by allowing religious believers to deviate from the general rule (for example, by allowing unarmed military service in some states), or by imposing prohibitions (for example, in some states by prohibiting dressing habits or the wearing of items of clothing closely associated with religion, or placing explicit religious symbols). For most of the area in question, with the exception of a few prohibitions, the rules are merely options offered by the legislator, which do not necessarily have to be exercised, and the latter ('negative' freedom of demarcation) is also protected. An important starting point is also that, within the *rule of law,* the state does not even seek to regulate all the possible aspects of religious behaviour or 'rule' with the application of the law – usually it is not necessary to have, for example, a legal form (registration) as a precondition for the operation of a religious community, only for a few activities that go beyond the practice of elementary religion, and to enjoy certain discounts and benefits. It should also be borne in mind that the role of the neutral state in guaranteeing the freedom of religion, in addition to the provisions directly governing freedom of conscience and religion, includes promoting a socio-cultural environment that 'facilitates free choice and provides adequate space for the practice of religion'.[28] It is the case that today it is not enough to analyse the decisions made by the domestic judicial forums of a state in order to perceive the content of freedom, as we must also take into account the case law of international fora. Among the narrower subjects of conflicts related to religious freedom and transforming into legal proceedings, recently European fora have dealt with cases on wearing religious symbols and displaying them in public places, as well as on dressing habits closely related to the given religion

[28] Balázs Schanda, *Állami egyházjog. Vallásszabadság és vallási közösségek a mai magyar jogban* (Budapest: Szent István Társulat, 2012), 28.

(*hijab, burqa* and so on), elements of education related to certain sexuality-related and ethical issues, certain decisions made by a church-maintained employer, and religious beliefs resulting in the rejection of active behaviours.

Judicial practices related to these also naturally change, and one of the tasks of legal science is precisely to show what subtle or even significant shifts have taken place in the practice of particular fora. One example is highlighting the fact that while the European Court of Human Rights (ECtHR) is increasingly focusing on protecting the rights of religious communities and employers, since 2017 the case law of the Court of Justice of the European Union (CJEU)[29] has prioritised the enforcement of individual rights through the courts.[30] This is particularly exciting in the light of the fact that, otherwise, the CJEU not only respects the decisions of the ECtHR but also generally follows its practice (despite the fact that it does not apply the European Convention on Human Rights directly).[31] However, the practice of law enforcement in this area is not only an example of a novel legal approach to traditional problems, as new and rapidly growing issues are emerging in the European area. The latter include, for example, '*sharia* councils, which use *sharia* in the manner of arbitration in family law and personal matters. The real question, then, is: Can a European state not only allow but also support *sharia* in cases where state law is not only available but is likely to settle the outcome of a dispute under different rules.'[32] The decisions made in these cases also shed light on the contours of Christian liberty; more precisely, they function as legal predictions of its nature, limitations and extent, which can be of help to all those for whom these issues are important.

These are the main starting points, through the examination of which we may *traditionally* devise a prognosis as to what can be protected in a particular state; that is, from the perspective of our topic, what the elements of Christian liberty that can be defined by rights will be, and where the approximate limits of those rights are. However, a forecast based on normative and individual legal sources (legislation and official decisions) in many respects *will not be able* to paint a really accurate picture; it is necessary to provide instead an in-depth analysis of what the *actual, practical extent* of freedom is. This is why, using the example of Hungary, I will attempt to apply a more useful and more reflexive approach.

[29] In the vast majority of specifically religious conflicts, the Grand Chamber of the CJEU has applied the prohibition of religious discrimination as set out in Directive 2000/78/EC and the exceptions for employers with a religious (ecclesiastical) spirit.

[30] Renáta Uitz, 'Lelkiismereti és vallásszabadság a multikulturális Európában. Hogyan tovább? Hova tovább?', *Jogtudományi Közlöny* 74, no 5 (2019), 213–228, 223.

[31] Ibid. 222.

[32] Ibid. 216.

(ii) The situation in Hungary

The objective here is not to analyse the situation of freedom of conscience and religion in Hungary, or to present in detail the legal developments of recent decades. The focus will be on those legislative nodes, and in particular law enforcement practices, that have had and continue to have an extraordinary impact on the group of phenomena that we have defined as the legal framework for Christian liberty. In this context, of course, priority should be given to the facts that already clearly raise the need for change; those that result in serious shifts in this dynamic, new notion of Christian liberty, compared to the prognosis outlined in subsection IIIA(i).

Under Sections 9(1) and 12(1) of the former law governing the religious sphere, Act IV of 1990 on freedom of conscience and religion and churches, the registration of a church was decided by a regional court competent for its seat or by the Metropolitan Court in a non-contentious procedure. For over twenty years before 2012, the process of registering churches was completely *formal* (although it was excluded that this had been the original intention of the legislator), mainly because the courts did not carry out any substantive examination beyond the applicants' declarations or the existence of the documents they were required to submit, neither in terms of the truth of these documents' content (statement of facts) nor the actual reasons and goals for the formation of the organisations. That is, if, on the basis of the documents submitted with the appropriate formality, a purpose emerged which sets out lawful and at least elementary religious content, the registration took place – in the vast majority of cases – automatically. Gaining ecclesiastical status after 1990, as opposed to continuing a still existing form of association, meant serious tax-related and other additional rights. Given that, at that time, it was possible to establish a church with one hundred people, compared to the ten people generally applicable to associations – it is obvious why almost all religious communities chose church status. In fact, consciously making it extremely easy to set up an organisation at the time of the regime change also opened the door to abuses and activities that used religious activity only as a disguise.

Legislation on religious communities most often enters the spotlight when, in response to certain (seemingly) extremist religious practices, the person entitled to do so takes it upon himself to change.[33] In Hungary, after the change of regime, problems arose in several waves, as a result of abusive practices, such as exemptions related to relics (before 2010),[34] in the context of more lenient rules for establishment

[33] Krystyna Daniel and W Cole Durham, 'A vallási azonosságtudat mint a nemzeti identitás összetevője', *Fundamentum* 1, no 2 (1997), 5–21, 6.

[34] The production and sale of a publication or a commemorative object necessary for a religious life does not qualify as an economic-entrepreneurial activity, the significance of which lies in the fact that the given church is thus released from its tax and contribution obligations in relation to this activity. In the past, there have been several attempts to market non-religious objects as a sacred object by

and visa facilitation for church ministers from abroad, in connection with tax exemption for 'collection money' and in the context of church establishments aimed at avoiding conscription (compulsory military service), among other issues. However, in connection with these phenomena, it can also be said that the authorities *did not act or only acted* in the most glaring cases, such as in the famous case of József Gyurcsok,[35] in which the prosecutor also undertook open action. In most cases, it was more the case that the legislation (in almost all cases parliamentary acts) was *changed,* rather than availing of the law enforcement tools otherwise available.

The first comprehensive regulatory attempt, which at the same time moved towards a meaningful tightening of regulation, was Act C of 2011 on the right to freedom of conscience and religion and the status of churches, religious faiths and religious communities, which was later declared unconstitutional by the Constitutional Court and therefore annulled.[36] The decision of the Constitutional Court[37] was based, among other things, on the fact that the law with regard to parliamentary recognition also lacked procedural deadlines and an explicit decision-making obligation for the National Assembly, as well as the possibility of appeal on the part of the applicant organisations. Add to this the fact that the legislation was extremely unprepared, with no prior impact assessment having been made whatsoever.[38] It is significant that the state here also followed the previous

founding a new church, for example, the experiment of the Győrújbarát motorcycle association, which would have organised a church around a shop selling motorcycles, deserves attention, so that all the items available in the shop could be considered relics, and thus a serious financial advantage could (have) be(en) realised. Goods imported as relics (duty-free) would then have been sold tax-free, also as relics. On their website one could read for a long time: 'Every year the members of our association give thanks to the Holy Carburator God and his child, the Holy Injector.' Ádám Rixer, 'A vallás fogalmáról', *Jogelméleti Szemle* 12, no 4 (2011), 1–8, 5. It should be noted here that an infringement committed with the intention of circumventing the law does not fall within the scope of Christian liberty – or in the hope of gaining some benefit and so on. In this dissertation, the concept of Christian liberty has a value content, it does not include the 'opportunities' created by intentionally abusive individual, community or social practices, even explicitly state practices – to this extent it is aligned with the theological meaning and content of the concept.

35 The telemedicine performed by the named person was not included in the founding document of the church (Egyetemes Szeretet Egyháza) – this was the subject of proceedings before the Pest county regional court.

36 The apparent reason for the adoption of the law, as communicated in the media, was the practice that increasingly took place from the end of the 2000s, in which the privately maintained homes for the elderly were transformed into churches, mainly with the involvement of those cared for, but without any actual religious activity, thus obtaining the so-called supplementary church normative subsidy.

37 For details see Decision 164/2011 (XII. 20.) AB.

38 The substantive (and preliminary) impact assessments in line with the final versions of Act C of 2011 and Act CCVI of 2011 would have been important because they could have demonstrated the fears, gaining headway already in the parliamentary debates one and a half decades earlier, that wanted to protect the Hungarian society from the rise of destructive sects, taking children, destroying

logic: When a problem arose (for example, the creation of pseudo-churches hunting for supplementary church norms), the law enforcement agency did not choose the appropriate solution, that is, to act, which was made possible, indeed mandatory, by the law (to change the court registration procedures into substantive procedures, and a series of prosecutorial actions), but – presumably for political reasons – legislation was enacted that radically intervened in the life of the whole sphere.

Although Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities eliminated several procedural problems, some substantive problems remained, which resulted in serious disputes, mainly by maintaining the recognition of churches by the National Assembly, considering that, although Section 14 of Act CCVI of 2011 specified nine exhaustive criteria for recognition, and the Minister's decision (more or less) bound the National Assembly with regard to the first six of them, the National Assembly was completely free to consider the existence ('proof') of the last three. Completely free discretion on the *merits* was not affected by the fact that the National Assembly had to justify its negative decision when making its resolution. Similarly, it did not mean the implementation of *content control* so that, although an organisation seeking religious recognition and carrying out religious activities could have asked the Constitutional Court to reconsider the National Assembly's decision, the Constitutional Court would have reviewed the lawfulness of the Parliament's procedure on recognition as a church rather than whether the relevant organisation could indeed prove the entity's 'willingness to cooperate and its ability to sustain it in the long term'.[39]

Not wishing to overlook all the legislative developments of the last ten years, it is clear that, after 2010, the legislative efforts to 'position' the larger, historical and 'established' churches have been corrected several times by the Constitutional Court's activities,[40] for example, Resolution 7/2017 (VII. 18.) AB, on the establishment of unconstitutionality manifested in the omission related to Act CXXVI of 1996 on the use of a certain part of personal income tax in accordance with the provisions of the taxpayer, and on the rejection of a constitutional

families, taking away their assets, encouraging their members to commit group suicide and ritual human sacrifice. It is feared that one of the main reasons for the lack of preliminary (substantive) impact assessments may be the fact that these fears have not proved to be real. Moreover, a truly objective survey would presumably support the fact that the vast majority of small churches, which were transformed from compulsion into a religious association in 2012, have a significant impact in Hungary today, for example, in strengthening social cohesion and solidarity, in renewing the fabric of society, which is less spectacular, but real in scale. Ádám Rixer, 'A hatásvizsgálatok jelentősége és egyes szempontjai a vallási szervezetek szabályozása körében', *Kodifikáció* 2, no 1 (2013), 91–102, 95.

[39] Act CCVI of 2011, s 14*(i)*.

[40] See in more detail Szilvia Köbel, 'Az Alkotmánybíróság vallásszabadsággal és vallási közösségekkel kapcsolatos gyakorlata', in Szilvia Köbel (ed.), *Az állami és a felekezeti egyházjog alapjai* (Budapest: Patrocinium, 2016), 207–234.

complaint. In addition to other Constitutional Court resolutions, Resolution 23/2015 (VII. 7.) AB also resulted in a substantive amendment of the law: In the last seven or eight years, a continuous and intense struggle has developed between the legislator wishing to re-regulate the religious sphere, certain religious entities and the Constitutional Court. In some cases, international fora have also been involved in the struggle,[41] and during this period there was also an amendment to the Fundamental Law of Hungary related to the subject under review. As we will see, the case law of ordinary courts is also permissive in terms of pressing legal constraints, which is exactly one of the reasons that an alternative definition of Christian liberty (description of the phenomenon) is needed.

B The newer proposed concept and some of its elements

The focus here is on a legal concept that is up-to-date and conceptualised, which may also be suitable for clarifying, deepening or modifying the image that can be obtained through an examination of the concept of Christian liberty based on

[41] The best-known example is the seven-member Chamber of the European Court of Human Rights (ECtHR) on 8 April 2014, deciding in 5 to 2 against Hungary on the subject of the joint complaints of 17 religious denominations that lost their ecclesiastical status on 1 January 2012 and 1 March 2012, respectively, under Act CCVI of 2011 on the right to freedom of conscience and religion and the status of churches, religious faiths and religious communities. The Court concluded that the Hungarian State had violated the applicants' right to associate (art 11) in relation to the right to freedom of religion (art 9), considering that the law recognised the church status of churches listed in the Annex as 'established churches', and other organisations that previously had church status were given an association rating, while the National Assembly also transferred the power of classification as a church from the jurisdiction of the courts to itself. In examining the case and the arguments, the ECtHR explained that the guarantee of freedom of religion and conscience means that the state remains independent and develops impartial regulations for religious communities. In the Court's view, by placing which religious communities are to be declared as churches in the jurisdiction of the Parliament, it had violated Article 9 of the Convention (the court cited the *Metropolitan v Bessarabia* case). The ECtHR further examined the existence of the conditions set out in Article 9(2), that is, whether the restriction was provided for by law or was made in order to protect public security, public order and public health or morals, or the rights and freedoms of others. The court established the restrictive nature of Act CCVI of 2011. Furthermore, in its view, the prevention of the misuse of public funds as a public interest objective is appropriate, but the Court concluded that the restriction was disproportionate to the objective pursued, given that the Hungarian State's measure was excessive and extremely strict. However, the public interest itself was not called into question by Strasbourg; it only considered justified to have lighter regulation that was more cooperative towards religious communities and more independent of the National Assembly. Subsequently, on 28 June 2016, the ECtHR awarded pecuniary and non-pecuniary damages to several complainants for previously identified violations. The damages awarded ranged from 40 thousand to 140 thousand euros. See Ádám Rixer, 'Az állam és a vallási közösségek kapcsolata a mai Magyarországon. A vallási közösségek nyilvántartása és pénzügyei a jogi szabályozás tükrében', *Államtudományi Műhelytanulmányok* 2, no 1 (2017), 1–45, 17.

legislation and judicial decisions. Our starting point, as we have indicated before, is that some aspects have been lost from the scope of the notion of freedom that can be gained as a result of the legal-positive approach, and other which may add, expand and broaden it. A broader concept of law may include infringing customary law, infringing legal custom and the unlawful conduct of law enforcement bodies, which is never brought before a judicial or other body, given that it has a positive effect on the persons (legal entities) concerned. This is a sociological approach that paints a more complete picture of the various aspects of Christian liberties, focusing on those phenomena of a legal nature, (most notably omissions) which cannot be read from the letter of the law and/or from 'official' law enforcement practice. What, then, are the areas (state practices) that modify the scope of freedom without, however, leaving a trace in the normative or individual sources of law?

(i) Law enforcement practices

Previous examples have shown that in the area examined, the state is often reluctant to act in cases where it could intervene and may even be obliged to intervene. This is not to incriminate the actors in the sphere, individual actors (religious entities), communities or individuals, but suggests that the *legal* approach to Christian liberty in practice (and religious freedom in general) might be broader than what we would experience in the event of full compliance by public authorities (that is what we could *assume* upon the first reading of the legislation). This typically involves not taking action against violations of certain rules, failure to comply with the obligations of the state to intervene, and 'reserved' fulfilment of this practice. On the whole, such laxity serves to expand and broaden Christian liberty; that is, the *actual* range of legal options enjoyed by Christians (of course, only if the lack of compliance with the law is interpreted as an extension of their opportunities, and not solely as a symptom of a broader malaise in the legal order or the entire legal system).

In addition to the old practice of registration and the 'timidity' of prosecutors' offices on religious matters, other examples may be given of such lenient behaviour by public bodies, for example, in recent decades it has been observed that since the late nineteenth century, the authorities do not act against various minor violations by Churches. To take a recent example, while state bodies have enforced the restrictions imposed to counter the Covid-19 coronavirus epidemic and checked compliance with the rules for a number of market entities (for example, social distancing, wearing masks and so on), in the case of churches (also subject to these rules) this has been waived. Of course, if the scope of 'freedom' may be increased through the conduct of law enforcement agencies (either within or outside the scope of legislation), then practices that result in narrowing are also possible. In Hungary, however, as we have already mentioned in subsection IIIA(ii) a tendency toward leniency can be observed when applying legislation.

(ii) Ecclesiastical internal law

The second aspect which expands the scope of Christian liberty that can be read from state sources, is the *ecclesiastical* domestic law recognised (allowed) by the state. The broadening (meaning the possibility of a greater room to manoeuvre) is clear: Even if the internal rules of the church cannot override state law, in parallel with it, or by settling areas and issues not affected by state law, such ecclesiastical regulations can provide a substantial, independent set of rules.[42] Thus, the development, stratification and independent viability of this legal segment – one which is not directly influenced by the state – greatly influences Christian liberty, insofar as it contributes to the fuller life of a given religion or by formulating religious views or regulations, or to better understand the content of certain (public service or employment related) legal relationships. It should be noted here that the 'breadth' of legal-type frameworks also stems in part from the fact that the legislator allows deviations from the general rule for religious entities in many respects (mostly in terms of organisation, internal structure and operation)[43] and, in case of certain types of organisation, it provides additional rights of a financial and economic nature, which in themselves result in an increase in opportunities.[44] At this point, of course, there is no question of unlawfulness, only noting the existence of a parallel legal order.

Many of the problems in this regard do not emerge in relation to the *existence* of internal rules but to the *content* and *interpretation* of specific (internal and religion-based at the same time) additional rules to be taken into account in the context of 'public purpose' activities of a service nature, accessible to the wider layers of the society. For example, in Western legal systems precise regulations and case law often protect the specific nature of the ecclesiastical employer as opposed to employees, taking concrete form in those norms, while protecting the privacy of employees is also becoming an increasingly important factor in these debates.[45] The requirements of Christian morality cannot be considered beyond the level of expectations, but it is important that they be applied uniformly and consistently by

[42] Pursuant to Section 8(2) of Act CCVI of 2011: 'State coersion may not be applied to enforce a state decision made on the basis of credits, internal law, statutes, organisational and operational regulations, or other corresponding regulations (hereinafter: internal rules) of a religious community, a public authority may not examine it. A decision of a religious community based on an internal rule may not be amended or reviewed by a state body, and a state body has no competence to adjudicate disputes arising from internal legal relations not regulated by law.'

[43] See, for example, Act CCVI of 2011, ss 9/B and 11/A.

[44] See in more detail Zoltán Ormóshegyi and Ádám Rixer, 'Magyarországi vallási közösségek pénzügyi forrásai és gazdálkodása a jogi szabályozás tükrében', in Köbel, *Az egyházjog alapjai,* 176–207.

[45] Schanda, *Állami egyházjog,* 115.

each church,[46] and, on the other hand, there are limits to the enforcement of loyalty that can be ensured by the state: In addition to certain reasonable expectations, the employee's private sphere must also be respected to some extent.[47]

In Hungary as well, the most interesting and in this situation the most common question is where the line is between 'internal affairs' (that is the decision-making situation that can be freely settled by a given religious entity) and the need to formulate state rules; this issue is especially pertinent in the field of the legal relations of the internal operation, application and users[48] of *church-run institutions*.[49] The starting point is obviously to state that there is no (and cannot be) total legal separation (autonomy): In the *Reynolds v United States* case,[50] the US Supreme Court distinguished between belief and action and concluded that the government has broad powers to regulate religious actions:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[51]

Another new and fascinating sub-issue in the literature is the use of biblical texts in the internal documents of church-maintained institutions and their incorporation with them, which also shows a close connection with employment, disciplinary and so on issues.[52]

(iii) Christian self-restraint

There are also occasions that *apparently* narrow the legal contours of Christian liberty; 'apparently', because the narrowing approach (conception) does not appear on the side of *law enforcement agencies* but on the side of potential subjects (users). These are the cases in which, in our case, on the basis of Christian conviction(s), an individual or a larger group abstains from the institutional solutions actually

46 Ibid. 117.

47 Ibid. 116.

48 As a well-known and instructive case law, see Fővárosi Ítélőtábla 2Pf.21.318/2004/3.

49 In these cases, the state must not only ensure the freedom to secede from religious communities but must also enforce aspects beyond this.

50 *Reynolds v United States* 8 US 145, 166–167 (1878).

51 Ibid.

52 Cf. Ádám Rixer, 'A Biblia szövegeinek felhasználhatósága az egyházi fenntartású intézmények belső dokumentumaiban', in Nándor Birher and Árpád O Homicskó (eds), *Az egyházi intézmények működtetésének etikai alapjai* (Budapest: KGRE ÁJK, 2019), 25–36, 26.

permitted by formal law by their own voluntary decision; This is a *negative freedom*, that is, one can voluntarily waive certain rights (freedoms), either by agreeing on these rights (for example, the right to marry), but enforcing the Pauline gift for myself (that is, opting not to marry) or by not agreeing to the law by refusing for anyone to use it specifically on religious grounds (for example, same-sex marriage, if the law permits – this is not currently possible in Hungary). There are also relationships in which, as noted earlier, the state, recognising the interpretation of religious norms as a sustainable position and the moral conflict between state norms, maintains an alternative regulation (for example, by allowing both armed and unarmed military service). Of course, in the case of self-restriction based on religious considerations, we can argue that it is not really a restriction of freedom, but precisely the realisation of freedom, if one does not want to use one of the possibilities offered by the law to make a free and responsible decision. They become a legal constraint to the extent that they become established as a custom among the members of a given community.

These examples aimed to illustrate the factors that have substantially expanded or narrowed the scope of Christian liberty in Hungary in recent decades. Although not highlighted above, it is also interesting to note that law enforcement agencies certainly had to adapt to the logic of the rule of law: In the initial period, the 'leniency' of law enforcement practices outlined above was partly due to the uncertainty of some judges in the new legal institutions. In some cases, quite amusing decisions were made, for example in the context of what the provision that no coercion by the state may be exercised in matters within the church should mean in practice.[53]

[53] In one case, the focus was on whether a claim for vacating a property owned by the church may be enforced *in court*. The property in the lawsuit, on which a building of the local Roman Catholic parish stands, was owned by the plaintiff. The property was inhabited by the defendant, who had been released from priestly service due to his retirement. The plaintiff's action sought that the property be vacated on the ground that it was used by the defendant without title and had not been vacated despite an earlier written agreement. The defendant requested the rejection of the action. He disputed that any authority of the Hungarian State could act in this case. He referred to being a sick, elderly man, who could not be compelled to move under church law.
In the judgment of the first instance, upholding the action, the court ordered the defendant to vacate the property subject to the action within fifteen days. On the other hand, on appeal by the defendant, the court of second instance set aside the first instance judgment and terminated the proceedings. In its reasoning, the court of second instance explained that the defendant was entitled to use the property on the basis of a special ecclesiastical legal relationship, so the title of use is not a lease relationship regulated by the Civil Code or in Act LXXVIII of 1993 on certain rules concerning the lease and alienation of flats and premises. In the event of termination of the parish relationship, the rights and obligations of the parties are governed by ecclesiastical law. In his application for review against the order, the plaintiff explained that the right of ownership of the ecclesiastical legal person is protected by the Constitution and that the right of ownership

IV The theological concept of Christian liberty

Christian liberty, as an important issue for theology too, has, according to the literature, condensed into a few nodes of thought: All the work that discusses this covers man's most general freedom of choice,[54] the freedom of the sons of God, the deliverance of Israel beyond its own accord,[55] Jesus' mission of salvation[56]

may be enforced on the basis of the rules of the Civil Code and Sections 23(2) and 75(1)(b) of Act LXXVIII of 1993.
The Supreme Court found the request for review to be well-founded, as far as it is true that, under Section 15(2) of (then effective) Act LXXVIII of 1993, no state coercion may be applied to enforce the internal laws and rules of the church, but this provision does not preclude the application of Hungarian laws existing in addition to the internal laws and rules of the church and, on the other hand, according to the correct interpretation, state coercion cannot be used in matters within the church, because the protected, internal autonomy of the church must prevail in this area. However, the part of the given legal relationship enforced in the action, that is, the owner's claim for the return of the real estate, does not fall within the scope of that provision; therefore, the Civil Code and the relevant legal provisions of Act LXXVIII of 1993 shall apply. In view of all this, the court of second instance erred in concluding that the plaintiff's claim could not be enforced in a court of law, said the Supreme Court (Legfelsőbb Bíróság Pfv. III. 23. 115/2000).

[54] The authors of some biblical texts emphasise the sovereignty of God's will so much (Isaiah 6:9; Romans 8:28, 9:10–21, 11:33–36) that it may seem that the texts do not recognise man's freedom of choice as real. In reality, however, the whole biblical tradition presupposes that man is capable of free choice: From the narration of the first sin (Genesis 2–3; cf. 4:7), it constantly refers to his decision-making ability, but at the same time underlines his responsibility. It is a man's duty to choose between blessing and curse, between life and death (cf. Deuteronomy 11:26, 30:15–20), to convert and endure to the end of his life (Ezekiel 18:21–28; Romans 11:22; 1 Corinthians 9:27; Matthew 7:13). The contradiction straining between divine sovereignty and human freedom is merely apparent, for both the grace of God and the free obedience of man are necessary for salvation. 'Paul sees this truth as applying to his own life (Acts 22:6–10; 1 Corinthians 15:10) and to that of every Christian (Philippians 2:12f). The mystery remains; but God knows how to move our hearts without violence and how to draw us to Himself without constraint (cf. Psalm 119:36; Ezekiel 36:26f; Hosea 2:16j; John 6:44).' Léon Roy, 'Liberation–Liberty', in Xavier Léon-Dufour (ed.), *Dictionary of Biblical Theology*. Transl. by P Joseph Cahill (New York: Desclée, 1967), 270–273, 273.

[55] God delivered the people from the bondage of Egypt (Exodus 1–15), and this deliverance is always referred to in the Scripture. '*On the social level,* biblical legislation itself reflects the rememberance of Israel's first deliverance, especially in the Deuteronomist tradition, when it sets down that the Hebrew slave should be set free after seven years in honour of Yahweh's deliverance of His people (Deuteronomy 15:12–15; cf. Jeremiah 34:8–22). The Law was not always observed, however; and even after the return from exile Nehemiah would have to rise up against certain of his compatriots who did not hesitate to lead their "ransomed" brethren back into slavery (Nehemiah 5:1–8). Nevertheless, "setting the oppressed free, breaking every yoke" is one of the forms of "fast which is pleasing to Yahweh" (Isaiah 58:6).' Ibid. 271.

[56] Christ is our Saviour. The deliverance of Israel was merely a forerunner of Christian salvation. For the reign of perfect and finite freedom is created by Christ for those Jews and Gentiles who join him in faith and love; 'if the Son set you free you will indeed be free (John 8:36).' Ibid. 271.

and the nature of that freedom,[57] the rules for its exercise and its[58] limitations.[59] The basic premise of Christian theology in this regard is that: 'It is for freedom that Christ has set us free.' In his letter to the Galatians, the Apostle Paul recorded this sentence (Galatians 5:1), as the basic tenet of Christian liberty, the good news of Christ's salvation for all men, which goes beyond the miracles and signs He performed during Jesus's earthly presence, as long as sinners are forgiven of their sins, the hope of resurrection for those who are destined to die and the final restoration of the communion with God. However, according to Jesus, freedom is not an end in itself; it is always connected to God's truth and/or love (grace), which is to grow in them. This freedom cannot be divided. If we try to highlight and analyse some of its facets on their own, we soon come to an apparent contradiction: Some aspects paint a distinctly radical, powerful picture of the nature of Christian liberty, in line with current conventions, while others emphasise mild and restrained, or downright self-sacrificing elements. The two are not mutually exclusive: In fact, *only together* can the two result in a healthy concept of freedom and its corresponding practical application. Hermann Pitters puts it this way:

> Luther, in his work written *On the Freedom of a Christian,* published in 1520, . . . stated: 'The Christian man is free from all things and is not subject to anything.' This freedom is experienced in faith. He whom God has seized in faith through His giving grace possesses

[57] 'Although it has repercussions on the social plane, to which the letter to Philemon bears excellent witness, Christian liberty is located beyond social structures. Available to slaves as well as free men, it presupposes no change in one's state (1 Corinthians 7:21). In the Graeco–Roman world, where civil liberty formed the very basis of personal integrity, this fact of Christian liberty was a paradox; but in this way the profound value of the deliverance which Christ offered was made clear.' Ibid. 271. The believer is free in the sense that, in Christ, he can now live in an intimate relationship with the Father without being shackled by the bonds of Sin, Death or the Law. Baptism provided the death and resurrection of Christ, thus ending our bondage (Romans 6:6). 'God rescued us from the domain of darkness and brought us into the kingdom of His beloved Son, in whom we have redemption and the forgiveness of sins (Colossians 1:13f). . . . We have died mystically with Christ, we are henceforward redeemed from the Law (Romans 7:1–6), and we cannot find the principle of our salvation in the fulfillment of an exterior law (Galatians 3:2–13; 4:3ff).' Ibid. 272. We live in a new system with a different degree of cord (Jeremiah 31:33; Ezekiel 36:27; Romans 5:5, 8:9–14; 2 Corinthians 3:3–6).

[58] The Christian behaves as a son before God (Ephesians 3:12; Hebrews 3:6, 4:16), because in baptism the Spirit you received does not make you slaves, the Spirit you received brought about your 'adoption to sonship' (Romans 8:14–17).

[59] 'I have the right to do anything, you say – but not everything is beneficial', states the Apostle (1 Corinthians 10:23). This statement refers to restraint, self-denial, responsibility to others and the waiver of our rights (1 Corinthians 8–10; Romans 14), the need for wise insight, thinking according to the divine plan of salvation and ultimately the necessity of love. We are not mistaken too much when we see common sense in avoiding tempting situations in that sentence. All of these are not restrictions on freedom, but forms of exercising them to a higher degree. Christians, raised from their slavery to serve God, (Romans 6) value the gift they receive, serving one another with love (Galatians 5:13) and others as the Spirit guides them (Galatians 5:16–26).

> a majestic, wide area of freedom. However, his second statement is just as true: 'The Christian man is a servant ready to serve in all things and is subject to all' through love. The love of a neighbour is respectful of other people and is ready to serve all that is good.[60]

Ignoring this dual nature of Christian liberty and emphasising one of the endpoints (also) led to misunderstandings in Martin Luther's time: Concentrating on the radical conception of freedom alone may easily lead one to neglect the need to care about love and the weak, and becomes a revolutionary programme to eliminate self-denial and the skills that prevail against self-interest in general.[61] From here, it is only one step to hide political goals in religious trappings. Even in Jesus's time, many Jews 'were looking especially for freedom from the yoke which the nations had imposed upon the holy land. This was probably the concept which the disciples travelling to Emmaus had of the task of "him who was to deliver Israel" (Luke 24:21).'[62] It is important to realise, however, that Jesus's programme is not a political programme embodied in physical resistance but a no less radical, spiritual type of struggle or 'deliverance', as expressed in Psalm 130:8: 'He Himself will redeem Israel from all their sins.' In fact, true salvation is the cleansing of those who have been called and their share in the sacrament of God, both back then (Isaiah 1:27; 44:22; 59:20) and also ever since.[63]

In relation to the duality of *selfishness – earthly goals* and *self-denial – spiritual goals,* as can be seen clearly from the above, Pierre Teilhard de Chardin notes that:

> Union with Christ presupposes essentially that we transpose the ultimate centre of our existence into him – which implies the radical sacrifice of egoism. . . . If Christ is to take possession of all my life – of all life – then it is essential that I should grow in him not only by means of the ascetic constraints and the supremely unifying severances of suffering, but also by means of everything that my existence brings with it of positive effort, and the perfecting of my nature.[64]

Teilhard de Chardin's idea also encourages us to define Christian liberty as not merely a juxtaposition of static elements, much less as a concept honed to a single aspect, but as the development of freedom *in the process,* thus (dis)solving the tension created by the static statements and by their apparent contradiction. We should realise that this issue or concept can be more easily grasped and presented in a process-like system consisting of elements that reflect on each other and build on each other. I assume that our relationship with freedom, especially as a Christian,

[60] Hermann Pitters, 'Luther Márton – a keresztény szabadság hirdetője. Gondolatok a reformátor születésének 500. évfordulóján', *Keresztény Magvető* 89, no 4 (1983), 239–245, 241.

[61] Ibid. As a concrete negative example, Pitters cites an external ecclesiastical reform initiative in 1522 by Karlstadt, a professor at the Faculty of Theology in Wittenberg, that led to the release of tempers.

[62] Roy, *Dictionary of Biblical Theology,* 271.

[63] Ibid.

[64] Pierre Teilhard de Chardin, *The Divine Milieu* (New York: Harper & Row, 1960), 93.

is also a fully-fledged, expanding knowledge and actual practice, and in this paper I will also attempt to briefly review this process by proposing a six-dimensional, dynamic model.

This approach *opportunity* is strongly supported by the fact that it is only in the New Testament that numerous examples of this approach can be found; that is, a process-like description of the development of a relationship with God. For example, 2 Peter 1:5–7 describe this process as follows: 'For this very reason, make every effort to add to your faith goodness; and to goodness, knowledge; and to knowledge, self-control; and to self-control, perseverance; and to perseverance, godliness; and to godliness, mutual affection; and to mutual affection, love.' It is therefore about development, overlapping steps, growth phases and a clear maturation process. In the same way, in one of the best-known parts of the Bible, in Matthew 5:3–12, a fulfilling character can be witnessed in the succession of sayings on happiness; that is, it is not just a collection of 'wise sayings' placed randomly next to each other:[65] The perception of an overwhelming spiritual need is followed by its emotional experience (assumption) and then, instead of anger and frustration, a humble encounter follows it. Through spiritual openness developed in this way, we can become receptive to the truth (about what needs to be done), and then by practicing the right action, one will be fit for the hardest thing: forgiving others as well. If, at this point in our development, we are not overwhelmed by religious pride ('how great I am'), then the temper of the pure heart will swell in gratitude and wish to tell everyone about it, thereby also trying to restore God–man and man–man relationships (this is the service of building peace). In the end, this life, rooted and fulfilled in Christ, and standing up for God, almost necessarily leads to persecution.

Let us now attempt to represent the concept of Christian liberty in a process-like way through the stations of a spiritual progress. This argument in favour of dynamic conceptualisation is, on the one hand, based on the fact that the individual's subjective perception of freedom is necessarily process-like if it is shaped by cognitions, conscious needs, external–internal struggles and evolving beliefs; and on the other hand, all change has a clear concept of freedom for one's own use; that is, the individual's own, unequivocal concept of liberty can only develop over a longer period of time. In addition to all these aspects, I also assume that the individual stations build on each other to some extent, and even their order is – at least in part – fixed. In this paper, I distinguish six such steps or elements of freedom that

[65] 'Blessed are the poor in spirit, for theirs is the kingdom of heaven. Blessed are those who mourn, for they will be comforted. Blessed are the meek, for they will inherit the earth. Blessed are those who hunger and thirst for righteousness, for they will be filled. Blessed are the merciful, for they will be shown mercy. Blessed are the pure in heart, for they shall see God. Blessed are the peacemakers, for they will be called children of God. Blessed are those who are persecuted because of righteousness, for theirs is the kingdom of heaven. Blessed are you when people insult you, persecute you and falsely say all kinds of evil against you because of me. Rejoice and be glad, because great is your reward in heaven, for in the same way they persecuted the prophets who were before you' (Matthew 5:3–12).

can be inserted into a system with respect to each other, considering it necessary to clarify and supplement them later, to expand them in a more nuanced way, and even to unify the individual elements further.

Phase 1: *Freedom to know God*. In addition to grasping the essence of the plan of salvation, this also includes the possibility and freedom of access to the knowledge of God, revealed by Him. The *basis* or *starting point* of Christian liberty is the freedom for one to know the person and will (intentions) of God on the basis of the appropriate knowledge. God makes Himself free to be known,[66] predisposing us to commune with Him without coercion, while caring diligently for those who, for some reason, cannot be taught about Him.[67]

Phase 2: *Freedom of God's choice by man*. An initial intellectual decision is needed, which is then followed by many more practical ones, even in specific, more difficult situations. It is a triviality, but essential: Love is not primarily a feeling, but rather – especially in the long run – a decision based on conviction, in any type of relationship. Our relationship with God is also like this: It is good and helpful to have feelings for a person, to be passionate and grateful, and so on, such as in the form of the gratifying feelings that follow a successful 'search',[68] but the right beliefs are also absolutely necessary for the permanence of the relationship. This phase – looking beyond the moment or moments of the first commitment – can also be seen as the behaviour of a young Christian with their 'first love'. It is definitely a phase of freshness, a lived joy of liberation through communion with God. In this period individual decisions and behaviour are emphatic and dominant in the whole situation, and in each of the situations that arise. The circumstances at this time seem secondary: Through the momentum of first love, the Christian soars freely against natural laws, religious tradition and even against the rules he has previously followed. He does not mind doing something that apparently has no worldly benefit, which makes no sense and which, by the logic of the world, is downright meaningless. He is driven from within by the joy that deepens his relationship with Jesus, and in the meantime becomes 'foolish': 'For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God' (1 Corinthians 1:18). This is also the stage of unlimited trust; that is, the time of determination trumping visible and physically experienced things: 'Simon answered so; Master, we have worked hard all night and have not caught a thing.

[66] The Bible is suitable for understanding the essence of true freedom and the nature of God (Romans 1:19–20; 2 Timothy 3:16: 'All Scripture is given by the inspiration of God, and is profitable for doctrine, for reproof, for correction, for instruction in righteousness', consequently, faith comes from hearing the message, and the message is heard through the word about Christ (Romans 10:17).

[67] For this see Romans 2:11–16.

[68] 'From one man he made all the nations, that they should inhabit the whole earth; and he marked out their appointed times in history and the boundaries of their lands. God did this so that they would seek him and perhaps reach out for him and find him, though he is not far from any one of us. For in him we live and move and have our being' (Acts 17:26–28).

But because you say so, I will let down the nets' (Luke 5:5). This how it all sounded in the Old Testament: '[A]nd will cry out to You in our distress, and You will hear us and save us' (2 Chronicles 20:9b). Moreover, in the same place, verse 12b also shows what a *complete* conversion entails, what perfect trust, even in the midst of uncertainties, means: 'We do not know what to do, but our eyes are on You.' This, then, is freedom of commitment.

Phase 3: The phase of *mature Christianity,* the cyclical phenomenon of regaining that first love. This is the stage of deepening beliefs and consciously regaining attitudes characteristic of first love (Christian stage of life). In terms of the emphases of the third phase (or component, aspect and so on), it is the logic or freedom of Christianity within an agreed, mature, stable community. It is accompanied by the recognition of the voluntary ('free') exercise of increased responsibility within the community as a necessity. It is the assessment and practical realisation that perseverance, renewal as a Christian, and recovery in spite of temptations and failures can only be made in a living community rooted in Christ. Most vividly, the 'each other' quotation from the New Testament shows what all this means in the tide of everyday life, in a time of a growing need for strengthening.[69] Decisions, while they still must be made by the individual, take on a community dimension, if only because the 'suction effect' of the world is enormous:

> So I tell you this, and insist on it in the Lord, that you must no longer live as the Gentiles do, in the futility of their thinking. They are darkened in their understanding and separated from the life of God because of the ignorance that is in them due to the hardening of their hearts. Having lost all sensitivity, they have given themselves over to sensuality so as to indulge in every kind of impurity, and they are full of greed. (Ephesians 4:17–19)

It is no accident that this is uttered in various forms over and over again: 'It is for freedom that Christ has set us free. Stand firm, then, and do not let yourselves be burdened again by a yoke of slavery' (Galatians 5:1).[70] The need for restraint, wise (mature) self-restraint, also arises where otherwise no 'border crossing' or obvious failure has taken place, only where a process of spiritual drift has begun, and it is worth recoiling in time.[71] However, part of this clearer concept of freedom is the

[69] 'Love one another deeply, from the heart' (1 Peter 1:22); 'Be devoted to one another in love. Honour one another above yourselves' (Romans 12:10); 'Accept one another, then, just as Christ accepted you, in order to bring praise to God' (Romans 15:7); 'Carry each other's burdens, and in this way you will fulfil the law of Christ. If anyone thinks they are something when they are not, they deceive themselves' (Galatians 6:2–3); 'Therefore confess your sins to each other and pray for each other so that you may be healed. The prayer of a righteous person is powerful and effective' (James 5:16); 'Bear with each other and forgive one another if any of you has a grievance against someone. Forgive as the Lord forgave you' (Colossians 3:13).

[70] See also Galatians 4:26–31; 1 Corinthians 7:22; 2 Corinthians 3:17.

[71] 'Jesus answered him, "It is also written: Do not put the Lord your God to the test"' (Matthew 4:7); 'So, if you think you are standing firm, be careful that you don't fall!' (1 Corinthians 10:12);

freedom of opinion on all issues that make a difference in everyday questions (what food I like, who my favourite writer is and so on) and on religious (theological) issues that are not fundamental to the faith (non-redemption issues) and as such, as the case may be, tolerance for those with a sensitive conscience may be classified here. While the Christian grows in knowledge and true love, he never becomes perfect in the human body, even if he grows in terms of paying attention to others and so on; he will necessarily make mistakes, and so the next phase, another round of freedom, is necessary.

Phase 4: *Freedom to err*. The most miserable form of Christianity is that which focuses *only* on obeying the rules, living a life of truth, and which, while verbally acknowledging its own imperfections, disguises most of its weaknesses in practice: this attitude, when it becomes an individual and communal way of life, necessarily results in hypocrisy and religious superficiality, and ultimately in cold-blooded compliance and constant dissatisfaction. Ultimately, this is about the nature of grace, about understanding that without it the joy of life that overcomes death, the power of love with truth, and everything else that can bring one's faith to life, is lost.

A good example of what has been said so far is the suggestion that we instruct a lawyer to elaborate a biblical concept of repentance. There is a good chance that any lawyer who can read and interpret a text would soon compile a three-pronged concept, according to which repentance (already as a Christian) is caused by heart-break, by emotional and mental distancing from the act committed, 'indignity' and, on the other hand, the creed of sin (of bringing it before God or men) and, thirdly, of dealing with the material consequences (reparation). If we accepted this kind of 'working concept' the most perfect conversion would be that of Judas, who, as the Scripture records, repented of his deeds, confessed to the leaders, and 'returned' the blood reward he had received.[72] Yet we do not see him with the other Apostles later; in fact, we read that he committed suicide. Why not, if he did everything human to correct his mistake? It is at this point that the question of grace enters the picture – or in our case, the answer: Judas could not understand, comprehend or accept one thing, that there was forgiveness for him; that either Jesus, if he followed Him, in time, or the other disciples, would forgive him. He did not understand the essence of grace, the nature of love that transcends earthly logics and goes beyond truth, the divine logic of forgiveness. Forgiveness for oneself and for other people, in other words, understanding and exercising grace, is thus the next degree of freedom. The apparent paradox is that, in our own decisions too, the fact that we can dare to add grace *freely* to the truth may only be the consequence of a more accurate understanding of 'truth' (note 69 shows the need for forgiveness in the community as a conduct without which there is no way forward – in a spiritual sense).

'You, my brothers and sisters, were called to be free. But do not use your freedom to indulge the flesh; rather, serve one another humbly in love' (Galatians 5:13).

[72] Matthew 27:3–5.

Phase 5: *God's freedom of choice*. By God's freedom of choice (as an indisputable element of Christian liberty), we mean that although there are certain truths in the most important things in life (unavoidable physical and/or religious facts), we do not anticipate a significant part of the things that await us: We cannot estimate and predict them in advance. This 'vulnerability' is the most exciting and at the same time the most humbling aspect of Christian liberty. It involves accepting the unexpected, the unwanted, our feelings, our sense of justice, tension, offence or other kinds of difficulty. It is, similarly, difficult to accept disease, such as the Covid-19 coronavirus epidemic that is still raging, and its consequences. Teilhard de Chardin expressed this constraint on our existence: 'The passivities of our life, as we said at the beginning of this study, form half of human existence. The term means, quite simply, that that which is not done by us, is, by definition, undergone. . . . In the first place the passivities ceaselessly accompany our conscious deeds, in the form of reactions which direct, sustain or oppose our efforts.'[73] However, in the midst of these 'passivities', it is not easy to trust in promises by faith: for example, that God does not tempt us to do evil,[74] that He does not overload us,[75] and that He will use everything – indeed everything – to my advantage if I seek Him, His will, in my life.[76] But at the same time, this trust opens up a perspective; it further clarifies the big picture and its contours in me, and it can help me to see heaven, which is also the next 'station', even more clearly. In summary, a correct interpretation of God's freedom of choice means assessing and accepting that although one may have no or only limited influence on the events themselves, one's attitude towards events is one's own decision (one does have freedom in this regard). In a broader spiritual perspective, this also means that not only do I have the opportunity to take note of all of this, but I am free to enjoy, and even live joyfully in a situation that I can plant and water, as it were, even if the seed was not planted by me.[77] I am only a co-worker, but now I can be a part of God's work, not as a servant but as a son or a friend.

Phase 6: *The freedom of Heaven – spending most of life in the direct presence of God*. Experiencing and 'interiorising' the previous stages (phases); that is, accepting God's person and His plan for my life in action, will necessarily *also* turn my attention to the promise of the future. It thus turns towards heaven, which is the decisive part of the future (the part of my being beyond physical and bodily form), which is a wonderful place. The Bible says: 'What no eye has seen, what no ear has heard, and what no human heart has conceived, God prepared for those who love him' (1 Corinthians 2:9b). God has a perfect plan for us, of which heaven is

[73] Teilhard de Chardin, *The Divine Milieu,* 75.

[74] James 1:13.

[75] 1 Corinthians 10:13.

[76] 'And we know that in all things God works for the good of those who love him, who have been called according to his purpose' (Romans 8:28).

[77] 1 Corinthians 3:6.

a part – it is also designed for us. Very specifically, we read the following about heaven: 'Since, then, you have been raised with Christ, set your hearts on things above, where Christ is, seated at the right hand of God' (Colossians 3:1). Not only is Christ sitting there, but He is actively waiting for us: 'My Father's house has many rooms; if that were not so, would I have told you that I am going there to prepare a place for you? So I will go and prepare a place for you' (John 14:2–3). This is also indicated in 2 Corinthians 5:1: 'For we know that if the earthly tent we live in is destroyed, we have a building from God, an eternal house in heaven, not built by human hands.' This, then, is the last stage or step, of the fulfilment of Christian liberty, by which the last element of our notion of a theological but dynamic nature has taken its place.

V Summary

We have tried to present the most exciting contexts of Christian liberty from the perspectives of several (academic) fields. The novel element was the dynamic, process-like approaches to both legal and theological research. In the former case, this proved to be expedient for formulating a more accurate concept of legal life in connection with our narrower topic through a (sociological) analysis that goes beyond the content of normative and individual sources of law and presents reality more accurately. For the latter case, we indicated that the emerging human character, which can be grasped in its development, is the natural medium of the paper – also resulting in a more precise concept. Of course, I have to admit that due to the rudimentary and experimental nature of the conceptual foundation, further research and more thorough analyses of it are required, while we hope that the findings of this paper will stimulate the research of others, either further research into Christian liberty or on other topics where dynamic, process-like approaches also seem justified.

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Freedom of Religion, Public Good, Christian Culture

Perspectives for Finding New (Old) Foundations

Balázs Schanda

I Introduction

Freedom of religion and religious tolerance occupy a special place in the Hungarian public law tradition and as such Hungary (and especially Transylvania) has a unique historical experience of how to ensure the peaceful coexistence of different denominations and of how external threats can promote the internal peace of a society. While in comparison to the previous meaning of freedom of religion, its present content has become much richer, two fundamental aspects remain the same: For the sovereign state, the believer constitutes a challenge, as his loyalty to the state is ultimately preceded by his loyalty to God. At the same time, the believer can also enrich the good of the community with a new quality; the community of believers creates a culture, and this culture underpins the existence of the whole of society. Freedom of religion requires a deeper reflection: What are the roots of this freedom and what fruits does it bear?

II Reservations on the freedom of religion

Pope Gregory XVI stated in his encyclical *Mirari vos,* dated 15 August 1832, that: 'This shameful font of indifferentism gives rise to that absurd and erroneous proposition which claims that liberty of conscience must be maintained for everyone.'[1] Compared to this position, the Catholic Church had undoubtedly come a long way by the time of the Second Vatican Council (1962–1965), when it made the solemn declaration, *Dignitatis humanae* on freedom of religion.[2]

[1] Pope Gregory XVI, *Mirari vos,* para 14.

[2] László Gájer, *XIII. Leó pápa megnyilatkozásainak filozófiatörténeti előzményei (különös tekintettel a vallásszabadságra* [PhD dissertation] (Budapest: Pázmány Péter Katolikus Egyetem Hittudományi Kar, 2013).

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The Church, which considers itself the custodian of objective truth, for a long time rejected the idea of freedom for fear of infidelity to the Truth: Error cannot have rights.[3] Obviously, historical circumstances also played a role in the Church's reluctance to embrace the concept of human rights. The idea of human rights emerged in the context of the natural law approach and the theory of the social contract, and subsequently the first human rights charters were formulated during the anti-clerical Enlightenment. Although there was a transition between natural law and the Christian conception of law, proponents of human rights did not start from the Christian image of man and revelation but from their own socio-philosophical assumptions. Religion-based legal systems are by no means characterised by a category of human rights but instead take duties as their starting point, whereas 'rights' are held by God. Thus, the neighbour cannot enforce his 'right' to love – which does not change the commandment of love while the Ten Commandments approach property from the prohibition of theft rather than from the point of view of legal protection.[4]

III The route to *Dignitatis humanae*

The last document issued by the Second Vatican Council is a solemn declaration on the freedom of religion, beginning with the phrase *'Dignitatis humanae'*. This was probably the most controversial document drawn up by the Council,[5] which itself travelled along the long road from tolerance to freedom.[6] With this step, the Council, while not without precedent, undeniably took a decisive step, with far-reaching consequences for the Church and the world. According to the American Jesuit theologian John C Murray, who played a major role in the drafting of the statement, the initial thesis, confirmed during the papacies of Leo XIII and Pius XII,[7] was the institutionalisation of Catholicism as a state religion, which does not allow the public existence of other religions (since error cannot have rights). Murray calls tolerance a hypothesis which the Catholic state could

[3] Josef Königsmann, '"Vollkommene Gesellschaft" oder "Religionsfreiheit" als Zentralbegriff einer Lehre über das Verhältnis von Kirche und Staat', *Österreichisches Archiv für Kirchenrecht* 19 (1968), 232, 245.

[4] Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990), 184.

[5] István Seregély, 'Nyilatkozat a vallásszabadságról: "Dignitatis humanae"', in József Cserháti and Árpád Fábián (eds), *A II. Vatikáni Zsinat tanítása* (Budapest: Szent István Társulat, 1975), 367.

[6] Roland Minnerath, *Le droit de l'Église à la liberté. Du syllabus à Vatican II* (Paris: Beauchesne, 1982), 124–126.

[7] John C Murray, 'Leo XIII and Pius XII: Government and the Order of Religion', in Leon J Hooper (ed.), *Religious Liberty. Catholic Struggles with Pluralism* (Louisville, KY: Westminster John Knox, 1993), 49–125.

exceptionally choose as the lesser evil.[8] *Dignitatis humanae,* going beyond the practice established since the Reformation, set a new conceptual foundation for thinking about society and the state, as was expressed in 1963 in the encyclical of Pope John XXIII, beginning with *'Pacem in terris':* The principles of truth, justice, love and freedom – meaning that freedom of religion was accepted by the Church because of a truth rather than for practical reasons – for the truth of the dignity of the human person.[9]

Dignitatis humanae starts from the dignity of the person, as opposed to ecclesiastical public law *(ius publicum ecclesiasticum)* with its traditional questioning, the main issue of which was the discussion of the relationship between the institutions and the *apologia* for the original and full power of the church and the state in their own territory. Of course, the statement does not stop at the level of the individual but also involves the rights of religious communities. Freedom of religion is not the same as freedom of the Church:[10] Freedom of the Church *(libertas Ecclesiae)* does not only follow from the freedom of religion but also from its very existence.[11] The essence of the state's previous preference for denominational commitment was for the state to recognise the interpretation of divine law according to the Teaching Office of the Church. After the solemn recognition of the principle of freedom of religion, the religious commitment of people can become meaningful through the commitment of Christian citizens to the democratic process, rather than through solemn state declarations. Along with the recognition of the freedom of religion, the Church indicates its preference for the rule of law and also accepts the secular nature of the state,[12] in that it does not require the state to make an institutional commitment to the Catholic Church. Acceptance of the secular nature of the state is, of course, not acceptance of secularism in the sense in which it appeared (especially in turn-of-the-century France) as an anti-clerical intellectual and political programme.

By recognising freedom of religion, therefore, the Church does not acknowledge error as true but confirms and protects the dignity of the erring human person, in the belief that the best human decision on the matter of their worldview should be made in a manner consistent with human dignity, that is, freely. Putting the dignity of the person first does not shift the boundaries between the Church and the state or the Church and society, and it also makes it clear that the Church does not start from an individualistic conception of human rights – on

[8] John C Murray, 'Religious Freedom', in John C Murray (ed.), *Freedom and Man* (New York: PJ Kenedy and Sons, 1965), 134.

[9] John C Murray, 'The Declaration on Religious Freedom', in Leon J Hooper (ed.), *Bridging the Sacred and the Secular. Selected Writings of John Courtney Murray, SJ* (Washington, DC: Georgetown University Press, 1994), 198.

[10] Second Vatican Council, *Dignitatis humanae* (1965), 4.13.

[11] Lorenzo Spinelli, *Libertas Ecclesiae. Directorate of Directed Education* (Milano: Giuffrè, 1979), 194.

[12] Minnerath, *Le droit de l'Église,* 137 and 141.

the contrary, it derives from the human right to freedom of religion and the community right to freedom of religion. Churches are composed of followers of the same beliefs, so obviously no one has the right to be or remain a member of a particular religious community that follows other beliefs. The autonomy of religious communities also extends to determining who is considered a member and what rights and obligations this membership entails – up to the limit of breaking the law. Thus, as Péter Erdő states, freedom of religion cannot be interpreted within the church.[13] The Church recognised, in the light of the gospel, that God does not force anyone to believe, so freedom of religion rests on the recognition of a person's ontological dignity and does not signify the recognition of religious indifference. Today, it has become increasingly clear that there is no place for coercion in our relationship with God – and the state must respect that freedom. The past fifty years or more have brought about decisive changes to the world. Religious diversity has intensified in much of the world, not least as a result of migration. The rise of extremism is also a new challenge facing many societies. While Western societies first made religion a private matter and then many moved away from the faith, today the question of the social role of religion has arisen with renewed vigour.

IV Freedom of religion is the foundation of human rights

Freedom of religion, as part of man's natural freedom, forms part of the public good, as pointed out by the Second Vatican Council among others.[14] Man, according to his nature, achieves self-awareness and experiences freedom within the framework of a community – the family and the nation. Community is essential to humanity, while the growth of one person's humanity also benefits other people. Religions and non-religious value systems that give meaning to human life can prevail in this space in the community or in society. The role of the state in this regard is to provide spaces of freedom – this is what Pope Benedict XVI called the state's 'positive laity':[15] The state should provide the space where answers to the most important existential questions can be formulated. It may also be interpreted by this that the state must also recognise the contribution of the Church to the common good, for example in the field of education. If it does not act in this way then it will become weaker.

Man's life cannot be meaningless, which is why every human being has an inviolable and indelible dignity as part of humanity. The Christian man lives in the knowledge that every man is a child of one Father. The Western world turned

[13] Péter Erdő, *Az egyházjog teológiája* (Budapest: Szent István Társulat, 1995), 190.
[14] Second Vatican Council, *Gaudium et spes,* 1965, 6.
[15] Thus, welcoming President Nicolas Sarkozy on his visit to France: https://bit.ly/2PG230f

away from religion, first to the world of philosophy and then to the world of science and technology, expecting them, also with a kind of religious faith, to answer questions about the future of mankind and, by the nature of what it encounters, to determine the limits of these answers. Meanwhile, the role of the state has also been transformed. The democratic state is unquestionably an achievement of our civilisation, but it is increasingly narrowing its perspective to formal, procedural issues: Instead of meeting the basic needs of man; we expect only the observance of formal rules to ensure social coexistence. When initiatives for cultural citizenship or positive discrimination to protect minorities arise, not only is the principle of formal equality violated, but new questions arise about the exercise of freedom of religion.[16] Pope Saint John Paul II also affirmed that religious freedom is the foundation of all other freedoms, an indispensable element of human dignity.[17] Pope Francis has powerfully highlighted the fact that humanity is going through a sea-change.[18] We need both to rethink many issues and to be conscious of issues that have long been taken for granted.

V 'Freedom of religion for the benefit of all'

An important, comprehensive document on the recurring reflections on freedom of religion is the 2019 paper of the International Theological Commission, 'Religious freedom for the good of all'. The International Theological Commission was established in 1969 by Pope Saint Paul VI to assist the Congregation for the Doctrine of the Faith in its work, by carefully examining major religious issues.[19] The Commission is made up of representatives from various schools of theology from around the world, who excel in their theological activities and are committed to the Teaching Office of the Church. The members, up to a maximum of thirty, are appointed by the Holy Father for five-year terms, on the proposal of the Cardinal Prefect of the Congregation for the Doctrine of the Faith, who consults with the relevant episcopal conferences prior to his decision. In its fifty years of existence, the Commission has issued twenty-nine documents.

The International Theological Commission's document on religious freedom, issued in 2019, sheds new light on the freedom of religion, not only from the perspective of the public good: It serves not only the public good, but the benefit of all. It considers the questions: How does another person's freedom serve mine? How do other people's search for God and lived faith benefit the community? Reflection

[16] Interview with Javier Prades, head of the working committee, in the periodical *Tracce* 44, no 7 (2019), 12–18.

[17] Pope John Paul II, *Redemptoris missio,* 1990, 286–287.

[18] Pope Francis, *Laudato si',* 2015, 19 and 102.

[19] Notice of Establishment of the International Theological Commission.

makes it clear that faith is not a private matter. It also draws attention to the fact that the misunderstood neutrality of the state can become an obstacle to an individual being able to live his faith and enjoy his citizenship to the full as a citizen of the community, thus making the community poorer.

Freedom of religion, as the first fundamental right, occupies a prominent place among human rights. *Dignitatis humanae* makes it clear that the basis of inviolable human rights is human personality. Human dignity is an innate part of the human nature of every human being. By defending freedom of faith, the Church testifies to all human beings that if freedom grows with truth then truth needs freedom to flourish. Referring to God as the transcendent foundation of the moral order in the heart of all men also limits human abuses: If God's place is replaced by man-made idols, or merely by the commonality of the people, experience has shown that the result is not greater freedom, but servitude.

The Old Testament revelation also makes it clear that a covenant with God takes precedence over all other authority – without doubting that secular power, in its own realm, can establish a kind of order. The kingdom of God, the coming of which was proclaimed by Jesus Christ, is not of this world (John 18:36). Saint Augustine of Hippo also makes it clear that the activity of secular power in the service of the common good is legitimate, but cautions that this power cannot extend its competence to religious matters; it cannot become a substitute for religion.[20] The distinction between secular and spiritual power has been a recurring issue from antiquity to modern times. The kingdom of God is evolving within the earthly kingdom: The two worlds live together, and it is appropriate for the church to give consideration to both for the promotion of the common good. Both the deification of the state and state-spread atheism are clearly wrong, by this logic.

A remarkable insight of *Dignitatis humanae* is that the supposed religious neutrality of the liberal state, which selectively excludes religious experience from public affairs, falsely transcends the new, occult ideology of power. In other words, the sovereign state, which sees itself as the ultimate reference, sets itself up as God. Referring to Pope Francis, the document emphasises that while the secularist view of religion is that it constitutes part of a subculture, it is in fact a divine gift that is a sure foundation for all other manifestations of freedom and is the decisive contribution to human brotherhood.[21] A more beautiful future can only be built where there is an intention to live together – otherwise the future does not promise much good to anyone. The religious spirit sees a relationship with God as part of humanity, and believes that such a relationship can become a blessing for others. The many religions that live together in a society must recognise the consequences

[20] Saint Augustine, *The City of God,* ch. XIX, s 17.
[21] Second Vatican Council, *Dignitatis humanae,* 1965, 17.

of the meaning and dignity of the human person, which is the basis of interreligious peace, with all its legal and political consequences.

It is precisely in connection with the most important issues of human life that the various religions enrich the whole community with their specific spiritual traditions. The liberal approach restricts the freedom of religion, as the morally neutral state itself strives for ethical authority, controlling all human judgement. Such a state goes beyond just ensuring the equality of citizens before the law, becoming absolutist and relativistic at the same time. With the exclusion of God, the transcendent basis of the collective moral conviction of the people ceases to exist, and man-made idols, namely the occult ideology of power, takes its place. The result is not the fulfilment of human freedom but, on the contrary, a new form of servitude. Such a state, which is ostensibly neutral, is not really neutral at all: This is not the attitude that Pope Benedict XVI called 'positive neutrality'. Such a state is not open to the contribution that Christians can make to answering ethical questions facing society, and is also reluctant to cooperate with religious communities. True freedom of religion contributes to the development of coexistence and social peace. Social coexistence has value for both the individual and society – which is what those involved need to wish for. Religious communities, if given the opportunity, can effectively promote this coexistence, provided, of course, that they all recognise fundamental human rights, including the rights of minorities. Ultimately, freedom of conscience is not indispensable: The individual, especially if the legal system of the state is detached from natural morality, must have the freedom to choose God over the legal norm.

VI Christian culture

'In Europe, the atheist is also a Christian' – this saying, attributed to József Antall, may have been true in a cultural sense for several generations of atheists: Atheists defined themselves by their opposition to Christianity; atheism was a denial of the Christian faith. According to Pope John Paul II:

> There can be no doubt that the Christian faith is a defining and inevitable part of the foundations of European culture. This is because Christianity has given shape to Europe, instilling some fundamental values. Modern Europe, which has endowed the world with democratic ideas and human rights, draws its special values from its Christian heritage. Europe is not so much a geographical place as a cultural and historical concept, meaning a real continent that has been able to unite different peoples and cultures thanks to the unifying power of Christianity.[22]

[22] John Paul II, 'Ecclesia in Europe', in *II. János Pál megnyilatkozásai* (Budapest: Szent István Társulat, 2005), 108.

However, seeing the process of secularisation (even the self-secularisation of churches)[23] in the countries of the Western world, there seems to be a new non-religious generation, for whom Christian words no longer hold any meaning.

Christmas is a holiday for almost every family, which seems to indicate the universal validity of Christian heritage. However, for many, their relationship with the Celebrated means nothing more than the person of Emperor Augustus does for the month that bears his name: Just as the use of Latinate month names does not make one Latin, neither does the Christmas tree make one a Christian. Christianity achieved its most historically influential cultural and intellectual image in Europe.[24] Both Christian culture and the culture of scientific rationalism, which also developed in Europe and excluded God from public thought, define Europe today, but Christians are no longer in tune with modern culture, as Pope Benedict XVI concluded: 'We live in a positivist and agnostic culture that is overwhelmingly impatient with Christianity. Therefore, Western society, at least in Europe, will not be a Christian society.'[25]

With its call for the protection of the Christian culture of Hungary, inserted in Article R)(4) by the Seventh Amendment of the Fundamental Law, the constitutional intention is that Christianity, or more precisely the Christian culture of Hungary, should appear not only as an element of the past requiring recognition but also as a value to be protected today. By its very nature, Christianity is a universal religion that has sought inculturation from the beginning (sometimes with varying degrees of success). The Fundamental Law does not provide for the protection of Christianity, a reality that has been enculturated in a certain way, but for the protection of a cultural reality. There are many historical examples of the faith that transforms the individual and permeates society like a leaven. However, the object of this constitutional protection is not the Christian faith, but the culture it has created, including the freedom to deny it. The Christian faith itself could hardly be given constitutional protection (the law does not protect against temptations, for example); at most, it could remind the holders of public power of their special responsibility – as the concluding sentence of the Fundamental Law puts it, responsibility cannot be limited to a one-off vote, however important, but embraces the whole of life.

The word defence conceptually presupposes a threat. The justification of the proposal to amend the Fundamental Law justified the addition with reference to the unnamed processes currently taking place in Europe, declaring the intention to preserve the cultural image of Europe and Hungary.[26] Neither the new element

[23] The concept developed in German theology was also used by Pope Benedict XVI, *Address of His Holiness Benedict XVI to the Bishops of the Episcopal Conference of Brazil*.

[24] Joseph Ratzinger, *Benedek Európája a kultúrák válságában* (Budapest: Szent István Társulat, 2005), 32.

[25] Benedict XVI, *Utolsó beszélgetések Peter Seewalddal* (Budapest: Szent István Társulat, 2016), 261.

[26] Summary amendment proposal of the legislative committee of the Parliament: www.parlament.hu/irom41/00332/00332-0011.pdf.

of Article R), nor the explanatory memorandum to its proposal stipulates that the changing composition of the population as a result of migratory processes, or secularisation, social deprivation or possibly other factors, may lead to a change in the continent's cultural image, which should be opposed, and it leaves a broad room for interpretation by this omission. A separate question is to what extent these processes can be influenced by constitutional law means: If societies with lengthy, strong commitments (perhaps Belgium, Ireland or Spain), which today often not only disrupt their Christian tradition but also their democratic legislation and have turned against natural law,[27] is it attributable to secularisation, the weakness of the church, or the negligence of the drafter of the constitution, or is it an uncontrollable natural process? These examples show that the will of the people can even disappear behind constitutional rules, and that the will of the overwhelming majority is followed by constitutional and legal provisions within a generation at most. In a concrete example, if the dominant majority of the population sees marriage as not only the union of a man and a woman, then sooner or later the legal system will also adapt to the new majority. It cannot be ignored that, with regard to issues such as the protection of life, the concept of marriage or even crucifixes in public buildings, the fault lines in Western Europe are not between Christians and Muslims but between religious traditions and secular forces.

The concept of culture is primarily the totality of material and spiritual values created by humanity, the manifestation of the culture of a community or a people. In an anthropological sense, culture is a way of life for a community.[28] Our culture can be threatened in many ways – the wording of the Fundamental Law is generalised, so it can send a confirmatory message to the preservers of cultural heritage, whether it is to protect the cityscape, nurture folk customs or emphasise the importance of teaching Latin. At the same time, it makes a comprehensive reference to the whole of the established Central European way of life, which includes the evaluation and protection of relationships and behavioural forms and virtues, from music education to dance schools. It would be impossible to give a truly comprehensive definition of the content of our culture that is to be protected. It would require a deeper clarification of whether this culture can actually be called Christian, or perhaps it would be more accurate to speak of a culture with Christian roots.

While the National Creed of the Hungarian Fundamental Law recognised the Christian heritage, Article R)(4), inserted in 2018, it orders the protection of Christian culture (noting that the assumption of a heritage includes not only the positives: Heritage can also have burdensome elements). This is not about acknowledging or protecting the Christian faith or the Christian religion, but about prescribing the protection of the culture that has developed on these roots. However,

[27] János Frivaldszky, *Jó kormányzás és a közjó. Politikai és jogfilozófiai szemszögből* (Budapest: Pázmány Press, 2016), 74.

[28] Ferenc Pusztai (ed.), *Magyar értelmező kéziszótár* (Budapest: Akadémiai, 2003), 774.

if a comprehensive approach is taken, Christian culture cannot be interpreted without the Christian faith: Culture sprouted from faith. Centuries of tradition and deep individual conviction permeate the works of Dante Alighieri or Johann S Bach and make the *Divine Comedy* or *St Matthew Passion* works of theology, which may be interpreted only in a truncated form if torn off their roots – without disputing the right of performers who do not share the faith of the creators to interpret the works of Bach, Georg F Händel or Zoltán Kodály. This reflection cannot be created by the will of the drafter of the constitution. Although the concept of Christian culture is much broader than the artistic expression of this culture, artistic expression and the fate of the works of art can be telling about our relationship with these roots, as when Sándor A Tóth's 1937 painting of Saint Elizabeth was put up for auction with the title *Art deco woman with flowers*.[29] On the one hand, one may feel that the recognition of artistic value is valid even without the recognition of the original meaning: The image not only appeals to the believing observer; on the other hand, it seems that something has been lost here.

A social practice incompatible with the Christian faith is precisely the protection of freedom rooted in Christianity. A significant part of the Hungarian society, including those who consider themselves Christians, do not follow many of the moral commands and traditions that stem from Christianity and the protection of Christian culture also protects this freedom. In contrast to religious-based legal systems (such as Islamic states), religious truth alone does not provide a basis for distinguishing between legal and illegal behaviour – we can only establish standards that are visible and reasonable to everyone. While in traditional, religious-based legal systems, the secular foundation of law may have seemed absurd, in a secular state, the criminalisation of murder or the regulation of economic crimes cannot be based by the legislature solely on the Ten Commandments.

Can we consider, even if it is against their will, the children of a Christian culture to be Christians?[30] In a cultural sense, this may be true: Today, in Hungary, name days are held regardless of denomination – and even non-Christians have adopted this custom. Many forms ask for the client's given name instead of their 'Christian name'. It is a question whether these customs, if emptied, are not precisely of concern to committed believers, but we would find it unfair for only Catholic children to be gifted by Santa Claus (we approach this custom not in veneration of the Bishop Saint Nicholas but from equal or more universal access to chocolate for children). At the same time, deciding what is compatible with the Christian faith is essentially a matter for ecclesial communities and authorities, as well as for the conscience of

[29] For details of the auction see www.kieselbach.hu/alkotas/art-deco-no-viragokkal_-1937_17740.

[30] András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-Orac, 2011), 180. The concept of Christian Europe is a concept that is strongly present in Christian Democratic thinking. Cf. Erich Kussbach, *Keresztény Európa és európai integráció. Európa mint keresztény értékközösség* (Budapest: Hans Seidel Alapítvány, 1996), 9–32.

the individual while the Constitutional Court is the interpreter of the Fundamental Law. How can a commitment to Christian culture be interpreted?

Protecting Christian culture can mean a ban on miniskirts, but it can also mean the freedom to wear one. Which interpretation is correct? Can the constitutional provision be perceived as an objective of the state; that is, does it place an obligation on the state to direct the value choices of society towards the Christian faith? This could entail such varied measures as stronger protection of human life beginning with conception or of the marriage bond, or restrictions on work on Sundays, pornography, esotericism and nostalgia for pagan Hungarian prehistory and the repression of the giving of non-Christian first names, the banishment of blasphemy from the vocabulary of the members of the armed forces, actions against tattoos, drug use and gambling, strong solidarity with the downtrodden, or the enforcement of subsidiarity in the organisation of society and the economy. The challenges, where profound social and legal change would follow from the Christian faith and where there is certainly a gap between current social practice (certainly that of the majority of the electorate) and the Christian approach, could be listed at length. This chasm may even be unconscious, as a significant proportion of those who profess to be Catholic do not even know the teachings of their church. The aspirations of the Christian voter and politician for the tenets of his faith to appear in the legal system and in the politics of the state must be legitimate, but they must present arguments that are not theological but accessible to all and must be brought to the majority in the democratic decision-making process.

If we were to consider the protection of Christian culture as a state goal, we could expect the state to take clear action to bring the value choices of society into line with the Christian tradition, that is, to promote the birth and survival of a Christian culture. Thus, in addition to the aspects of legality and expediency, all state bodies should consider how a particular decision may be assessed from the point of view of Christian culture. The wording of the Fundamental Law suggests that the drafter of the constitution aims to protect current social practice rather than to recreate Christian culture – even in aspects where there is a gap between the Christian ideal and social practice. This is suggested by the fact that it prescribes the protection of a particular culture (the culture of Hungary) rather than the protection of the Christian culture, which could also include the notion that the culture of Hungary should be made Christian. The drafter of the constitution does not seem to have been driven by the intention to ban the miniskirt but to protect the freedom to wear it. If the culture of Europe – and thus of Hungary – is Christian,[31] the protection of cultural identity can only mean the protection of a Christian culture.

[31] Europe's identity is given by its Christian heritage; Joseph HH Weiler, *Un'Europa Cristiana: Un saggio esplorativo* (Milano: BUR Saggi, 2003); Miklós Király, 'Európa keresztény gyökerei és az alkotmányos szerződés', *Iustum Aequum Salutare* 2, no 3–4 (2006), 67–72; András Pünkösty,

VII The relationship between Christian culture and the Christian faith

The culture-creating role of faith is a historical experience.[32] A culture stemming from Christianity could only be organically defended in conjunction with Christianity.[33] The Fundamental Law and the state can only protect its results, what derived from Christianity, by ordering the protection of culture. Without living faith, the fruits of the faith of ancestors can last only for a while, perhaps for a generation or two. By ordering the protection of culture, the Fundamental Law does not protect the tree, the Christian faith, (it is not even suitable for this) but the fruits of the faith of previous generations. It is not up to the drafter of the constitution whether the tree lives – or in the end it will only be the skin, the appearance of the fruit, that we will protect even if it has been plucked from the tree. The Fundamental Law (and its National Creed) is a forward-looking, optimistic document. By defending Christian culture, it does not seek to board a train that has already arrived at its terminus.

A specific issue is whether, to protect the specific cultural reality, the state can take action against those who formulate a genuinely Christian point of view on an article of faith or on a moral basis. If we identify 'Christian culture' with the forms of behaviour that prevail today, it is precisely the representation of an authentic Christian position that, over and over again, may require a confrontation with the dominant culture; perhaps in its roots but not in its content.[34] Criticism of the existing Christian (origin) culture can easily result from Christian faith. Freedom of religion includes the right of individuals, religious communities or their leaders to take a stand on matters of religion or morality, and this is legitimate even if it challenges the existing cultural environment. The authenticity of the position, beliefs and moral views of believers should not be called into question by outsiders. It does not matter, however, whether that criticism is aimed at renewing or destroying Christian culture (at its roots). In both cases, freedom to criticise enjoys the protection of freedom of speech and thus of our Christian culture.

The role of the state in the preservation of the Christian heritage does not raise concerns precisely from the point where that heritage is organised as a culture. The relationship with tradition is by no means uniform, nor is the cultural identity of the political community homogeneous. Examples range from the symbolism of coins and banknotes issued by the central bank, to the heraldry of local governments and to

Az európai uniós jog etikai vonatkozásai. Kritikai elemzés, különös tekintettel az Egyház társadalmi tanítására (Budapest: Pázmány Press, 2014).

32 Csaba Török, *A kultúrák lelke* (Budapest: Új Ember, 2016) 16.

33 To evaluate the cultural Protestantism that deviates from the faith and to praise its historical role, see László Tőkéczki, 'Keresztyén hit és kultúrprotestantizmus', *THÉMA* no 2 (2000), 80–86.

34 An example of 'overtaking from the right' is the strong action against the extension of the in vitro programme by the President of the Hungarian Catholic Bishops' Conference, András Veres, on 20 August 2017. See Baranyai Béla, 'Megtérésre és megújulásra hívott Veres András Budapesten államalapító szent királyunk ünnepén', *Magyar Kurír,* 20 August 2017.

the practice of naming public spaces and public institutions. Even explicitly religious gestures may seem to be more of a cultural tradition than a manifestation of faith, for example, considering how, in 2007, the then Budapest city administration called in a priest to bless the tunnel building shield of the new Metro Line 4. It is not just a matter of re-establishing broken traditions – as with, for example, the hospitals in the capital being given back their 'Holy' names – but in many cases furthering them, as new institutions have been given similar names, as for example in 1991, when Dunaújváros Hospital took the name of Saint Pantaleon. It requires sensitivity rather than regulation to decide how much and what content the community can accept for public space, or more broadly, community institutions (including public education institutions or public service media) without causing tension. The Saint Martin's Day lantern parade, or a nativity scene in the municipal kindergarten, seems to be a kind of folk custom rather than the aggressive spread of a religious tradition. At the same time, the kindergarten teacher needs to pay attention to detecting whether some parents are worried about a ceremony due to a conflict with their worldview. At the same time, it is necessary to avoid the child feeling left out of the wider community, and adaptation should not only be expected only from the members of the majority, because in this way we create emptiness rather than neutrality.

The protection of the Christian culture of Hungary is not a command to create a Christian culture but rather the obligation to protect the existing culture. The protection of culture is a legitimate task of the state, but the state is not able to establish and maintain its character: The formation and preservation of Christian culture is still not the responsibility of the state, but of Christians as individuals and communities. A dominant culture detached from its roots sees the Christian faith as the private affair of a small group,[35] and it is precisely for this reason that it becomes intolerant of Christianity. The question is whether Christians should withdraw from society in the age of the new barbarism,[36] or, following the proposal of Pope Benedict XVI, they must strive to save and enrich the tradition of civilisation in a creative, productive minority.[37] The majority society today is no longer a Christian one since Christians – Christians who truly practice and preserve their faith – are present in society as a minority.[38] This minority situation definitely requires greater awareness. The contradiction between the command to protect Christian culture and the weakening of its foundation (the Christian faith) is not merely apparent. Its resolution requires, above all, the freedom for religious communities to truly develop their identities and thus contribute to the renewal of society.[39]

[35] Pope Benedict XVI, *Die Kirche und der Scandal des sexuellen Mißbrauchs*.

[36] Rod Dreher, *The Benedict Option: A Strategy for Christians in a Post-Christian Nation* (New York: Sentinel, 2017).

[37] Pope Benedict uses Arnold Toynbee's expression.

[38] László Gájer, 'A legutóbbi pápák víziója Európáról', *Theology* 53 (2019), 126–137.

[39] László Gájer, *A periféria teológiája*. Manuscript.

VIII Conclusion

Freedom of religion requires understanding and sensitivity to religion because communities that live their faith can benefit society as a whole. As society becomes non-religious, religion is becoming less and less comprehensible to the majority of society; more precisely, it can only be understood when it is not taken really seriously, when it is perceived merely as a custom or tradition. A separate issue is that self-secularisation is a dead end: Religious communities can never give up enough of their specific heritage to satisfy a secular society. With the emergence of religious expressions in the public space as a result of secularisation, society and the law are also becoming increasingly insecure and mistrustful. Lack of understanding is not incidental to the legal treatment of religious expressions either. When society treats it strictly as a private matter, it displaces almost all manifestations of religiosity from the public space, making religiosity and religions themselves incomprehensible to outsiders. A non-incidental benefit of healthy pluralism could be that the presence of different religions in society becomes natural: a religion lived authentically makes followers of other religions more willing to understand and be patient. At the same time, the state, if it is not to be its own enemy, must build on the cultural preferences and historical traditions of society. The constitutional provision on the protection of the Christian culture of Hungary calls for this. Those who understand its roots have a special responsibility to sustain our culture.

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Christianity and Human Rights

From the Point of View of Human Dignity

Zsolt Péter Balogh

I Introduction

Prestigious naturalists boldly state that 'philosophy is dead'. It is boldly proclaimed that 'all gates left open to God are the result of not being sufficiently consistent and coherent. With the "great deprivation of the throne", the universe has become so interpretable that there is no place for God in it'.[1] If human rights are approached from such a standpoint, they amount to the fulfilment of human supremacy. The origin of human rights can also be found by an approximation method, according to which their roots are to be sought in post-World War II sobriety,[2] or they can be interpreted on a political basis, as a product of the liberal worldview and an integral part of it (of it alone).

This study rejects these claims, and assumes that human rights are natural and inalienable rights, inseparable from created man, that are nourished by the Christian idea of freedom.[3] Rights arise from the dignity of Man as a creature; these rights precede society and are binding on it.[4] An examination of the relationship between Christianity and human rights must start with human dignity. Rethinking human rights in a Christian spirit has also proved necessary because the fermentation of social processes has rendered uncertain the values that were previously believed to be absolute: 'The notion of the moral bearer or implementer of values has been replaced by the primacy of the rule sanctioned by the state. . . . In its final stages, law has

[1] Csaba Török cites Stephen Hawking's thoughts in his paper 'Az apokalipszis lovasai', *Vigilia* no 7 (2020), 484–485, 487.

[2] See the UN Charter or the Universal Declaration of Human Rights 'on the inherent dignity . . . of all members of the human family'.

[3] 'Freedom is exercised in relationships between human beings. Every human person, created in the image of God, has the natural right to be recognised as a free and responsible being. All owe to each other this duty of respect. The right to the exercise of freedom, especially in moral and religious matters, is an inalienable requirement of the dignity of the human person. This right must be recognized and protected by civil authority within the limits of the common good and public order.' Catechism of the Catholic Church, 1738.

[4] Ibid. 1930.

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become a formal set of rules, and it is not perfect in this, unlike the purity of logic and mathematics; it has become a case-by-case, value-serving system.'[5] Personalised legislation is no longer even the subject of disapproval; the merits granted by the law have been accepted.

II Human dignity as merit given by God

A medieval mystic, Johannes Tauler, preached in a sermon: 'There are, in a sense, three people in man: an animal man, who lives according to his senses; a rational man; and finally the highest, *deiform* man (man in the form of God).'[6] This paper will approach dignity with the latter in mind. Human dignity is the quintessential human quality. The social teaching of the Catholic Church,[7] and the Catholic Catechism emphasises, at many points, the right to human dignity, inalienable from all human beings, as the basis of freedom. Clearly, human dignity is greater than the law and different from it. However, if we want to include it in the system of human rights, it is necessary to explore the legal context. Fundamental dogmatics treat human dignity as a 'mother right', that is, the source of all other rights. We cannot talk about human rights without human dignity. The concept of man in the legal sense[8] or the 'human image'[9] also starts from the dignity of man; this provides a basis for further thought. However, human dignity is also present in all other fundamental rights, including the dogmatics of fundamental rights: It is the essential content of all other rights. Human dignity is the basis of the fundamental rights system. Human rights can be restricted, but the ultimate (and as such in no sense permissible) limit of a restriction is that it must not violate human dignity. What, then, constitutes human dignity?

In terms of fundamental rights, the dualism of body and soul consists in (the right to) life, which is connected to the body, and human dignity, which is connected to the soul. A distinction can thus be made between rights connected to the biological and social dimensions of man.[10] While human dignity is

[5] János Zlinszky, 'Emberi jogok és keresztény etika', *Iustum Aequum Salutare* no 2 (2009), 127–132, 131.

[6] Johannes Tauler, *A hazatérés útjelzői* (Budapest: Paulus Hungarus – Kairosz, 2002), 365.

[7] Compendium of the Social Doctrine of the Church.

[8] In Hungarian public law, the basic features of the legal concept of man are given in Resolution 64/1991 (XII. 17.) AB, still effective.

[9] The human image of the Fundamental Law is not that of the isolated individual but of the responsible personality living in society. Resolution 3132/2013 (VII. 2.) AB, Statement of reasons, [95].

[10] In Hungary, the former non-pecuniary compensation or today's grievance award also started from the participation in social life becoming more difficult, and it has reached the point where it is a symbolic means of remedying spiritual, self-identity grievances. Hence, the social dimension and spiritual identity of man appear in the 'language of law' in a legal institution. It was raised in

rooted in the soul,[11] the concept of the soul itself is difficult to deal with by law. By referring to human dignity, a concept is thus implicitly included in the system of human rights that everyone knows, everyone has heard about, and that is the basis and origin of identity, and of religious belief. The system of fundamental rights can therefore also be viewed from this perspective; it can be seen as a system of human rights that is permeated – through human dignity – by the whole of people's humanity. Moreover, without this it could be said that the catalogue of fundamental rights amounts to no more than self-interest.

By asserting that the human rights system is not a set of scattered guarantees, but a unified and cohesive value system, this value system becomes the value system of a person born for freedom and self-realisation, and the value system of a person based on conviction arising from dignity, a man living in faith. A person with religious beliefs should, therefore, not be distanced from the human rights system (as a framework that is foreign to him, because the human rights catalogue is the bible of forces which fracture society) but, on the contrary, should be drawn to it, since it is the foundation of his freedom granted by the Creator; human quality and dignity reside in the depths of human rights. As Géza Kuminetz puts it, '[t]he dignity of the human person is fundamentally determined by the quality of his moral consciousness. Emotional maturity is a kind of prerequisite for this, and its culmination is religious consciousness, although these factors interact mutually and strongly'.[12]

When exploring the framework for the unbridled enforcement of human rights, it is often argued that they are only valid in conjunction with the fulfilment of obligations. In my opinion, the framework is not created by legal obligations of a very different quality from human rights,[13] but stems from the perception of life of a person taking responsibility for himself, with the conviction that arises from his human dignity. This is what creates the real quality of fundamental rights and human rights, because this is the basis on which the inviolable essence of all fundamental rights really emerges. The catalogue of fundamental rights is thus not merely a set of disparate guarantees, because it is held together by 'human quality'. It is also unfortunate to place the fulfilment of obligations in opposition to this, because a person who does

the American legal literature as early as the late 1800s that mental and emotional suffering could provide a basis for non-pecuniary damages.

[11] 'Because of the human soul present in every human being, every human being has a dignity that permeates their whole being; that is, their spiritual (mental), psychological, and physical existence.' János Frivaldszky, 'Emberi élet és méltóság', in Lóránt Csink, Balázs Schanda and András Zs Varga (eds), *A magyar közjog alapintézményei* (Budapest: Pázmány Press, 2020), 501.

[12] Géza Kuminetz, *Egy tomista jog-és állambölcselet vázlata II. Az emberi önrendelkezés szükségszerű és ünnepélyes aktusa: személyes világnézet (vallás) alkotása. (Kísérlet az emberi jogok egy lehetséges megalapozására)* (Budapest: Szent István Társulat, 2018), 62.

[13] If we look at constitutional obligations (for example, those of defence, burden-sharing and so on), these say nothing about the basis for exercising rights; therefore, they cannot be preconditions for exercising rights. This seems too schematic.

not fulfil – not only his legal but also his (human) obligations (leaving his sick parents, leaving his children and so on) still has human dignity; in other words, he is also invited. And it may be that, by exercising his human rights, he reaches a point where he is elevated by an act of conviction arising from dignity. Typically, this is when, in a particular situation or due to an event, a strong religious belief rapidly develops, which then accompanies the person on his or her further journey. In this way, freedom of thought, conscientious self-identity or, here, freedom of religion, which is part of the human quality, takes him into the world of freedom and action resulting from dignity.

Approaching the above thoughts from the other direction, it is necessary to define the protection of human dignity. What does human dignity protect? It obviously protects man, the human quality, so it is obvious, for example, that the death penalty as a punishment is forbidden, just as anyone who seeks to take human life is punishable. However, human dignity and its scope of protection entail much more than that. While each right represents different aspects of people's lives,[14] human dignity affects man as a whole. The scope of protection of human dignity appears in its functions, which can be translated into the language of law, but at the same time these functions permeate, complement and presuppose each other.

III Certain public law aspects of the protection of human dignity

Human dignity has three major functions in the system of protection of fundamental rights: protection against humiliation, protection of the personality and protection arising from the belief in equality (against discrimination).

A Protection against humiliation

Perhaps the closest function to the nature of dignity is protection against humiliation. At this point, an unavoidable problem is that the objective standard required by law in order to protect human dignity cannot be developed or is very difficult to develop. The basis of the problem is that human 'sensitivity' varies. What is offensive and humiliating to someone may not cross the stimulus threshold of another. In such a situation, the objectivity required by law can only be ensured by solid aspects, with clear guidelines. Some of these aspects are discussed below.[15]

[14] For example, exercising the right of assembly, as a kind of expression of opinion, obviously focuses on the given problem, which is the object of the gathering, while dignity forms the essence, the immanent core of the individual, permeating all the actions of the individual, for example, also when and how to exercise his right of assembly.

[15] See Zsolt Balogh, 'Az emberi méltóság: jogi absztrakció vagy alanyi jog?', *Iustum Aequum Salutare* no 4 (2010), 35–45.

It is certain that human dignity is violated by a regulation or legal practice that dehumanises: It directly or indirectly calls into question the human being, the human quality of the individual (or worse, members of a people or religious group and so on). A dehumanising rule, which questions a man's humanity, is obviously a serious violation of human dignity. Some of the literature on genocide argues that one of the preconditions for genocide is to dehumanise the victims; that is, to doubt and then deny their being human. One typical form it takes is to call the opponent an animal. This leads to the conclusion that, since the opponents are not human, any inhibition can be set aside.[16] It has also been suggested in the Hungarian case law that 'identification with an animal always dehumanises the person concerned, and this may be capable of violating human dignity'.[17] Beyond all this, albeit in a distant context, dehumanising regulation or jurisprudence can be considered to result in a distortion of the 'human image'. Doubting the ideal of a citizen with the freedom of action to take responsibility for his decisions, especially if it affects a particular group, can trigger this harmful process.

The protection against humiliation should include the prohibition of treating humans as objects. According to the ban on instrumentalisation transposed into law from the moral-philosophical works of Immanuel Kant, people cannot be considered tools. The right to human dignity is violated by one who treats persons as mere objects. However, Kant's notion of human dignity, as applied in his work of moral philosophy, and the notion of human dignity used in the philosophical sense of law are somewhat difficult to reconcile. A distinction must be made between obligations arising from virtue and legal obligations, that is to say, morality and legality. In the prohibition of treating man as an object, reference is made to Kant's work, *Groundwork of the Metaphysics of Morals,* more precisely to the lines: 'A human being, however, is not a thing and hence not something that can be used merely as a means, but must in all his actions always be regarded as an end in itself.'[18] The abstract notion of dignity in Kant's moral philosophy can be grasped in humanity, in the existence as a human being, in the fact that human dignity represents the whole of humanity in the person of every human being.

In connection with the ban on instrumentalisation, examples can be cited from the German case law. The decision of the German Federal Constitutional Court on the Air Safety Act was justified by reference to 'objectification'. The court believed that the possibility of shooting down a civilian plane in order to prevent a terrorist attack

[16] See Gáspár Bíró, *Az egyenlő méltóság elvéről. Emberi méltóság korlátok nélkül* (Budapest: Országgyűlés Hivatala, 2009), 70.

[17] This arose in an election case, in Decision Kvk.I.37.441/2014/2 of the Curia. The court added that 'in Hungary, identification with monkeys results in the imagined negative traits of the animal being linked to the candidates (negative campaign), while the campaigning candidate appears in human form'.

[18] Immanuel Kant, *Groundwork of the Metaphysics of Morals*. Ed. and transl. by Mary Gregor (Cambridge: Cambridge University Press, 1997), 34–40, 38.

violates human dignity by degrading innocent passengers to mere objects.[19] An earlier example is the trial of Erich Honecker.[20] Here, the Court ruled that the prosecution of Honecker, over eighty and with terminal cancer, could not achieve its legitimate aim, given the imminent occurrence of his death. Continuing the proceedings would result in the suspect being seen as a mere instrument, which violates human dignity.[21] In the Hungarian legal practice, treatment as an instrument, as an aspect of the violation of human dignity, is not so clearly present, although there are cases in which, in fact, this is the sole issue. According to the concurrent opinion attached to the Constitutional Court resolution abolishing the death penalty itself, 'there is an absolute limit beyond which neither the coercive power of the state nor of other people can extend, that is the core of autonomy, individual self-determination, removed from the provision of everyone else, by which, in the classical wording, man can remain a subject and not become an asset or an object'.[22] The prohibition of treatment as an object thus equates to the protection of a person created with human dignity.

Protection against humiliation, and thus of human dignity, should also include the prohibition of the abuse of an individual's vulnerable position by others (exploitation of a vulnerable situation by others). A number of pieces of legislation in the Hungarian legal system incorporate the protection of human dignity into the norm itself. The most striking is the Health Act, which, among patients' rights, also 'regulates' – and in detail – *the right to human dignity*. (This includes, for example, the protection against the sense of shame, reasonable wait and so on – according to the law.)[23] Other rules essentially repeat the constitutional imperative to protect the right to human dignity. The preamble to the Act on Human Genetic Research, Investigations and the Operation of Biobanks states that, during these procedures, the *enhanced protection of human dignity* is justified.[24] According to the Social Act, during the placement of homeless persons, special attention must be paid to the *protection of human dignity*.[25] Another law, in connection with public purpose fundraising, states that fundraising should not involve the harassment of donors, with the *violation of human dignity;*[26] as a further rule, detainees in police custody must be treated with *respect for human dignity*.[27] It can be seen, therefore, that human dignity, albeit with different wordings, is reflected in legal rules, in cases where it

19 BVerfGE 115, 118, (154, 157).

20 Criminal proceedings were instituted against the former secretary general of the German Communist Party for the shooting of people trying to escape to the West.

21 BerlVerfGE NJW 1993, 515.

22 See the concurrent opinion by László Sólyom to Resolution 23/1990 (X. 31.) AB.

23 Section 10 of Act CLIV of 1997 on Healthcare.

24 Preamble to Act XXI of 2008 on the protection of human genetic data, human genetic testing and the rules for the operation of biobanks.

25 Section 94/H (1) of Act III of 1993 on social administration and social welfare benefits.

26 Section 12(1) of Act CLVI of 1997 on public benefit organisations.

27 Section 1(2) of Decree 19/1995 (XII. 13.) BM on the order of police detention facilities.

may be assumed that the individual enters *a vulnerable position* when an unequal communication or other relationship (may) develop(s) between the parties (even more so if one of the parties is the state).

Thus, the legislator itself presupposes an asymmetrical relationship, therefore considered it necessary to enshrine the protection of human dignity with the aim of 'raising the position of the vulnerable party', with the objective of eliminating the asymmetry. An example of the violation of dignity (vulnerability, prevention of vulnerability) in a vulnerable situation can also be cited from the practice of the Constitutional Court. As we have seen above, the legal system emphasises the protection of human dignity in these situations as a special guarantee. One of the decisions of the Constitutional Court in connection with camera surveillance applied the notion of human dignity (more specifically, the right to human dignity) directly to the regulation to be judged, in a way that is not at all typical of practice: 'The statutory condition that the consent of the person concerned to conduct that constitutes a restriction of a fundamental right, even if he or she is observed in an intimate situation, violates a fundamental constitutional right to human dignity.' [28]

In this context, it may be considered an additional aspect that it is a violation of human dignity if it can be justified on reasonable grounds that the individual has become a victim of a serious insult to the essence of his or her personality. This is the most malleable aspect and, depending on human sensitivity, it is subject to the least objective standards.[29] According to the relevant considerations, humiliation should be understood as meaning that in doing so, the person must have a rational justification for feeling that his or her self-esteem has been offended. Adverse circumstances alone cannot be a violation of dignity; only human acts or omissions. Another condition for an act to be classified as humiliation is that there are reasons that can also be understood – and verified – by a third party. The Hungarian legal system also takes such offensive situations into account. Typical forms of conduct that violate the rule of law or violate human dignity in misdemeanour or criminal law are the violation of the right to practice religion, begging by a child or, for example, the abuse of a subordinate in military crimes. It is easy to see that, for example, disrupting a religious ritual is a material violation of the personality of believers.

[28] Decision 36/2005 (X. 5.) AB, ABH 2005, 401–402. We believe that the reasoning for this decision has gone astray in dogmatics. Neither before nor after did the Constitutional Court apply the violation of the right to human dignity as a fundamental right directly to the law.

[29] Individual sensitivity and insult to the essence of an individual's personality may arise in many ways. Thus with regard to religious identity, for example, András Koltay in his study draws attention to the fact that in her parallel reasoning for the second Lautsi decision, Judge Ann Power considered that mere 'grievance' and 'feeling offended' by unwanted communication do not reach the level against which the court can provide redress for an individual who feels offended. András Koltay, 'Európa és a feszület jele. A Lautsi and Others v Italy ügy alapvető kérdéseiről', in Levente Tattay, Anett Pogácsás and Sarolta Molnár (eds), *Pro vita et scientia. Ünnepi kötet Jobbágyi Gábor 65. születésnapja alkalmából* (Budapest: Szent István Társulat, 2012), 124–150, 128.

B Personality protection

Human dignity in the world of the law entails the protection of the individual. Constitutional law, civil law and criminal law all include a large number of (legal) institutions for the protection of the individual. Constitutional and civil law instruments may exhibit similarities to each other, although they concern different legal aspects. Constitutional law reflects the protection of the personality arising from human dignity through three major groups of rights: rights to self-identity, fundamental rights related to the right to self-determination and privacy rights. These rights and the other rights arising from them presuppose and complement each other, and newer and newer rights can be derived in the field of protection in order to protect personality.

The right to self-identity is sometimes identified with the right to the integrity of the personality, or the right to moral integrity, in other words as a form of prohibition – the prohibition of physically or morally breaking one's personality. Obviously, no one is permitted to force others to abandon their personality and put them in a position to be at variance with their identity. Religious self-identity, and religious, conscientious belief are inextricably linked to self-identity. The choice (and where appropriate, change) of a religious or conscientious belief is an absolute right that cannot be affected by anyone.[30] Another part of self-identity is belonging to a national or ethnic minority and the freedom to confess and disclose it. When one invokes the protection (infringement) of one's identity, the reality of the cause of conscience cannot be examined: Human dignity is inviolable. In the world of law, the traditional means of protecting identity are non-pecuniary damages,[31] and today it is the grievance award, the current legal institution. If mental and identity damage is suffered, the victim does not sue for ten or one hundred forints because they need this amount, but for the court to establish that a violation has occurred and for the symbolic compensation to express that the damage to identity cannot be financially compensated (mental, self-identity damage does not end with a financial contribution just as the violation of human dignity cannot be remedied with material goods: the two are not compatible).

The legal institution thus clearly has a moral value-creating function, in addition to the legal recognition of the protection of the individual. Finally, it should be noted that the protection of identity must be dynamic; that is, it must take into account the development of the personality, or the change of personality. Like self-identity, freedom of self-determination embraces the whole of the personality. At the same time, the human dignity that shines in self-identity is inviolable from the outside, but the freedom of self-determination, also known as action, may be subjected to limitations to a high degree. Restrictions may be placed primarily for the protection of the rights of other(s), and may also be restricted with regard to an individual's

[30] The 'intimacy' of this is very well expressed by János Pilinszky's poem *Zsoltár,* the last stanza of which reads: 'And one who falls over a cushion / does not feel alone: / He is really not alone.'

[31] See Decision 34/1992 (VI. 1.) AB.

danger to himself.[32] Thus, freedom of action is not an unlimited right. While I am free to decide how I shape my life, it can only happen while respecting different frameworks. The legal framework applies to everyone, but other frameworks also exist: Moral frameworks, frameworks set up by religious norms, by different community norms that apply to themselves, and so on. The different frameworks can even be called sanction limits, because if the individual – exercising his freedom of self-determination – crosses them, the different systems (for example, the legal system) will not remain indifferent.

Within the framework of self-determination, it is important to stress that the guarantee of human rights and the freedom granted by human rights – through self-determination – also includes the freedom not to exercise a right, that is, the waiver of a right. This brings us back to to the frameworks set up by the various systems: Through the waiver of a right, the rules of a system of religious or moral norms are observed, where appropriate. A good life is achieved if these different frameworks of self-determination are in harmony with a person's self-identity, and adherence to the rules is not the result of coercion but of internal conviction. The free development of personality, or self-realisation, takes place through self-determination, which is also inseparable from human dignity.

The principle of human dignity also protects privacy through the protection of personality. The protection of privacy is an indisputable human need, and its legal protection is also nourished by this 'ancient need'. The development of the legal protection of the private sphere is primarily the result of developments in American law, and European legal systems have subsequently adopted it.[33] However, regardless of the timing of its appearance in this form, the right to be left alone has been present throughout history. Nevertheless, in terms of the scope of protection of human dignity, there are no definable edges of the right to privacy, as privacy is protected by a system of self-identity, self-determination and even human rights. A sure foundation, then, is human dignity, which is present in all rights, and in this presence the rights presuppose and complement each other. However, an examination of rights related to privacy reveals the rights to a good reputation, to privacy, family life, freedom of home or freedom of contact with individuals, as

[32] This is a complex area which requires thorough research into when and to what extent the state or others can protect the individual from self-harming activities. In extreme cases, for example, participating in suicide or drug abuse are punishable. At the same time, there was no longer such a clear and lengthy social debate on the permissibility of sterilisation and the conditions for its permissibility. The Catholic Church made a stand for a ban on it. However, it is also self-harming to smoke or drink alcohol, where action against this is already assessed differently. In all these issues, the limitation and limitability of self-determination, its limits – the marginalisation of the individual against the community have to be assessed.

[33] The starting point for the definition of privacy is linked to the names of Samuel D Warren and Louis D Brandeis, whose work 'The Right to Privacy' was published in 1890 (*Harvard Law Review* 4, no 5 [1890], 193–220).

well as the right to control the information related to us, that is, the protection of personal data.[34]

Every human being is unique and unrepeatable – which stems from human dignity – and as such, a personality also has infinite components, with different priorities for each personality. The law captures only the most characteristic of these, but as we have outlined above, these 'legitimised' and named components also presuppose each other and cling to each other, and can be substituted for each other. The socio-legal imprint of the equal dignity of all human beings is a system of named rights that is never closed and must always be receptive to more and more acceptable components. Therefore, the system of personality protection has never been a closed one. Of course, the element(s) of identity which are inseparable from the essence of personality – one of which is religious identity – will always remain the central core of personality protection.

C Equality

In addition to the functions of protecting human dignity from humiliation and personal protection, it is also crucial to recognise its role in ensuring equality. Human dignity and the equality of all people go hand in hand. Equality means equality in dignity which shows the essence of man. Based on the equality of the created man, the value of human lives is the same. 'Created in the image of the one God and equally endowed with rational souls, all men have the same nature and the same origin. . . . The equality of men rests essentially on their dignity as persons and the rights that flow from it' – states the Catechism of the Catholic Church,[35] and a similar wording can be found elsewhere: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.'[36] Although of later and less esteemed provenance, it is also worth recalling the following passage: 'The right to equal dignity, in unity with the right to life, ensures that there is no legal distinction between the value of human lives. His human dignity and life are inviolable to everyone who is human, regardless of his physical and mental development or condition, and also how much of his human potential he has realised and why that much.'[37]

The equality function of human dignity is the essence of dignity; the identity of the value of human lives cannot be asserted without equality in dignity. In addition to equality in dignity, people are, of course, different. These essential differences are emphasised; these are the so-called protected characteristics. Discussions of equality or the other side of it, the ban on discrimination – whether they concern constitutions, international human rights instruments or other non-legal declarations of equality – always result

[34] See the Fundamental Law of Hungary, s VI(1).
[35] Catechism of the Catholic Church, 1934, 1935.
[36] Declaration of Independence of the United States of America (1776).
[37] Following Decision 23/1990 (X. 31.) AB; Decision 64/1991 (XII. 17.) AB.

in a shorter or longer list that in particular highlights the aspects according to which discrimination is prohibited. The shortest list is the prohibition of discrimination based on sex, race, colour, social status, language, religion or political opinion.

This separate list doubles the legal protection afforded, as, for example, equality between men and women is re-established as a rule in the prohibition of gender discrimination, or, for example, the prohibition of religious discrimination (that is, the fact that everyone is free to practice their religion) is enshrined separately in religious freedom. Without analysing the candidate 'protected characteristics' separately, it is worth touching upon equality between men and women. In our view, this equality is at the heart of Christianity. Whether in the Synoptic Gospels or the Gospel of John, the mention of women and men as equals appears as a natural thing, although it was not at all natural at the time.[38] Not only in death, but also in dignity, everyone is equal – so what is professed about human dignity has a message for all ages.

Equality mediated by human dignity also acquires a special meaning through the prohibition of discrimination. 'On coming into the world, man is not equipped with everything he needs for developing his bodily and spiritual life. He needs others. Differences appear tied to age, physical abilities, intellectual or moral aptitudes, the benefits derived from social commerce and the distribution of wealth. The 'talents' are not distributed equally![39] As treating non-equals as equals results in even greater inequalities, there is still a need for a legal distinction to be drawn. However, this distinction must be adapted to the situation of the individual, and to social reality. Just as the requirement of equality reflects justice, so drawing the necessary distinctions is a basic expectation that it reflects social justice. Eliminating glaring inequalities and helping the poor are at the heart of Christianity;[40] the Catholic Church consistently proclaims that extraordinarily large economic and social inequalities between members or peoples of a human family cause scandal and are contrary to social justice, equity, the dignity of the human person and social and international peace.

Equality stemming from human dignity demands fairness in the distribution of goods. In the language of law or even according to the social teachings of the church,[41] it presupposes the creation of rights to create a worthy life for everyone. In the language of law: 'The right to social security includes the provision by the State of a minimum standard of living to be provided by all social benefits, which is essential for the realisation of the right to human dignity.'[42] According to Church teaching:

[38] In addition to the twelve disciples, there were many women with Jesus who, along with the later apostles, were among Jesus' closest disciples (for example, Luke 8:1–3; Matthew 27:55). The main figure of many stories or parables was a woman, for example, the Samaritan woman (John 3:22–36). In the same way, women appear in the actions of the apostles, where they prayed with the apostles (Acts 1:14) and so on.

[39] Catechism of the Catholic Church, 1936.

[40] See, for example, the story of the rich young man (Mark 10:17).

[41] Among the social encyclicals, we can refer to the encyclical *Rerum novarum* of Pope Leo XIII (1891) as an 'ancient source'.

[42] Resolution 32/1998 (VI. 25.) AB.

> But first we must speak of man's rights. Man has the right to live. He has the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest and, finally, the necessary social services. In consequence, he has the right to be looked after in the event of ill-health; disability stemming from his work; widowhood; old age; enforced unemployment; or whenever, through no fault of his own, he is deprived of the means of livelihood.[43]

Thus, not only do freedoms grow out of human dignity but the world of social rights is rooted in human dignity. In my opinion, considerations that produce only a catalogue of classical freedoms under human rights are mistaken. It is precisely from the equality function of human dignity that second-generation rights arise, and the enforcement of these rights (entitlements) is more important in some places. Classical freedoms and social rights presuppose each other, if only because of their common foundation, the 'realisation' of human dignity. Enforcing the prohibition of discrimination by no means achieves equality. The proportional distribution of wealth must be the primary goal of a state-organised society. This is the only way to express the value that people living in a community are not isolated individuals, who need only take responsibility for themselves, as mentioned earlier but, just as importantly, they must take responsibility for each other. There are several levels of this, and different expectations can be set according to the nature of the communities. It is not enough just to contribute to social redistribution systems, but it is incumbent on everybody to take part personally, even actively, in making social security a reality for all. Solidarity or, in other words, fraternity, also follows from the idea that man is a person with dignity. It is not about aid, but about the self-restraint of those who are rich in material goods and the provision of opportunities for those in need to help themselves. Since this problem is global, global measures are also required to solve it. Christianity has been living with this problem for thousands of years and offers a solution in every age.[44]

IV Closing thoughts

The author is in a difficult position when writing about the relationship between Christianity and human rights. He is in a difficult position because, although he is on solid ground when using the language of law alone, whether it is about human rights in general or in relation to individual rights, with known standards and an established conceptual culture, when one has to step out of this conceptual culture and draw on other disciplines to shape one's thoughts into an acceptable form, the soil becomes precarious. In any case, this essay provided an opportunity, albeit on an experimental level, to combine legal knowledge with fascinating ideas and books that are lovely reads in private life. I hope that, despite the uncertain ground, the reader will have found an idea or a reference, on the basis of which he will remember this article favourably.

[43] Pope John XXIII, *Pacem in terris,* 1963, 11.

[44] With very instructive findings, solutions are required recently by Pope Benedict XVI's encyclical *Caritas in veritate,* 2009.

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What is Freedom?

Freedom in the Context of Constitutional Law and the Bible: Similarities and Differences

Lóránt Csink

Freedom is one of the basic concepts of both law and theology, and it is also a concept that has a common meaning: Everyone believes he knows what freedom is. After a brief reflection, however, the complexity of the issue becomes apparent: Freedom means something different for the law or for theology, and not only do different branches within the law ascribe different meanings to freedom but no uniform interpretation of freedom can be found even within a single branch of law. Freedom is typically a concept that constitutional law uses in its day-to-day operation but does not define. It should be noted at the outset that, in a philosophical sense, total freedom does not exist. One cannot disassociate oneself from the law of gravity (a physical limit), and one can postpone but not avoid death (biological limit) and so on. Freedom can therefore only be interpreted in the context of external factors. This seems so natural that we consider total freedom to be complete freedom within an environmental framework. In law, the concept of freedom is typically defined in terms of the subject (freedom for something) – producing a much more tangible, easier-to-use concept.

This essay will examine how the two defining ideals of our day, the Bible and liberalism, approach freedom. Contrasting Christian freedom with liberal freedom has become a popular topic in recent years. The reason for this is that the representatives of each trend are quite critical of the concept of freedom of the other, to the extent that they do not even consider it to be freedom. Critics of Christian freedom do not see Christianity as freedom at all, but as embarrassing compliance with well-intentioned, but anachronistic moral rules. On the other hand, critics of the liberal idea of freedom see it as the liberty to sin, the self-realisation of immoral ideas. This essay will argue that this contrast is wrong. I believe that the key difference between the two concepts of freedom in the biblical sense and those used in liberal law and used in constitutional law is not primarily a difference in content but a difference in the source and purpose of the two freedoms. In order to substantiate this hypothesis, I will first examine what concepts of freedom the Bible uses, from where Biblical freedom originates, what its content is, and what its purpose is. I will then analyse the meaning of the concept of freedom used in constitutional law, developed in the spirit of liberalism, and finally compare the two concepts of freedom.

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I The concept of freedom in the Bible

The focus at this point is intentionally not on Christian freedom. The Bible is not merely a collection of moral teachings; it is more about God, man and the relationship between the two, from which a Christian ethic follows, although that is not the purpose of the Bible. The concept of freedom in the Bible is not one idea, teaching, or doctrine. The Bible speaks of freedom in (at least) two senses. One possible interpretation of freedom in the spirit of the Bible is free will, that is, that man is free to decide for or against God. It should be noted, although it is not the subject of this essay, that – according to the Bible – there is no third way. This meaning of freedom appears in the fifth book of Moses, in the Book of Deuteronomy: 'This day I call the heavens and the earth as witnesses against you that I have set before you life and death, blessings and curses. Now choose life, so that you and your children may live.'[1] Just before this verse, God describes what blessings the chosen people can expect if they follow His teachings and commandments, and what curses they will have to reckon with if they reject them. However, freedom of decision is given: God did not force His people to decide for Him. Another issue is that one's decision has consequences.

One manifestation of freedom, then, is that no universal, all-binding command can be deduced from the Bible that one should live under the authority of God. Even if Christianity at the same time took a different view of this, the Bible only offers entry into God's covenant – the freedom is that everyone is free to accept or reject it. Another aspect of freedom that is even more important to this subject is the freedom of the believer; that is, what the Bible says about what those who have already chosen God are allowed to do. Before analysing this in more detail, it is worth examining Jesus's words about freedom in the Gospel of John:

> To the Jews who had believed him, Jesus said, 'If you hold to my teaching, you are really my disciples. Then you will know the truth, and the truth will set you free.' They answered him, 'We are Abraham's descendants and have never been slaves of anyone. How can you say that we shall be set free?' Jesus replied, 'Very truly I tell you, everyone who sins is a slave to sin. Now a slave has no permanent place in the family, but a son belongs to it forever. So if the Son sets you free, you will be free indeed.'[2]

In this extract, Jesus is not speaking to humanity, not even to Judaism in general, but only to those Jews who believed in him (that is, who chose him on the basis of their freedom in the previous sense). Jesus tells them that 'the truth will set you free', about which they are baffled, saying we 'have never been slaves of anyone'. In this dialogue, Jesus's listeners identify freedom with the absence of captivity, to which Jesus responds by saying that he who commits sin is a servant of sin. Consequently, freedom requires 'liberation by the Son' (that is the assistance of a divine person).

[1] 5 Moses 30:19.
[2] John 8:31–36.

Thus, based on this verse, freedom does not mean an opportunity for action but a state. This condition affects the options for action, but does not equate to them. It is instructive to examine what the source of this freedom is (where the freedom comes from), what its content is (what the freedom covers), and what its purpose is (whether freedom can be put to use for something). It also follows from the verse quoted earlier that the origin of biblical freedom is God: a free man is whoever is 'set free by the Son'. In other words, only He can set one free. According to the Bible, this freedom cannot be granted by anyone else, but neither can it be taken away. In connection with the sacrifice of Jesus's life, he articulates this freedom: 'No one takes it from me, but I lay it down of my own accord. I have authority to lay it down and authority to take it up again.'[3] The first feature of biblical freedom, then, is that, because it comes from God, it is independent of external circumstances. This explains how even those who are in bad circumstances can enjoy this freedom, even if they are hungry, humiliated, persecuted or imprisoned. Although their ability to act is limited, this freedom is not, as it is not an opportunity to act, but a state.

Second, Paul, the Apostle's words govern the content of freedom: '"I have the right to do anything", you say – but not everything is beneficial. "I have the right to do anything" – but not everything is constructive."'[4] Or as he writes later: '"I have the right to do anything", you say – but not everything is beneficial. "I have the right to do" – but I will not be mastered by anything.'[5] This is in line with Paul's exhortation to 'test them all; hold on to what is good'.[6] Freedom does not homogenise; believers may think differently, represent different views, positions and so on. In the wording used in legal language: Biblical freedom (also) gives autonomy of individual action. The content of freedom is not bound by external factors; Freedom is not an awkward compliance with external commands. What binds freedom is, in turn, its purpose. One of the most important ideas of the Bible is that freedom is not an end in itself. It is sufficient to refer to only a few of the many verses about this here: The apostle Paul advises, in his letter to the Galatians: 'You, my brothers and sisters, were called to be free. But do not use your freedom to indulge the flesh; rather, serve one another humbly in love.'[7] The apparent contradiction that freedom serves to serve someone else can be resolved by understanding the following verse: 'For none of us lives for ourselves alone, and none of us dies for ourselves alone. If we live, we live for the Lord; and if we die, we die for the Lord. So, whether we live or die, we belong to the Lord.'[8] Since the believer does not live for himself, he does not use his freedom at his own discretion but to glorify God and help his fellow men.

[3] John 10:18.
[4] 1 Corinthians 10:23.
[5] 1 Corinthians 6:21.
[6] 1 Thessalonians 5:21.
[7] Galatians 5:13.
[8] Romans 14:7–8.

The purpose of freedom, then, is to carry out God's plan in an individual's life, and that is quite different from complying with religious commandments.

Summarising the biblical concept of freedom, we can state the following: On the one hand, the Bible gives man the freedom to choose for or against God, and on the other hand, the Bible delineates the freedom of the believer's life, which is (1) not a possibility but a state; (2) independent of external conditions; (3) unlimited in content but bound to a goal and (4) the exercise of freedom must be subordinated to God's goals.

II Freedom in liberal (constitutional) law

As in the Bible, several concepts of freedom exist in constitutional law. It should be added that liberalism is not the only trend of constitutional freedom; natural law is usually cited as a competing trend, with an emphasis on the relationship between freedom and responsibility.[9] However, the subject of this writing is a comparison of liberal freedom and biblical freedom, so the liberal concept will be analysed below.

Not only must liberty be explained but its derivation, 'liberal', also needs to be interpreted. This problem is raised by Ronald Dworkin, who describes how, until the 1960s and 1970s, liberals could be identified from the views they professed: Formerly, it was liberals who wanted greater economic equality, globalism, freedom of speech and the abolition of censorship; they called for the abolition of racial segregation, the sharpest possible separation of church and state, strong procedural guarantees for those subject to criminal proceedings and the decriminalisation of certain 'moral' crimes (for example, drug abuse). Based on British and American experiences, Dworkin concluded that after the Vietnam War, the classic liberal–conservative fault line had disappeared as more and more issues emerged whose support or rejection was not based on this division.[10]

In this essay, what I understand by the concept of liberal freedom is that which puts the individual at the centre of society, and hence seeks to understand the role of the individual and society from the starting point of the individual. This choice of definition is arbitrary, and not necessarily the same as what is considered liberal in today's political communication. I regard this as the starting point for freedom (in the legal sense), because it was this idealism that led to the paradigm shift that replaced absolutism in the eighteenth century: It is not man for the state, but the state for man. As the American Declaration of Independence stated in 1776:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government

[9] Péter Erdő, 'Szabadság és jog keresztény szemmel', in Gudrun Kugler and Péter Pásztor (eds), *Szabadság és hit* (Budapest: Polgári Magyarországért Alapítvány, 2012), 14.

[10] Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 181.

> becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[11]

That is, the state must serve the individual and the freedom of the individual, and if the state fails to fulfil this obligation, the government can be replaced.

Constitutional law uses the term 'freedom', and defines individual freedom in a socio-political sense. Socio-political freedom is the opposite of tyrannical systems and dictatorships. A society where there is no oppression is free. Freedom in this sense is also a political programme, a goal to be achieved. Political freedom is, of course, related to individual freedom, but the freedom of the individual is not guaranteed by the autonomy of the political community alone.[12] In general, it can be said that individual people are freer in a democracy than in a dictatorship. In a comprehensive analysis, however, political freedom does not necessarily entail individual freedom: In no democracy can it be said that everyone really lives freely. Political liberty is not an unlimited freedom, but a freedom guaranteed by the masses.[13]

Legal theory has defined the concept of individual freedom in several ways. According to Thomas Hobbes, '[b]y liberty, is understood, according to the proper signification of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgement, and reason shall dictate to him'.[14] In Hobbes's approach, freedom depends on external factors. When external impediments are 'far away' (not existing), there is freedom, while when external impediments are close, there is none. Furthermore, the content of freedom is that one can do what one wants to do, even if one cannot fully achieve it due to external obstacles. In essence, Immanuel Kant took a similar view: 'Freedom is independence of the compulsory will of another.'[15] In this approach, too, freedom depends on external factors: Man is free if he can free himself from the arbitrary coercion of others, or more simply if they cannot force him into what he does not want. It is worth exploring the origin, content and purpose of this concept of freedom. According to John Locke, freedom and equality are the natural state of man.[16] However, freedom is not absolute, for its exercise depends on external factors; freedom must be sacrificed in order for additional values to prevail. Examples of such an added value are security for Hobbes and equality for Dworkin.

On the relationship between freedom and security, Hobbes was of the opinion that, in the state of *bellum omnium contra omnes,* the unrestricted freedom of the

[11] The unanimous Declaration of the thirteen united States of America.

[12] András Bragyova, 'Alkotmány és szabadság', *Fundamentum* 7, no 3–4 (2003), 5.

[13] Gábor Halmai and Attila G Tóth, 'Az emberi jogok eredete', in Gábor Halmai and Attila G Tóth (eds), *Emberi jogok* (Budapest: Osiris, 2003), 39.

[14] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 1998), 86.

[15] Immanuel Kant, quoted by Bragyova, 'Alkotmány', 5.

[16] John Locke, *Two Treatises of Government,* para 26.

individual ultimately leads to his or her vulnerability, since the unrestricted freedom of others endangers the preservation of his or her own property and personal integrity.[17] There was, therefore, a fundamental need for power in order to create order and predictability and to protect the property and person of the people, in short, to provide security. In this approach, security is a very complex and multifaceted concept, including on the one hand all the protection required to prevent an attack on a person or property, and on the other hand, the feeling of comfort that an individual does not have to expect such an attack for any reason.[18] In practice, it can be seen that the more an individual sees his or her security as a threat, the more he or she is willing to sacrifice his or her freedom, and vice versa: The more he or she lacks his or her freedom, the more he or she risks his or her security. In Hobbes's conception, there is no freedom without security, and to this can be added that without freedom there can be security, but it is meaningless as it does not realise the natural state of the individual.[19] In addition to the conflict between freedom and security, it has also become clear that the first two of the slogans of liberty, equality and fraternity of the French Revolution cannot coexist in an absolute way: The two principles compete with each other. As Dworkin writes: 'Unfortunately, liberty and equality often conflict: sometimes the only effective means to promote equality requires some limitation of liberty, and sometimes the consequences of promoting liberty are detrimental to equality.'[20] It can be seen, then, that the source (origin) of freedom is the natural state of man, that is, man is inherently free. However, one can only exercise one's freedom if there are appropriate external circumstances.

In terms of the content of this freedom, this entails autonomy of individual action. Individual freedom is the freedom to behave independently,[21] and, according to the liberal conception, the freedom of the individual is the first, but not the only, goal of the state.[22] András Bragyova added that, in a negative sense, freedom means the absence of a restriction, and in a positive sense, the provision of a specific opportunity for action.[23] Based on the autonomy of action, the individual is free to decide what behaviour to take, what position to form, how to live, and so on. Autonomy of individual action also means the free exercise of human rights, although not exclusively. This freedom is substantive in the sense that it can be restricted only in certain cases, such as in order to ensure the freedom of others, or to achieve other justifiable purposes. Although the exercise of freedom is entirely

17 Hobbes, *Leviathan,* 160–162.

18 We cannot talk about security if the individual lives in constant fear that his or her property and physical integrity are in danger, even if the attack on them does not happen in the end.

19 Also to be welcomed is Benjamin Franklin's oft-quoted sentence: 'Those who would give up essential liberty, to purchase a little temporary safety, deserve neither liberty nor safety.'

20 Dworkin, *A Matter of Principle,* 188.

21 Bragyova, 'Alkotmány', 12.

22 Ibid. 5.

23 Ibid. 12.

left to the individual (who holds it), this concept of freedom does not include the view that the individual should have only his or her own personal interests in mind when exercising his or her freedom.[24]

There is also an economic and moral justification for 'taking the other into account'. According to the economic justification, market competition is of particular benefit not only to the economy but also to the participants in the competition: While competing with each other, they not only improve their own position but also contribute to the development of the competitor. As János Kis formulated it, people should be allowed to pursue their own benefit, but they can benefit others by allowing them to pursue their own benefit.[25] In economic terms, mixed-motivation games are typically non-zero-sum ones; players cannot only win or lose from each other, and in many cases, competition is the best way to develop effective cooperation.[26] The moral justification of liberal freedom means that freedom does not mean complete libertinage, the selfish enjoyment of goods. Morality plays an important role in the liberal way of thinking: The behaviours shown must be compared to the moral standard. Morality, of course, is not inherent in liberalism: Augustine of Hippo remarked that '[j]ustice being taken away, then, what are kingdoms but great robberies?'[27] The liberal conception, however, links morality directly to constitutional law: 'The "moral reading" therefore brings political morality into the heart of constitutional law.'[28] This concept of fundamental rights places the centre of gravity of law on constitutional fundamental rights, and one criticism of this argues that the direct moralisation of the legal system destroys law.[29]

The liberal conception, therefore, does not abandon morality, but makes it the standard of action. This morality is universal in the sense that, in general, at the abstract level, there can be a consensus on what is moral and what is not, and consequently on what behaviour is acceptable and what is not (for example, the pursuit of peace is a virtue, war is not, patience is a virtue, impatience is not, love is a virtue, hatred is not and so on). However, universal morality does not always help to assess the morality of a particular life situation objectively. It is easy, for example, for both warring parties to blame the other for the warfare, or for spouses to blame each other for the deterioration of the relationship. In such cases, the standard of conduct will not be universal morality, but everyone will have their own moral convictions; that is, they will ultimately set for themselves the moral standard to which their actions will be aligned in principle.

[24] János Kis, *Az állam semlegessége* (Budapest: Atlantis, 1997), 191.
[25] Ibid. 191–192.
[26] László Mérő, *Mindenki másképp egyforma. A játékelmélet és a racionalitás pszichológiája* (Budapest: Tericum, 1996), 145 and 149.
[27] Saint Augustine, *The City of God,* Liber IV, caput 4.
[28] Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), 2.
[29] Béla Pokol, *Jogbölcseleti vizsgálódások* (Budapest: Nemzeti Tankönyvkiadó, 1994), 8.

III A comparison of biblical and liberal freedom

After examining the characteristics of the Bible and liberal freedom, we can make the following comparison:

- According to liberalism, man is inherently free, and he has preserved that freedom, and as such he is able to live freely. According to the Bible, although man was originally free (God created him free), he lost that freedom with sin, so he is currently unable to live freely.
- It reasonably follows from the previous point that, according to liberalism, the source of freedom is human nature itself. According to the Bible, the origin and source of freedom is God; the free are whosoever are set free by the Son.
- According to liberalism, the exercise of freedom depends on external circumstances (arbitrary influences, security, equality and so on), according to the Bible, freedom is independent of external circumstances.
- In terms of the content of freedom, according to both liberalism and the Bible, freedom provides an opportunity to demonstrate behaviour stemming from individual beliefs.
- According to liberalism, the measure of the exercise of freedom is morality, its purpose is the realisation of the individual's interest, and according to the Bible, the purpose of freedom is to fulfil the will of God.

The differences and similarities are summarised in the table below.

Table 1 Differences and similarities of biblical and liberal freedom

	Liberalism	**Bible**
The original state of man	free	free but lost his freedom
The source of freedom	human nature	God
Dependence on circumstances	dependent	independent
Content	certification of conduct	certification of conduct
Goal or benchmark	moral	God's will

Source: Compiled by the author

This study sought to contribute to the comparison of Christian freedom and liberal freedom by analysing the difference between freedom in the biblical sense and liberal freedom. The author merely pointed out that the biblical view of freedom offers a different approach than one of the defining trends in constitutional law. The correctness or incorrectness of liberalism does not follow from all this, nor that, on a biblical basis, constitutional law should be based on a trend other than liberalism. The Bible cannot be used for any of its spiritual justifications, and ultimately not for any political orientation.

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The Constitutionality of Conscience

Gergely Deli

I What will it be about?

I have never understood on what basis a Christian could sue. Even if it is your own constitutionally protected fundamental right, would it not be better for you to gently give up your claim? I understand and feel heroism in Rudolf von Jhering's vocal call to fight for our rights and at the same time for the law,[1] but that alone does not provide me with a satisfactory answer to the above dilemma. Therefore, in this study, I will try to formulate my own answer and analyse constitutional problems with the tools of the nightly examination of conscience. At first glance, this may seem strange, and for some it may be daunting, despite the fact that both the use of the evening for creative work and the study of conscience are an integral part of European culture. In connection with the former, it is enough to think of Aulus Gellius[2] or Dániel Berzsenyi:

> I painted the evening classes of my harvest,
> If I let my maid rest,
> And I can barely hear the noises of joy,
> I start a fire under my ancient walnut tree.
>
> Wrapped in a veil, I lean on my elbow,
> I look at the blinking flames of my wick,
> I dive into the heavenly dream of the imagination,
> And I live the holy hours of a more beautiful spiritual world.[3]

Mention of the examination of conscience test, may bring to mind Seneca[4] and Saint Ignatius of Loyola.[5] As for the rest, since there has been a constitution, there have also been constitutional law issues, and they can also be seen *sine dubio* as scientific problems. Hence, two thorny issues may trouble the attentive reader *(lectori salutem!):* Linking the evening examination of conscience and constitutional issues in an edited volume that classifies itself as academic. This may prove to be a delicate issue, as the author either defends the scholarly nature of his approach or abuses the

1 Rudolf von Jhering, *Der Kampf ums Recht* (Wien: Manz, 1894), 16.
2 Aulus Gellius, *Attic Nights* (London: Joseph Johnson, 1795), v.
3 An excerpt from Dániel Berzsenyi, *Fragment of a Letter to My Girlfriend*.
4 Lucius A Seneca, *On Anger.* Book III, para 36, 1–4.
5 Saint Ignatius of Loyola, *Spiritual Exercises,* 5, 4.

https://doi.org/10.36250/00907_06

goodwill of the editors. However, I can assure everyone with a clear conscience that my intentions are both fair and scientific. The examination of conscience, in fact, amounts to a conceptual analysis carried out in solitude, on one's own. Man tries to subsume certain concrete life stories and actions under certain concepts (in particular, the concepts of sins and virtues), sets up categories, makes distinctions and considers them. That is, he performs thought operations that can meet the strict requirements of scientific methods. Examination of conscience is undoubtedly an extremely personal activity, but its method, the conceptual analysis, may coincide with the scientific one. Our initial, sudden and perhaps hasty aversion to the idea could ultimately be caused by the fact that there really are very few things that are both personal and scientific. However, the right examination of conscience can even be perceived as such, perhaps because, *per naturam,* it strives for a kind of objectivity and universality.

Having set our minds at ease concerning the scientific nature of the subject (constitutional law issues) and the method to be applied (the examination of conscience as a conceptual analysis), let us outline briefly what will not be discussed. Above all, there will be no mention of the trend called religious constitutionalism in the relevant literature.[6] This is a trend that was embraced by the Social Democratic parties, which were gaining strength and a leading role in Europe for decades, in the post-World War II ideological space, which stated that the equal and inalienable human dignity of man was the ultimate basis of fundamental rights. It is a common mistake to attribute this privileged role of human dignity to the experience of facing Nazi atrocities. The idea had already been embodied in papal encyclicals published in the 1920s, long before the far right gained ground,[7] and sought, in essence, to give Catholicism, which was rapidly losing its secular influence, a resurgent ideological background and to provide legal protection to Christians who were largely oppressed or persecuted by the state.[8] It is no coincidence that later, the leftist movements of the 1960s devoted so much energy to re-conceptualising the notion of human dignity, which had previously been largely Catholicised.

On the other hand, there will be no question of the constitution of Jesus either, since He did not have it, or at least we do not know about it. Even so, much of the spiritual ammunition needed for an investigation comes from the Gospels, and there will be no question of scholastic or law of nature constitutionality filling the absence of Jesus' constitutional studies in the Middle Ages. There is already an extensive literature on the latter,[9] from which an interested person may be informed very thoroughly.

[6] See Perry Dane, 'Foreword: On Religious Constitutionalism', *Rutgers Journal of Law and Religion* 16 (2015), 460.

[7] *Divini redemptoris* is to be mentioned primarily.

[8] See Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015).

[9] See, for example, Günther Mensching, 'Moderne Elemente der Staatsauffassung des Thomas von Aquin', in Rolf Schönberger (ed.), *Die Bestimmung des Menschen und die Bedeutung des Staates* (Baden-Baden: Nomos, 2017), 227–248.

The aim of this study is to show that constitutional problems can be examined not only according to the prevailing clichés, using well-established tests and vocabulary or from a (politically or otherwise) correct ideological point of view. Ultimately, the constitutional problems that affect us all can also be measured by weighing virtues and sins. If some people are concerned about this method, let it be their business. It is the duty of science to worry us sometimes. What, then, will it be all about at the end of the day? Instead of a dominant, human dignity-based, individual, consequence-oriented, human rights-based and 'rational' constitutionality, a weak experiment in thought, it will be an 'emotional' constitutionality that is based on human salvation, personal, intention-oriented, and making sins its subject. However, we also expect the latter, the constitutionality of conscience, to be at least potentially capable of performing all the functions of the former, mainstream constitutionality.

II What should the constitutionality of conscience look like?

Attempting to outline a constitutionality directly inspired by the Gospel raises serious difficulties from the very beginning. One is that Jesus stated quite clearly that His kingdom is not of this world.[10] The other is that He sought to decouple His own teaching from secular authorities: 'So give back to Caesar what is Caesar's, and to God what is God's.'[11] Not only did Jesus not have a conception of state theory but He also accepted the state as it was. Jesus did not outline an image of an ideal or practical state but focused on how His followers should relate to the existing state. However, Jesus only had to exacerbate our current predicament, not just His theory of the state but His theory of law. Or, if the concept of legal theory is interpreted broadly, it operated with a kind of negative, self-destructive legal theory: 'If someone slaps you on one cheek, turn to them the other also. If someone takes your coat, do not withhold your shirt from them. Give to everyone who asks you, and if anyone takes what belongs to you, do not demand it back.'[12] Thus, we are not faced with legal protection, but with waiving it. Elsewhere this is stated even more clearly: 'Man, who appointed me a judge or an arbiter between you?'[13] Jesus did not focus on the dispute, or on resolving it, but on the subject of the dispute. How can these expectations, which are incompatible with the common sense of state and law, become a constitutionality of conscience, based on the teachings of Jesus?

From the above two criteria for the state (that it is essentially irrelevant as it is mundane and must be accepted anyway), we can conclude, for existing states, that state-related studies can only be positively assessed, from the point of view of

[10] John 18:36.
[11] Matthew 22:21.
[12] Luke 6:29.
[13] Luke 12:14.

constitutionality of conscience, if they help the citizens achieve salvation, or at least do not divert them from it. There is, in fact, nothing new in this statement, simply the Aristotelian, thought[14] reworded *ad analogiam*. It follows from this expectation that human rights must not be interpreted as the limits of state arbitrariness, in accordance with the liberal approach, but as instruments of salvation. However, we cannot follow the Christian Democratic view, which sees fundamental rights as values that protect or mediate Christianity, the individual Christian or Christian teaching. If the requirements of legal theory are now added to this framework of state theory, it becomes clear that the function of fundamental rights and constitutional protection is radically different from the classical conception. In contrast to the culture of constitutional complaints, we must proceed, on the basis of the constitutionality of conscience, that all legal claims, including the claim of human rights, are basically an act conceived as a sin. A person who vindicates a right for himself is fighting for his right in the Jheringian sense, and through this for the rule of law, but not for his own salvation. Our spiritual constitutionality must move from this sinful basic situation to salvation by the end of the debate. In this view, human rights function as state-protected means of human salvation. Instead of rationality, the degree of outrage will function as a basic yardstick.

III The procedure

In order to move from sinful legalisation to individual salvation, it is worthwhile performing the following procedural steps when analysing a constitutional problem. The procedure is divided into three main parts. The first part examines the complaint, the second the norm (be it a law or a judicial decision), and the third compares the two. In the first main part, when examining the complaint, it must first be established what, through the fundamental right invoked, is the most serious criminal intent in the situation which may have led the petitioner to lodge the complaint. It is then necessary to determine which is the cardinal virtue, the realisation of which can be promoted by the fundamental right invoked in the given situation. The normative power of a complaint is inversely proportional to its ability to offend people.[15] The greater the outrage caused by the criminal intent that appears as a legal claim in the complaint, the weaker the normative force of the complaint. (See Figure 1; a complaint vector drawn as 'C' pointing from slackness to justice. Here it is enough to suggest that its normative power is high, meaning the act was less outrageous.)[16]

[14] Aristotle, *Nicomachean Ethics,* 1095a.

[15] Outrage as an aspect was included in the model from the teaching of Thomas Aquinas. See *Summa Theologiae,* I–II, Q 95, A 2.

[16] The vectors are for illustration only, the ones explained here have no mathematical basis.

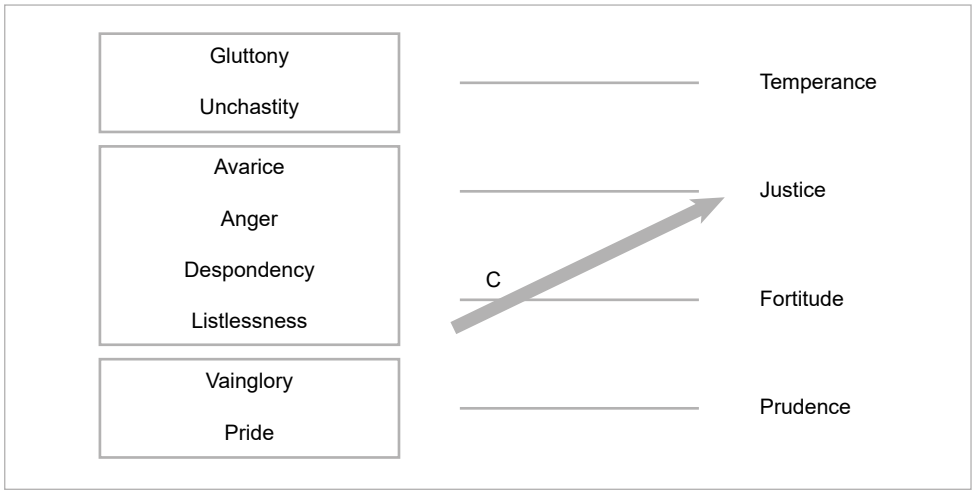

Figure 1 Sins and virtues
Source: Drawn by the Author

In the first phase of the second main part, it is necessary to assess whether the legislation in question intends to move in a good or sinful direction compared to the previous situation, on the basis of the intention of the legislator. In the second step, the most robust reading possible of the norm in question must be constructed in relation to the given facts. The closer the legislative intent thus revealed is to the established ideal reading, the greater the normative force of the challenged norm (legislation or judicial decision). (See Figure 2, in which the norm vector, is drawn as 'N'. The legislative intent is good, hence the length of the vector indicates a large coincidence between intent and an optimal reading.)

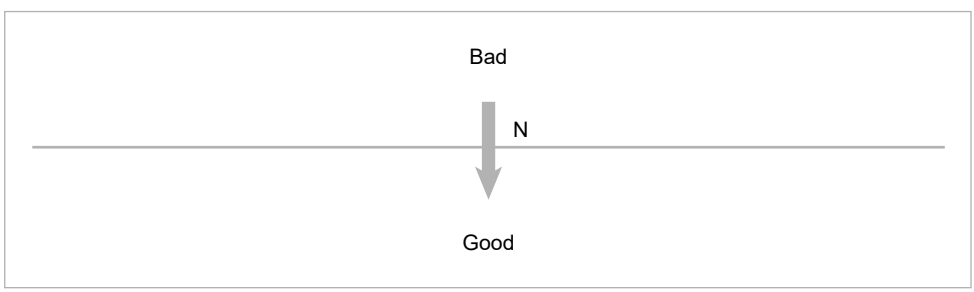

Figure 2 Legislative intent
Source: Drawn by the Author

The third main step is to compare the normative force of the complaint and the norm and, in the light of this, to determine the legal consequence, which may include rejection, establishment of a constitutional requirement or omission, or annulment, in ascending order of the degree of intervention. (See Figure 3, where the addition

of the previous two vectors, 'C' and 'N' gives 'LC' as a legal consequence vector, pointing in the direction of the desired legal consequence.) Having outlined the procedure, it is now worth examining each step of the procedure in more detail.

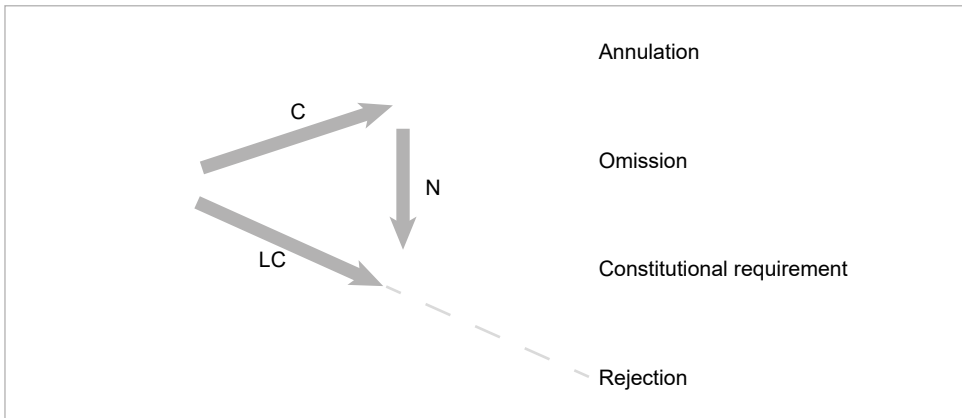

Figure 3 Legal consequences
Source: Drawn by the Author

Based on the basic premise that 'every statement of right is a sin', the sinful intentions embodied in the complaint have to be subsumed under one of the eight 'evil thoughts' identified by the Desert Fathers of third-century Egypt.[17] These eight vices, in ascending order of harm, are gluttony, unchastity, avarice, anger, despondency, listlessness, vainglory and pride.[18] In contrast, the four cardinal virtues that a fundamental right can defend in its pure form are the well-known virtues of temperance, justice, fortitude and prudence.[19] It is worth noting that the eight vices and the four virtues are well matched. The best antidote to gluttony and unchastity (or lust) is temperance; the antidote to material greed and anger is justice; we can respond to despondency and laziness with the virtue of fortitude; and finally, it is worth defending ourselves against vanity and pride with the virtue of prudence. The greater the relative difference between the misdemeanour and virtue in question, the more severe a sanction is justified, for example, the distance between gluttony and justice is small, but great between vainglory and temperance. In the course of the analysis of the complaint, on the one hand, we have to establish the misdemeanour subjectively recognised by the complainant in the specific case, and on the other hand, the abstract virtue lurking behind the fundamental right in the given case.

[17] Johannes Cassianus, *Az egyiptomi szerzetesek tanítása, I* (Pannonhalma–Tihany: Magyar Bencés Kongregáció, 1998), 134.
[18] For the hierarchy, see Evagriosz Pontikosz, *A szerzetes* (Pannonhalma: Pannonhalmi Bencés Főapátság, 2018), 82.
[19] See Catechism of the Catholic Church, 'virtue'.

The normative power of the complaint, as noted above, is inversely proportional to its objectively (that is socially) assessed intended capacity to offend.

In the second main step, the challenged norm is analysed. The legislative intent is assessed binarily (good or bad), as a function of the shift from the current situation, and the normative power of a norm is determined by how it relates to the best moral reading of the norm. The closer the legislative intent and the optimal reading are, the less likely we will be to oppose it, and conversely, the greater the discrepancy between the two, the more severe a sanction will be justified. For example, in an evil piece of legislation (*morally bad law*,[20] or *gesetzliches Unrecht*[21]), such as Government Decree No 1240 ME of 1944 forcing Jews to wear a yellow star, the intention of the legislature is clearly bad, and even the best moral reading of it does not help much, thus the norm is weak. However, if the intention of the legislature is positive and close to the best reading of the norm, a norm has a more secure place in the legal system.

In the third step, the legal consequences are determined. Obviously, the least intrusive sanction is rejection, since in this case the challenged norm remains intact. This is followed in increasing strength by the definition of the constitutional requirement, the establishment of an omission, and finally the strongest sanction, annulment. Comparing the normative force of the complaint and the norm, we can determine the optimal legal consequence. For example, if a complaint constitutes a more serious misdemeanour, but the fundamental right concerned has a lesser degree of virtue, and the outrage caused is great, a complaint will be strong. A norm in the face of such a complaint will only survive if the legislative intent behind it is very positive and approaches its best moral reading. Obviously, this scheme can be used not only in constitutional law cases, but also *mutatis mutandis* in all disputes.

IV Specific examples

As the above procedure may seem quite abstract, it may be useful to illustrate this scheme with examples from four very well-known legal cases. The first case is *Riggs v Palmer*.[22] According to the facts of the case, in his will, an elderly man (Francis B Palmer) appointed his grandson, Elmer E Palmer, to be his heir. By burdening the inheritance with legacies for the benefit of the testator's daughters, Palmer also had to take care of his mother. (A less relevant element in the case is that the will also contained a stipulation that if the inheritance provisions were to come into effect

[20] Ronald Dworkin, 'Seven Critics', *Georgia Law Review* 11 (1977), 1201–1268, 1253. For this, see Genaro R Carrió, 'Professor Dworkin's Views on Legal Positivism', *Indiana Law Journal* 55, no 2 (1979), 223.

[21] Gustav Radbruch, 'Gesetzliches Unrecht und übergesetzliches Recht', *Süddeutsche Juristen-Zeitung* 1, no 5 (1946), 105–108, 107.

[22] *Riggs v Palmer* 115 NY 506, 22 NE 188 (1889).

when the grandchild was still a minor, the mother's maintenance would be borne by the testator's daughters, but only until the boy's mother gets married. The mother actually did get married later.) The testator subsequently expressed his intention to change the content of the will. His grandson learned of this, and to prevent this from happening, he killed his grandfather. Palmer was convicted of murder, which was followed by a civil case in which the plaintiffs were the daughters of the testator; the defendant was the testator's killer and testamentary heir.

The central legal question was whether the person who killed the testator for this purpose could acquire the inheritance. The court annulled the testamentary disposition, so Palmer eventually fell out of the inheritance. According to the majority opinion, the will was declared invalid on the basis of the principle 'no man should profit from his own inequity or take advantage of his own wrong'.[23] In this case, the court, essentially on moral grounds,[24] disregarded a completely clear provision of substantive law and ruled on the basis of a well-known principle of law. According to the positive law, the inheritance must be granted to the person who has been appointed as heir in the will, but the court considered the above principle to be a stronger argument.[25]

Justice John C Gray attached a dissenting opinion to the judgment, in which he was joined by Justice George F Danforth. According to Justice Gray, if the applicable laws are clear and unambiguous, they must be complied with. In the present case, the rule is clear that the inheritance belongs to the person designated in the will. Furthermore, according to Judge Gray, the majority position violates the principle of *non bis in idem,* according to which no one may be punished twice for the same conduct.[26] If this is compared with the principle that no one can invoke their own reprehensible conduct in order to gain an advantage, then not only do the rules and principles compete with each other, but even the principles themselves concur.[27] How can this case be evaluated in our model?

The legal statement was made by the Elmer girls, as they acted as plaintiffs to acquire their father's assets. The main vice that might have driven them was greed (avarice). The ultimate virtue that could have been realised by their acts may be justice, as it would be unfair for their father's killer to inherit. Their actions themselves are not outrageous, as they took action against the profiteering of

[23] For the difficulties of the decision see Benjamin N Cardozo, 'The Nature of the Judicial Process. Lecture I', *Journal of Law: A Periodical Laboratory of Legal Scholarship* 1, no 2 (2011), 329–348, 344.

[24] Stewart F Hancock, 'Meeting the Needs: Fairness, Morality, Creativity and Common Sense', *Albany Law Review* 68, no 1 (2004), 81–104, 87.

[25] For the legal theoretical difficulties underlying the case see Rodger Beehler, 'Legal Positivism, Social Rules, and *Riggs v. Palmer*', *Law and Philosophy* 9, no 3 (1990), 285–293, 286.

[26] For more details see William B Meyer, 'The Background to *Riggs v Palmer*', *American Journal of Legal History* 60, no 1 (2020), 48–75, 59.

[27] For more details see Kevin D Ashley, 'Teaching Law and Digital Age Legal Practice with an AI and Law Seminar', *Chicago-Kent Law Review* 88, no 3 (2013), 783–844, 809.

a person who had committed an extremely scandalous act. That is, the 'complaint' is quite strong and connects or balances a vice and virtue of equal standing. The norm they challenged with their claim is the provision of the will that passed the inheritance to the grandson. This norm, as intended by the legislators (the testator), is fundamentally positive since, in the social environment of the time, it was appreciated and even approved of if one wanted to transfer one's fortune to a male descendant. In this case, however, it is difficult to provide a morally valid justification, since it is morally problematic to defend the transfer of the deceased's property to his own killer. The normative force of the norm is therefore small. The result obtained by comparing the complaint and the force of the norm points in the direction of a serious sanction, annulment, which in the present case naturally does not mean the removal of the norm from the legal system but only its inapplicability and technical invalidity in this case (see Figure 4; the complaint vector is horizontal and long; the norm vector points upwards and is short. These amounts indicate the need for annulment).

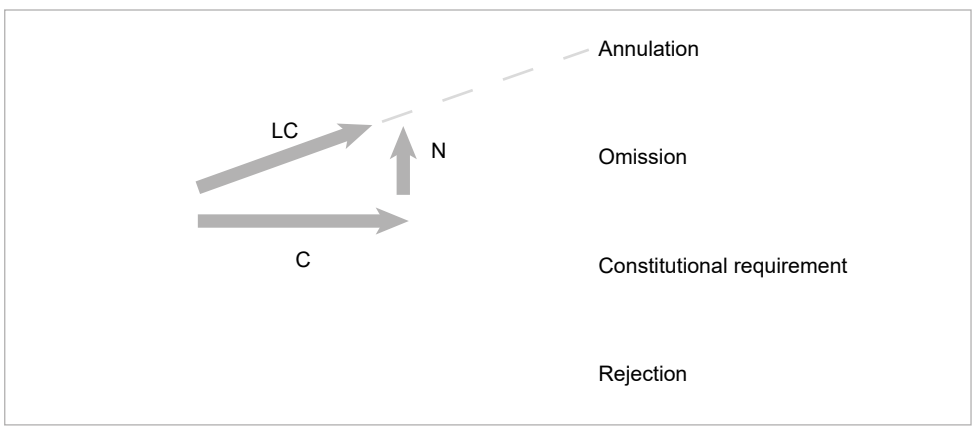

Figure 4 *Riggs v Palmer*
Source: Drawn by the Author

The second case is *People v Collins*.[28] The background to the lawsuit is quite trivial. A lady on her way home from a shopping trip bent down on the way, and someone pushed her to the ground. She did not see who the perpetrator was, nor did she hear his approach. When she looked up, he noticed that her purse was gone, and a blonde woman with a ponytail, wearing dark clothes had run past her. Another eyewitness, who was just watering his lawn at the end of the street, noticed the screaming and that a blonde woman in a dark dress was hurrying into a yellow car driven by a bearded black man and then driving away. The question of law was whether a means of proof based on a mathematical probability calculation is

[28] *People v Collins* 68 Cal2d 319, 438 P2d 33 (1968).

admissible as evidence.[29] It was an expert opinion that sought to determine, from the likelihood of certain elements of the facts (blonde woman, bearded black man, yellow car and so on), whether or not the couple involved in the proceedings could be considered guilty. The court's answer was negative.

The prosecution's argument was essentially that the likelihood of the above criteria occurring together is very small, making it very likely that the couple who have all of these distinguishing features are guilty. In this regard, the court argued in its reasoning that the numerical values used for the probability calculation are not necessarily realistic. There are no reliable statistics on how many yellow cars there are in Los Angeles, how many blonde women there are, and so on. On the other hand, we cannot be sure that these factors are independent of each other,[30] for example, wearing a beard may be overrepresented among blacks. There is also a possible connection between someone having blonde hair and wearing it in ponytail. Moreover, if the individual factors are not independent of each other, the combined probability of their occurrence cannot be determined in the same way as the expert did.[31] On the other hand, the probability calculations might show the chances that, for example, a black man and a white woman can exist as a couple, but does not necessarily point to it, nor does it prove in absolute terms that this couple actually exists. The probability calculation does not provide rock-solid evidence that the act was committed, nor does it provide evidence that the two persons in question, the Collinses, were guilty.[32] On the contrary, it can also be deduced from the model that there are even more such couples in a given Los Angeles region. (A special piquancy of the case is that in 1968, in the court's reasoning, blacks were still called 'negroes', and it is possible that there were one or more jurors within the jury who resented white woman and black man couples.)

How can this case be interpreted according to our model? The legal statement was made by the appellant Afro-American man, Collins. In the worst sense, he gave an example of torpor, as he sought to get rid of a potentially legitimate punishment with his appeal. In so doing he rejected the possibility of repentance in atonement. In the best interpretation of his act, it can realise the virtue of justice, for if he is not guilty, an appeal can help to establish this. An appeal as an act in itself is not outrageous, as everyone has the right to lodge one. Thus, the strength of the complaint is relatively small, and the distance between virtue and vice is also moderate.

[29] See William Twining, 'The New Evidence Scholarship', *Cardozo Law Review* 13, no 2–3 (1991), 295–302, 297.

[30] For more details see Michael Risinger and Jeffrey L Loop, 'Three Card Monte, Monty Hall, Modus Operandi and "Offender Profiling": Some Lessons of Modern Cognitive Science for the Law of Evidence', *Cardozo Law Review* 24, no 1 (2002), 193–286, 272.

[31] Bert Black, 'A Unified Theory of Scientific Evidence', *Fordham Law Review* 56, no 4 (1988), 597–695, 644.

[32] Cindy J O'Hagan, 'When Seeing is not Believing: The Case for Eyewitness Expert Testimony', *Georgetown Law Journal* 81, no 3 (1993), 741–772, 748.

The challenged norm is the judgment of the lower court, backed by the statistical calculation outlined above as the main evidence. The judicial intent is fundamentally positive, as it is aimed at punishing the person he or she considers guilty; moreover, on the basis of an objective, mathematical argument it seems to have a very strong case. However, the best moral reading of the norm shows something completely different. The statistical argument is not simply misleading but also erroneous, so the discrepancy between intention and best reading is significant; the power of the norm is small. On the basis of the above, the result, again, is annulment, that is the appellate court did the right thing in setting aside the judgment of the court of first instance and instructing the forum concerned to proceed with a retrial (see Figure 5; the complaint vector is short, pointing slightly upwards, as is the norm vector, and the end result, the legal consequence vector, thus indicates annulment).

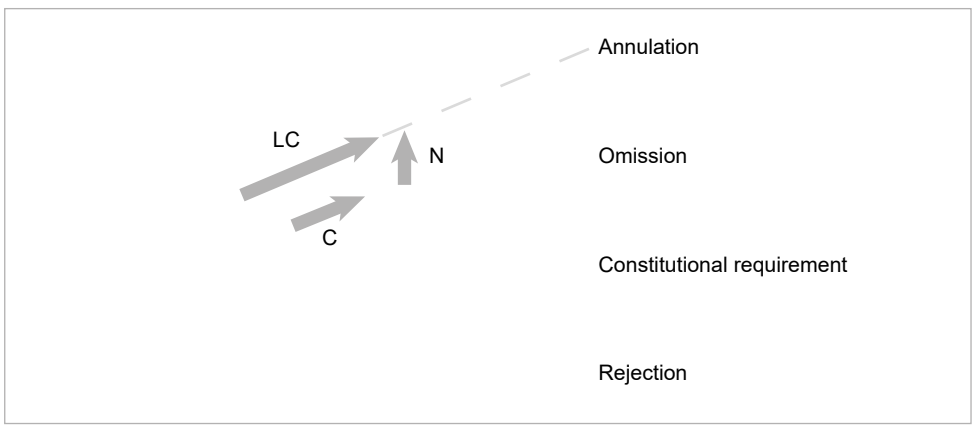

Figure 5 *People v Collins*
Source: Drawn by the Author

The third case is *District of Columbia v Heller*.[33] The District of Columbia enacted a law aimed at curbing the possession of firearms. Under the provisions of the law, citizens were not allowed to keep unregistered handguns in their homes, and further registration of guns was suspended, and the police captain was not allowed to extend existing gun licences. After the law came into force, Dick A Heller's application for a gun licence was turned down. Heller challenged that decision, citing the unconstitutionality of the law. The question of law was whether the law enacted by the District of Columbia was in conflict with the Second Amendment to the Constitution of the United States of America.[34] The affirmative, majority opinion

[33] *District of Columbia and Others v Dick Anthony Heller* 128 SCt 2783 (2008).
[34] Stephen G Giles, 'Mandatory Liability Insurance for Firearm Owners: Design Choices and Second Amendment Limits', *Engage* 14, no 1 (2013), 18–24, 18.

was expressed by Justice Antonin G Scalia. According to the statement of reasons on the judgment, the text of the Second Amendment at issue can be divided into two parts, and there is a causal link between them. In view of this, the text of the provision can be worded as *since* a well-regulated Militia, being (is) necessary to the security of a free State, *therefore,* the right of the people to keep and bear Arms, shall not be infringed. According to the majority opinion, the right to self-defence exists on the basis of *ius naturale,*[35] and concludes that, because of individuals carrying weapons, the army will be more efficient, because less time and financial resources will have to be spent on training soldiers.[36]

The judgment also states that, by using different statistics, both sides are able to argue for their own interpretation of the truth. Proponents of gun-carrying recalled that 85 per cent of cases where a host was able to deter a burglar with a gun end without personal injury. Opponents of gun-carrying, on the other hand, cite data showing that roughly one in five deaths suffered by juveniles in the USA is caused by some form of gun abuse. The response of those in favour of arms to this was that the causal link behind the phenomenon raised was not clear, as it would be possible that if it were forbidden to carry a gun, the ban could be counterproductive, because even more murders would be committed. The ban would only be respected by law-abiding citizens, and criminals would still acquire guns on the black market. The dissenting opinion emphasises that the constitutional amendment does not provide individual citizens with the right to carry arms, but provides protection for federal states against potential repression from the central government.[37] Justice John P Stevens said the ban in the constitutional amendment was, moreover, addressed to Congress and not to the federal states. Justice Stephen Breyer criticises the majority opinion because it does not follow the precedent governing the protection of human life and the right to carry arms, or adequately demonstrate why it deviates from this precedent. How can we evaluate all this according to our model?

The case was brought by Heller, who wanted to keep a handgun in his home. He wore a gun anyway during his work, which is what he also wished to do at home. The main vice he displayed by this is pride: He openly serves in the courthouse carrying a gun; why not do it in his own apartment as well? The main virtue in favour of keeping a gun at home is fortitude. He could thus bravely defend himself and his family against external intruders. Carrying a gun in a basically urban, densely populated neighbourhood is quite outrageous, although it is moderated by

[35] Robert E Shapiro, 'Natural Rights: Requiescant in Pace', *Litigation* 39, no 3 (2013), 55–58, 58; David B Kopel, 'The Natural Right of Self-Defense: Heller's Lesson for the World', *Syracuse Law Review* 59, no 30 (2008), 999–1016, 1013.

[36] Robert J Spitzer, 'Gun Law, Policy, and Politics', *New York State Bar Association Journal* 84, no 6 (2012), 35–42, 37.

[37] Hadley Arkes, 'The Natural Law Challenge', *Harvard Journal of Law & Public Policy* 36, no 3 (2013), 961–975, 965.

the fact that there is plenty of support in the USA for carrying guns at home. The complaint is therefore moderately strong, and since the vice and the virtue have roughly the same weight, this in itself suggests a more moderate sanction. The intention of the legislator in framing the norm was completely positive, as it was aimed at protecting one of the most important values, human life. Its best moral reading coincides with this if it really achieves it. As we have seen, the court did not really come to terms with this question of fact either. In any case, Christian intuition suggests that fewer weapons, not more, bring greater peace, and that a state of 'ceasefire', which is mutually sustained by fear of the other's weapon, is less valuable. The norm is therefore strong rather than weak in this respect. All in all, the recommendation must be a weak sanction, a rejection, or a constitutional requirement, and therefore the opposite result to that of the court hearing the dispute (see Figure 6; the complaint vector is of medium length, slightly upward, while that of the norm is longer, and goes downward, so their amount points to a milder sanction).

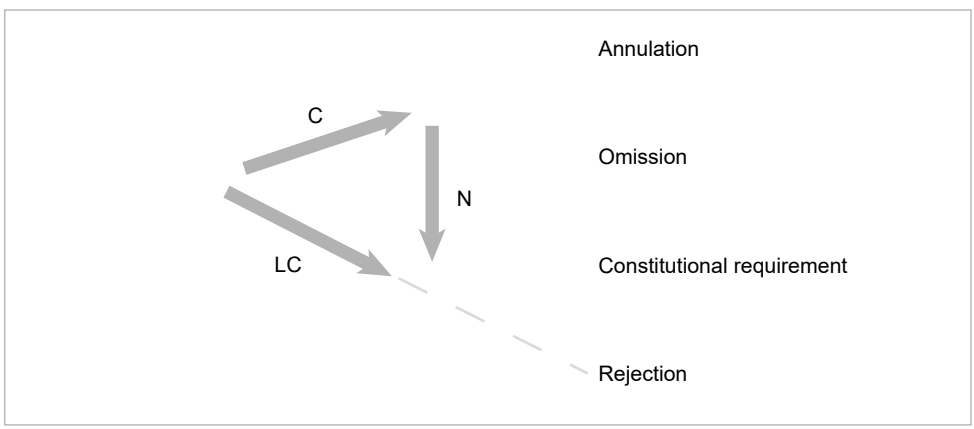

Figure 6 *District of Columbia v Heller*
Source: Drawn by the Author

The fourth and last case is *Tennessee Valley Authority v Hill*.[38] As part of a large-scale project, the US Congress began building a substantial system of dams on the Little Tennessee River. The central element of the facility was a valley dam called Tellico, which, as designed, would have swollen the section of river in front of it. The dam would also have been used as a hydroelectric power plant to supply electricity to hundreds of thousands of residents, and the project would have provided many jobs in a region from which young workers were constantly migrating. Construction was already in full swing when a law protecting endangered species came into force in 1973. Subsequently, a biologist discovered

[38] *Tennessee Valley Authority v Hiram Hill and Others* 437 US 153 (1978).

that a rare type of fish, snail darters, live in the Little Tennessee, and the species was later added to the list of endangered species. Nevertheless, construction did not stop for years: The competent authority voted to approve the necessary budget year after year, despite the fact that it was repeatedly raised during a congressional budget debate that continuing construction may be contrary to the provisions of the Endangered Species Act.[39]

The total cost of the project was more than 110 million dollars, of which about 57 million dollars had already been invested by the start of the lawsuit.[40] The authority in charge of construction therefore did not wish to stop construction. A law student, a law professor and a local lawyer sued the state authority for violating the Endangered Species Act. The case dragged on for years and triggered huge press coverage. The state authority, meanwhile, tried several times to establish snail darters in another river, but failed to prove the success of these efforts. According to biologists, it takes ten to fifteen years to state with certainty whether the translocation of a fish species has been successful or not. In addition, the snail darter is a very delicate freshwater animal species. The annoyance of the state authorities may have been increased by the fact that new perch species were discovered in the area every year, of which there are a total of about 140 registered ones, which differ only slightly. The question of law was whether the term 'action' referred to in Article 7 of the Endangered Species Act includes the completion of a project that has already begun.[41] The Article specifically prohibited acts that endangered the survival of the species listed in the annex to the act.[42] When the Supreme Court ruled, the debate was not about continuing the project, but about completing it. In fact, 80–85 per cent of the project had been completed, with only the closure of the sluices and the construction of some minor structures (for example, a footbridge) remaining. According to the court, the term *'action'* includes all actions, whether or not closing the project is an action.[43] What can be done about this rather spicy case?

The main guilt of the lawmakers is the vain desire for glory. What else can drive a biologist to waste his time on such a Sisyphean activity of little scientific

[39] Harold H Bruff, 'Legislative Formality, Administrative Rationality', *Texas Law Review* 63, no 2 (1984), 207–250, 224.

[40] Some, by contrast, say the value of the perch species is invaluable, see Edwin M Smith, 'The Endangered Species Act and Biological Conservation', *Southern California Law Review* 57 (1984), 361–413, 389.

[41] For the case see Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 23. About this see Steven J Burton, 'Ronald Dworkin and Legal Positivism', *Iowa Law Review* 73 (1987), 109–129, 122.

[42] George C Coggins, 'Protecting the Wildlife Resources of National Parks from External Threats', *Land and Water Law Review* 22, no 1 (1987), 1–28, 9.

[43] Zygmunt JB Plater, 'Statutory Violations and Equitable Discretion', *California Law Review* 70, no 3 (1982), 524–594, 586.

value as identifying distinct species of different perch that are barely separable from each other. And what else can drive a law professor and a law student to prevent a project costing millions of dollars in taxpayer money that could change the standard of living of an entire region? The virtuous reading of their actions is fortitude, as they allied to help an insignificant little species which is unable to defend itself. Their action caused great indignation, and the vices were a little more serious than the strength of virtue. The normative force of the complaint thus suggests the application of weaker sanctions. As far as the norm in question, the Endangered Species Act, is concerned, the underlying legislative intention must be seen as positive. In this particular case, however, the best moral reading may have trouble preventing the introduction of a large-scale project. For this reason, the normative force of the norm is small and points in the direction of milder sanctions. A comparison of the two leads to a rejection of the application, which again has the opposite outcome to that of the Court (see Figure 7; the complaint vector points slightly upwards and is quite long, and the norm vector is down and short, therefore their sum indicates rejection).

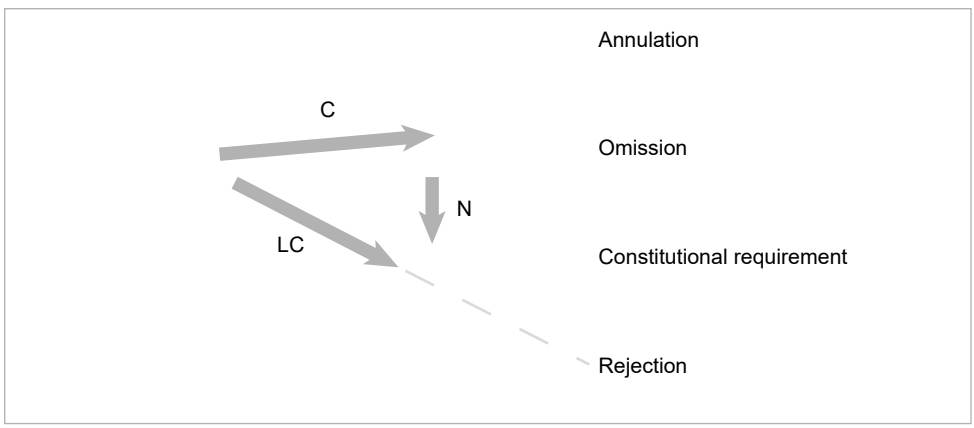

Figure 7 *Tennessee Valley Authority v Hill*
Source: Drawn by the Author

V Summary

The above few examples have shown, hopefully, that conscience-based analysis allows for as deep a study as traditional dogmatics, but it works with other concepts, values and limits. However, constitutionalism of conscience certainly has a serious advantage over classical analysis: It problematises and makes public a much more comprehensible, more important area that affects everyone, namely the world of vices and virtues. When working with the above method, we do not make the assessment to which we are accustomed, and it is not our main expectation that

our reasoning should be consistent and coherent. Rather, we perform a kind of meditation, where, by almost internalising the object in question, we pay attention to our own sinful and virtuous impulses. Moreover, our main expectation is not to allow ourselves to suppress within ourselves the clear voice that is necessary for an honest judgment of a given act.

The reader who has honoured these lines with their attention so far should not be daunted. I have not lost my sanity: I do not think the above scheme can ever displace conventional methods. This is true despite the fact that it relies on much more ancient traditions than legal reasoning. On the other hand, perhaps Christian people, or those who, relying on their own inner sense of justice, are attempting to orient themselves in an increasingly tangled world, may find the above method useful. Conducting 'examinations of conscience' may not only contribute to arriving at a well-founded opinion on the assessment of a socially important debate but may also serve as good practice to judge a case from a yes–yes, no–no perspective. One who becomes adept at this operation will not only be wiser but will be closer to the supreme rule of law, the *honeste vivere,* to fulfil the command to live a decent life.

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Human Rights as a Political Doctrine

The Case of Freedom of Conscience

Zoltán Balázs

I Introduction

In this paper, I will argue that human rights are primarily a political doctrine or toolbox that have, of course, moral, moral-philosophical and theological dimensions and a historical context, but that the use and application of a particular feature is polemical, ideological, confrontational or constructivist, but definitely political. This thesis has significant implications for the interpretation of the doctrine, which I will also try to present briefly. My line of thought is as follows. First, I will clarify the concept of political doctrine. The concept refers to a train of thought, a system of thoughts or principles, that is strongly connected to the political struggles of a given age or historical context, but which goes beyond them and is not treated as a political theory or philosophical concept or approach. I will then briefly discuss the historical roots of human rights as a doctrine (especially its mediaeval beginnings) and then explore in more detail the thoughts of authors who had very different approaches to human rights and whose thought left a lasting impact, from John Locke to Edmund Burke and Thomas Paine, whose works particularly clearly represent their political affiliations. If there was, and to some extent still is, an ideology that truly distrusts the political doctrine of human rights, it is the Catholic tradition (more simply: Catholicism). Therefore, it is worth examining this tradition more deeply, and this will be the focus of the next part, after which I will focus primarily on freedom of thought and conscience. Here again, I will select various authors and writings from the sixteenth to nineteenth century; on the one hand, in order to find ideas that can be aligned more with the texts discussed in the previous section, and on the other hand, because today's Catholic teaching, although not denying its own past, has undergone serious modifications, mainly at the Second Vatican Council and afterwards.[1] The lesson is twofold. On the one hand, ecclesiastical teaching includes the 'right' to life, to freedom of thought and conscience, but – and this is the point

[1] In the Catechism of the Catholic Church, Sections 1776–1802 deal with the freedom of conscience. It is, of course, about a false conscience, a neglected conscience, that is, *reference* to conscience in itself does not justify anything; nevertheless, to follow a sure conscience is, *ceteris paribus,* obligatory.

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– it is conceived not primarily as a right, but as a quality belonging to human nature. On the other hand, and in line with this, the Catholic tradition, due to the depravity or corruption of human nature, sought to shape this freedom (through universities, judicial procedures and monastic orders) not within the framework of law but within the framework of other social institutions. In the wake of the democratic regime and democratic sentiment in general, these institutions proved to be too narrow and elitist, and the Church went on the defensive politically. The doctrine of human rights itself found its own institutions, in fact, by somewhat institutionalising the individual (but also by founding institutions of power, primarily the courts). The fact that this doctrine is basically not a system of philosophy or ethics but of political thought is proved not only by this institutionalisation but also by its very robust mobilising, ideological power, although it is not the task of this essay to list and analyse concrete examples.

II Political doctrine

First, the technical term of 'political doctrine' needs to be interpreted. It is well known that the theory or theoretical knowledge of politics has, entirely unsurprisingly, always been strongly intertwined with the practice of politics, or certainly much more strongly than other modes of philosophical reflection. However, political doctrine was never entirely identified with political practice, or in other words, we can only speak of a political theory or doctrine if direct practical goals and motives prove to be meaningfully and permanently detachable from it. Niccolò Machiavelli clearly had very definite political goals – partly, it can be argued, community goals (Florence's independence and power), partly obviously individual goals (his own career) – but none of his writings became part of the canon of political thought on these grounds. Universally and permanently valid arguments, understanding and insights provide the theory, and in his work, evidently, the backbone of his doctrine or teaching.

In its original context, Locke's *Two Treatises of Government* are in the nature of a discussion paper – the first part is a refutation of Sir Robert Filmer's views on the patriarchal origins of royal power, the second and constructive part concerns the legitimacy of the parliamentary side of the civil war and the defence of how it was perceived, in particular the justification of armed action against the ruler's authoritarianism. At the same time, Locke's various theses – about the origin of property, natural law, the separation of powers, the majority principle, tacit consent and, of course, inalienable rights – have also become the standard set of arguments for modern constitutional-liberal political theory. A third example is the political doctrine behind the American Constitution, which was explained by the authors of *The Federalist Papers,* primarily James Madison and Alexander Hamilton. This corpus of texts was also written for a clear political purpose: The authors sought to

reveal and defend the structure of a new state. However, many of their arguments proved to be universal, and the authors intended them as such (for example, on the issues of the republic, shared popular sovereignty, representation and parties). Political doctrine is thus a system of views, a coherent set of arguments, the political *Sitz-im-Leben,* which may be well-defined, but it is also permanently and broadly connected to the tradition of political theory.

Human rights in this sense can safely be called a political doctrine. First of all, it is enough to recall the decisive impetus given to its development by a policy document (the Declaration of Human and Civil Rights), which was soon joined by renowned amendments of the US Constitution. In case of declarations, proclamations and legal texts, however significant an effect they may have, it is even more important to be aware that these documents fit into a broader *tradition,* which can be identified with the rights-expanding, rights-protecting line of European legal and political development. The philosophical derivation or justification of human rights is, of course, an important task,[2] but the time in which they emerged has a history, in which, however, it is not so much the historical details that matter but the philosophical lessons. One of these is precisely the logic of the expansion of rights, which at that time was halted by certain counter-forces, and its remaining ambivalence. Let me turn first to this tradition or, to use a more outdated expression, to the tradition of spiritual history.

The Middle Ages can be seen as a world of immunities and privileges, which were primarily collective rights. As a reminder, the Cluniac reform movement contained, among others, the idea of papal authority and the sovereign legislation of the Church in general, for which the rediscovery and application of Roman law was paramount. This can even be said to have been a legal revolution,[3] but it was at least as much a political revolution, since to achieve liberation, the freedom of the Church and later to secure her supremacy and her need for control over secular power, it could not have been otherwise. The Church as a legal community is an idea of key importance, but it is not the only one by any means. Within the Church herself, bodies and corporations were established not long afterwards, which enjoyed a special internal freedom, with their own rights and privileges, first the religious

[2] One of the most intriguing early theories that treat human rights entirely within the framework of an analytical moral philosophy is Alan Gewirth's *Reason and Morality* (Chicago: The University of Chicago Press, 1978). Gewirth hypothesises that human action has a normative structure, from the understanding of which a final ethical principle can be deduced, which presupposes respect for generic rights before everything else: 'Always act in accordance with the generic rights of yourself and the person you are concerned with.' Ibid. 135. A similar experiment is the basic work of the modern Hungarian liberal system of ideas, see János Kis, *Vannak-e emberi jogaink?* (Paris: Dialogues Européens, 1987).

[3] Miguel Vatter, 'Theocratic Legal Revolution and the Origins of Modern Secularism in Dante', *Síntesis. Revista de Filosofía* 2, no 2 (2019), 26–48; Paul E Nahme, 'Law, Principle, and the Theologico-Political History of Sovereignty', *Political Theology* 14, no 4 (2013), 432–479.

orders, second the universities, then other communities with various legal standings. Finally, Protestantism also spread, especially in the early days, by taking advantage of the autonomy of local, mainly urban communities: Some of them continued as self-governing churches while others (in the Lutheran and then Anglican Reformations) moved towards the national church concept. Similar processes took place in secular structures, in well-known ways in cities (and within them inside the world of guilds), and in a political society that was progressively arranged into orders. Finally, it is worth noting, even if they are more peripheral in importance, the freedom traditions of ethnic communities (and, of course, mixed cases, such as mediaeval regulations for Jews, which were of course less in terms of privileges than in the sense of immunities).

III The beginnings of doctrine

How did these emphatically collective rights become modern individual rights? Evidently this required a thorough shock, that is, another historical experience, which made it clear that tradition and the processes of legal expansion inspire not only the protection of individual rights but also the idea of collectivism across all borders. The main theorists of the French Revolution were certainly not individualists. On the contrary, they were much more deeply gripped by the idea of collective freedom – referring to the people, to the nation and, eventually, to humankind.[4] In his well-known essay on the freedom of the ancient and modern, Benjamin Constant sought to picture a pre-revolutionary author (Abbot Gabriel Bonnot de Mably) as a 'representative of the system' that 'demands that the citizens should be entirely subjected in order for the nation to be sovereign, and that the individual should be enslaved for the people to be free',[5] but he acknowledged that 'the men who were brought by events to the head of our revolution were, by a necessary consequence of the education they had received, steeped in ancient views which are no longer valid, which the philosophers whom I mentioned above had made fashionable'.[6] This Republican conception was, notoriously, suppressed very soon by the national idea, and with it the collective concept of freedom(s) was transferred to the political discourses on national freedom. The idea of modern collective freedom (republic–people–nation–state) brought with it

[4] For a history of the collective concepts of the French Revolution see Istvan Hont, 'The Permanent Crisis of a Divided Mankind: "Contemporary Crisis of the Nation State" in Historical Perspective', *Political Studies* 42 (1994), 166–231.

[5] Benjamin Constant, 'The Liberty of the Ancients Compared with that of the Moderns', in Benjamin Constant, *Political Writings*. Ed. and transl. by Biancamaria Fontana (Cambridge: Cambridge University Press, 1918), 318.

[6] Ibid. 319.

the expansion and abolition of privileges and immunities at the same time. *Some* (groups, bodies, orders) possessed such desirable privileges, which *others,* that is, the larger communities – potentially all of humanity – coveted, therefore one of the political driving forces was *acquisition*. However, as the nature of these rights is associated with limitation and existence *vis-à-vis* others (or at least existence *compared to* others), their total extension or acquisition by all did not *ceteris paribus* (that is, in the absence of some novel individual right protection strategy) attract anything else but their abolition. Mediaeval legal limitations and contingencies; the material quality of rights, so to speak, their crudeness and sometimes their raw dimension of power have disappeared (there are only remnants of them, of which the right to bear arms under the American Constitution still has spectacular staying power, although a modern state legislature usually easily shrugs it off).[7] The catastrophic consequences of this process became apparent very quickly in the French Revolution – which is what Constant's famous essay quoted above dealt with. Thus, we come to the conclusion that the way in which human rights (or, as Constant himself put it, the language of law[8] as we use it today, in fact and in terms of political tradition) arose was as a ladder used to get out of a pit. The way of filling the vacuum left after the destruction of the world of collective but fragmented rights, and one which has undoubtedly had considerable success, is the doctrine of individual human rights, being both the heir to the world of the Middle Ages and its traitor.

IV The political birth of the doctrine: Locke, Burke and Paine

The proposition that human rights is a political doctrine is a statement that is very broad, textual and cannot be proved empirically, but which can be upheld on the basis of a tradition, hopefully credibly and veritably substantiated by the historical context cited. This is because if we present the most important theoretical texts in terms of the history of their impact, we can gain similar insights. Undoubtedly, among such texts are the two treatises by Locke, already cited, on the origins of civil government. Perhaps less well known is that, despite their titles, these writings are not explicitly philosophical treatises (Locke's very significant philosophical work on the human intellect is such a monograph in today's sense). As already mentioned, despite the text – especially the *Second Treatise* – being written for a political purpose (to establish the case for the exercise of sovereignty by parliament and to question

[7] Interestingly, some more of these include: a degree of autonomy of universities, special rules for churches, separate criminal justice for members of armed bodies, some guild-like professions (chambers of medical doctors, bars of lawyers with public authority powers).

[8] Constant, 'The Liberty', 201.

the legitimacy of the Jacobin Government), it clearly has a broader perspective, addressing key issues in political theory.

As part of this, Locke elaborated on his thesis of inalienable rights, from the first moment as an axiom, leading to the foundation of government, thus as a fundamental political principle. Undoubtedly, Locke also sought to take into account the theological axioms inherent in contemporary public belief: 'Men being all the workmanship of one omnipotent and infinitely wise Maker . . . they are his property whose workmanship they are, made to last during his, not one another's, pleasure'.[9] Shortly afterwards, however, he stated just as emphatically that man is 'master of himself and proprietor of his own person and the actions or labour of it.'[10] The contradiction is quite obvious, all the more so because 'property' for Locke is certainly not a metaphor but a key concept. Referring to this (also), Peter Laslett notes that Locke was 'perhaps the least consistent of the great philosophers', explaining that this may sometimes be due to inattention, but sometimes it is because Locke has run into a real dilemma that he was not able to solve.[11]

Leo Strauss, who loves such contradictions, sought hidden, real meaning behind them, and of course, Locke's real message was by no means a theological statement with restrictive consequences but a political axiom declaring full self-determination and personal sovereignty (everyone owns his own person).[12] The political theoretical goal, at least in this case, is quite clear: Locke certainly wanted to avoid a situation where an absolute ruler may claim that, since everyone owns his own person, he is free to surrender it, as with Thomas Hobbes, not to the Church, of course, but to the State (the ruler or the community). The theological constraint, then, is not merely a rhetorical tool but plays an actual role as it is ultimately supposed to *protect* the *individual* – from himself. Locke, of course, also wanted to anchor the norm that no property could be taken away from anyone without his consent.

The solution to this lies in the theory of the origin of property, the key concept of which is labour. According to Locke, property is in fact an extension of our own body through work (this idea, through Marxism, probably had a better career than many of Locke's other political theses). This may be considered one of the unresolvable dilemmas mentioned by Laslett, which still has many practical manifestations today. It may simply be a matter of Locke recognising a dual interest: On the one hand, we need to be protected by means of our rights, even independently of us, and on the other hand, the 'independently of us' clause

[9] John Locke, *Two Treatises of Government*. Ed. and intr. by Peter Laslett (Cambridge: Cambridge University Press, 1992), 47, 271.

[10] Ibid. 143.

[11] Peter Laslett, 'Introduction', in John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1992), 82.

[12] Leo Strauss, 'Locke's Doctrine of Natural Law', *American Political Science Review* no 2 (1958), 490–501.

opens up quite dangerous possibilities. In today's dilemma: Is there a possibility of protection of interests being substituted (for example, by collective constitutional complaint or ombudsman inquiries) without the authorisation of those concerned, or even against them, even if it is, so to speak, in their interests? As long as this has well-recognised (material and political) benefits, there are likely to be fewer protests, although the dilemma of paternalism can still be raised. However, more serious ethical dilemmas also exist.[13] In any case, Locke's views already contain a great deal of human rights conflicts in their germs and, to some extent, provide a basis for addressing them. From our point of view here, in any case, they make it clear that one of the founding or key texts of the doctrine is based on fundamental questions of political theory, that is, considerations of the nature of the relationship between the individual and public power, although it is also true that ethical aspects were present in the text from the outset.[14]

A century later, in the early stages of the French Revolution, Burke wrote his notable *Reflections,* and in response to them Paine wrote *Human rights*. Both are intrinsically political texts, perhaps even more explicitly than Locke's treatises. Burke's writing is perhaps better known, but it is worth recalling that the author's main concern is to protect certain rights not because the human intellect either established or found them correct as a result of some philosophical derivation, or by all means considers them to be an axiom, but because, according to historical experience, they are worthy of protection. 'We wished at the period of the Revolution, and do now wish, to derive all we possess as an *inheritance from our forefathers*.'[15] The core idea, which Burke elaborated on in other long paragraphs, is that the law is essentially a legacy. He then provides us with a colourful, rhetorically well-formed and up-to-date description of the model of immunities and privileges that served as a social and political organising principle in the Middle Ages. Arguably, Burke's reasoning is a textbook example of demonstrative argumentation. But, of course, it leaves open the question of 'from where?', which Burke still had to address, as we know, not so much when arguing with the French revolutionaries but with the Jacobins of London. He did so: 'Far am I from denying in theory . . . the real rights of men. . . . If civil society be made for the advantage of man, all the advantages

[13] Suffice it to refer to euthanasia: does disposition over our own body include the right to dispose of our lives; and which is the state of consciousness that is completely 'ours' (for example, in the case of severe dementia, is the doctor or authority bound by my previous decision about my own death, because if so, it means that my previous decision was somehow more deeply connected to me than my resistance now? (The Dutch Supreme Court essentially ruled this way on 21 April 2020 in a relevant case.) Locke is also one of the classics of modern philosophy of consciousness, so other views are important in deciding these ethical issues.

[14] Locke cannot be acquitted of his responsibility for justifying slavery. It is hardly plausible to assume that Locke really thought the slaves were losers in a just war, as his 'justification' has it.

[15] Edmund Burke, *Reflections on the Revolution in France*. Ed. by HP Adams (London: University Tutorial, 1910), 31.

for which it is made become his right. . . . In this partnership all men have equal rights, but not to equal things.'[16]

He then turned to the fact that living in a civil (in today's sense, political) society is all about giving up the right to self-government. This is, in fact, a secondary circumstance anyway, since governance is first and foremost related *to needs* rather than *rights*. If we insist very much on it, the right to meet needs could even be called a fundamental human right, but then we have to accept that the government interferes in our lives in many ways; primarily by means of rules, of course. Thus, Burke's answer to the (universal) question of 'from where?' is twofold, that is, he outlines two different arguments. One argument is that any government is acceptable if it is based on respect for the rule of law – which is the rule of law argument. It is not some 'metaphysical' but particular and concrete rights that matter, and how abstract property rights relate to the general right to life or self-determination is a purely academic question. The argument thus transforms the previous inheritance-based observation (which was limited to England) into a political theoretical thesis. The roots of the other argument may also be found in the Middle Ages, or even further back in the Roman principle of *salus publicus,* which is the basis of modern, utilitarian government philosophy as well. Using a modern example, in disputes over basic income, the law and direct material needs may be linked in a similar way. One can add a John Rawlsian line of thought and state, as a first principle of justice, that everyone should share equally in basic goods, but again, this is not necessary in terms of political theory, as it is part of a millennial consensus about the business of any government. Burke was aware, thus, that after Locke, and of course in the light of French developments, he must have a position on the political significance of human rights, but he stated that (let us add, drawing on David Hume)[17] the organic and needs-based concept of rights can be seen as protecting both the individual and the government. The point, in any case, is that the doctrine of human rights does not emerge outside of politics (governance) and of political theory. From Burke's perspective, the political benefit of the doctrine itself is the ultimate question: If we regard rights as the basis of some ultimate principle of philosophy or ethics, or seek this principle through them, we make good governance impossible; if we take existing rights seriously and generally govern according to the law, we may also provide human rights themselves with political effectiveness and dynamism.

Even a modern, more left-wing liberal may not necessarily be unfamiliar with such a Burkean approach, although typically metaphysical beliefs about the existence of rights tend to complement this. An example can be found in one of

[16] Ibid. 60.

[17] Hume speaks specifically with delight about the monarchical governments of his time: 'They are found susceptible of order, method, and constancy, to a surprising degree. Property is there secure, industry encouraged, the arts flourish.' David Hume, 'Of Civil Liberty', in David Hume, *Essays* (London: Henry Frowde, 1904), 89–97, 95.

Jeremy Waldron's important writings, at the end of which, thus in a prominent place, but somewhat vaguely, he states that: 'Many, perhaps most, conflicts – whether between rights and utility or among rights themselves – are best handled in the sort of balancing way that the quantitative image of weight suggests: we establish the relative importance of the interests at stake, and the contribution each of the conflicting duties may make to the importance of the interest it protects, and we try to maximize our promotion of what we take to be important.'[18] Waldron, of course, not only emphasises the instrumental role of rights in governance, but also follows the argument of Constant, who already saw the danger in Jeremy Bentham's utilitarian philosophy of government,[19] arguing that rights are also essential for protection against government, not just as a measure of the content of government activity (satisfaction of needs). The lesson is the same here, and is affirmed: The doctrine plays an eminently political role.

Paine's pamphlet sharply criticised Burke's views, but did not go beyond the political doctrine of human rights at all.[20] More precisely, in today's language, he contrasted Burke's argument of historicity with political theological reasoning, that is, he argued that Burke was not *sufficiently* historical, because he did not go all the way back to creation, which, as Paine wrote, clearly states the equality and unity of the people. In his opinion, following Jean-Jacques Rousseau's views, this has been spoiled by some governments. Paine considered all this to be an obvious truth, but added that classical political theological truths are only helpful as long as natural rights are accepted and acknowledged. Nevertheless, they are still needed, because they cannot be overwritten by civil society, on the contrary: It is the power of the community that is needed to enforce them. Some natural rights do not need to be enforced because they are within the purview of the individual (freedom of thought), but for most, this is not the case.

It is noteworthy that, up to this point, Burke may have agreed with Paine's reasoning. The novel part of his argument comes after this. Paine turned to the extent to which this logic prevailed in the familiar systems of government, and, of course, unsurprisingly, he found it to exist virtually nowhere: In fact, this was also Rousseau's legacy. He cited two reasons for this: one is superstition (in today's language, domination based on religious legitimacy), the other is conquest (in today's language, domination based on violence, which, as Paine notes, will always attempt to find some more acceptable source of legitimation for itself, and this will typically be religion again). However, Burke's arguments are not theological, at least not directly; as we have seen, for him, governance *per se* carries its own legitimacy

[18] Jeremy Waldron, 'Rights in Conflict', *Ethics* 99, no 3 (1989), 503–519, 518–519.

[19] Benjamin Constant, 'Az egyéni jogokról', in Benjamin Constant, *A régiek és a modernek szabadsága* (Budapest: Atlantisz, 1997), 197–208.

[20] Thomas Paine, *Common Sense: The Rights of Man, and Other Essential Writings* (New York: Meridian, 1984).

(meeting needs and creating rules, which in turn presupposes the permanence of rules, that is, the rule of law). Paine sensed this as well, so he tried in detail to unmask and mock all of Burke's rhetorical tools, dash and sometimes exaggerations, to expose them as irrational, but at the same time he spared no effort to construct some kind of government philosophy based on the doctrine of human rights.

Obviously, it is not difficult to guess that constitutionality, the constitutional encirclement of doctrine and the right to political participation derived from equality play a key role in his argument. Of course, Paine was not naive either, but he trusted that Man's baser instincts would disappear as soon as the disguised domination of violence was abolished. As we know, in the light of the later events of the French Revolution, Burke is considered a prophet and Paine an idealist at best (no doubt his not-so-pleasant experiences of revolutionary government did not shake his worldview), but we cannot deny that in the long run only Paine's constructivist-democratic governance prevailed, although the counter-arguments of the anti-rationalist (but not irrationalist) Burkean tradition did not disappear or become obsolete either. However, the lesson is the same, even in the case of Paine, who faithfully followed the ideas of the Enlightenment: He derived a robust concept of governance (or political system) from a legal theological foundation based on the tradition of Protestant biblical interpretation and distanced himself from thinking in an abstract, axiomatic philosophical-ethical system. The doctrine of human rights is thus, in the minds of both Burke and Paine, crucially located in a political context.

V Viewed from the theological tradition

The well-known *topos* of the Enlightenment, which Paine also shared, and which has its roots in the Reformation, is that Catholic theology, or rather the Teaching Office of the Church – the Magisterium[21] – has always and radically opposed the doctrine of human rights. They did not go into great detail or devote much energy to explaining this *topos;* similarly to Paine, they attributed it to priestly craftsmanship, the desire for domination, moral depravity, and they fondly cited the persecution of heretics, the mediaeval emperor–pope conflicts and the provisions of the Council of Trent, mainly on censorship. Of course, it would not have been particularly difficult to find the writings of the masters of Scholasticism, with their findings on natural reason and the markedly non-absolutist socio-political principles they derived from them. It is not that they would have found a flawless

[21] Of course, this is not about a single institution. In Catholic terminology, teaching is a power of Christian origin (in this sense, office, one might say, ability or competence) that can be exercised in various legal forms, including official manifestations of synods, popes and bishops. 'Teaching' itself also has several levels of binding force. The opinion of theologians, if uniform, mature and multiplied in many ways (for example, appears in official papal or synod documents) also has binding force.

doctrine of natural law, free from contradictions. But they would have found that the origin, purpose and destination of the government and the relationship between the individual and the community were no less prominent themes and problems for the scholastics as they were later. The classics merely developed and used a more sophisticated theological and natural law conception than that presented by Paine and many Enlightenment propagandists.

Francisco de Vitoria's lecture *On the American Indians* was written a good two hundred years before Paine's essay.[22] Vitoria was the founder of the School of Salamanca, and one of the main figures and dominant intellectuals of his age and country (which was perhaps the most powerful Christian state at that time, and influential in Rome), so his views cannot be called peripheral (much less heterodox). This is not to claim that this text is entirely free from contradictions. The reason for this is partly the author's very delicate intellectual role (I will address this shortly), and partly the secular, theological and philosophical conflict between secular power and spiritual power, which was based on much deeper problems than the philosophers and evangelists of the Enlightenment would have acknowledged, or would have been willing to appreciate at all (Burke might have done so, but the radical Quaker Paine, with his anti-Catholic roots, would certainly not have). Vitoria was required to legitimise the presumed claims of the Spanish ruler over the peoples of the New World, but he was essentially unable – or unwilling – to carry out this task in full. Above all, this was because he had to maintain some key theses in his own European context: Non-Christian governments can also be legitimate; even unnatural sins cannot justify war (since such sins are also committed by Christians); natural reason is a sufficient basis for the establishment of a legitimate government. (The European context focused on the situation of Christian subjects of Islamic rulers, including their political and civic duties.)

Vitoria's argument sometimes seems startlingly enlightened, although it is based heavily on scholastic and antique authorities: 'My sixth conclusion is that, however probably and sufficiently the faith may have been announced to the barbarians and then rejected by them, *this is still no reason to declare war on them and despoil them of their goods*.'[23] He adds that this theorem is accepted by Saint Thomas Aquinas and 'the doctors of both canon and civil law', and then, referring to Aristotle, supports it with the argument that 'belief is a matter of will, but fear considerably diminishes the freedom of will. . . . To come to the mysteries and sacraments of Christ merely out of servile fear would be sacrilege.'[24] Religion, therefore, cannot be promoted by force. However, his argument also undermined religious legitimacy of secular power. Moreover, Vitoria accepted the decisive difference between secular and spiritual

[22] Francisco de Vitoria, 'On the American Indians' in Francisco de Vitoria, *Political Writings*. Ed. by Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 231–292.
[23] Ibid. 271.
[24] Ibid. 272.

power or authority, emphasising that the enforcement of natural law does not require ecclesiastical authority, so ecclesiastical or canonical laws concern only those who accept the mystery of faith. Thus, these laws have a different status. In doing so, he questioned papal authority (that is over 'barbarians').

As previously indicated, at the end of his lecture, Vitoria tried to find arguments for proving *Spanish* authority. Expressed in today's language, he referred to the prevention of crimes against humanity (human sacrifice), and assumed, with emphasised caution, that the inability to self-govern could also justify intervention or the establishment of an external government, but only for educational purposes. However, even these arguments cannot prove the legitimacy of an enduring tutelary government and, of course, make the exact identity of the external power which may intervene entirely incidental. Vitoria went so far as to leave the election of the government to the freedom of the people (the majority!).[25] Two important lessons can be learned from this. On the one hand, that the doctrine of human rights, with its theological roots, is essentially consistent with the general consensus of the scholastic doctors; and on the other hand, that it had or could have had direct political significance for the Magisterium. This significance is also twofold: On the one hand, it requires that the legitimacy claims of secular power be universally accountable (in fact, it requires secular power to act proactively on the basis of natural law – natural rights), while on the other hand, it limits from the outset the possibility of ultimate religious legitimacy (that is, conquest is not permitted and other peoples and countries cannot be subjugated on the grounds of spreading the Christian faith, which Vitoria called outright sacrilege; a stronger term for the protection of freedom of conscience in the sixteenth century can scarcely be found).

Vitoria, as previously noted, is a classic and an authority on Spanish neo-scholastics, so even if his reasoning cannot be regarded as a direct and indisputable manifestation of the Magisterium, it is not far from it. Of course, there are plenty of classic authors in patristic literature and mediaeval thinking, especially those who provided the ideological ammunition for the Crusades, who did not reject the strategy of forced conversion. The basis of the argument is Augustine of Hippo's

[25] 'The choice ought not to have been made in fear and ignorance, factors which vitiate any freedom of election, but which played a leading part in this particular choice and acceptance' – the author here refers to the hypothesis that the Spaniards were about to somehow offer the peoples of the New World the acceptance of their own government. 'The barbarians do not realize what they are doing; perhaps, indeed, they do not even understand what it is the Spaniards are asking of them. Besides which, the request is made by armed men, who surround a fearful and defenceless crowd. Furthermore, since the barbarians already had their own true masters and princes, as explained above, a people cannot without reasonable cause seek new masters, which would be to the detriment of their previous lords. Nor, on the contrary, can the masters themselves elect a new prince without the assent of the whole people. . . . Since, therefore, in these methods of choice and acceptance some of the requisite conditions for a legitimate choice were lacking, on the whole this title to occupying and conquering these countries is neither relevant nor legitimate.' Ibid. 275–276.

school of thought. Saint Augustine rejected violence in his early works, but was more supportive in his later years, particularly due to his increasingly gloomy views concerning the original sin, the resulting corrupt will, and the consequent weakness of judgement and understanding. Paine's political principle (equality), drawn from the history of creation, would presumably have been rejected very robustly by Saint Augustine, who would point out that it was only half of the story, and that the troubles mentioned by Paine were not caused by the deterioration of government, as *that* also has a cause. The corrupted will leads to a corrupted conscience, which in turn is corrupt, broken, flawed and sinful; it cannot have complete freedom, much less because it could cause more harm as it can damage others. However, the Augustinian argument can only be called constructive and politically relevant if it includes the possibility of redress; that is, if it can anchor the truth in a specific institution. This, of course, can only be the Church, which is the bearer of regenerative grace leading to truth. But the sanctity of the Church and its imperfect, human and depraved dimension are also inextricably linked, while worldly structures cannot be denied the help of grace, that is, the justice-bearing role of natural reason, either. More specifically, the functioning of secular power or government also stands or falls on its ability to distinguish, for example, between good and evil, right and wrong, merit and sin; if not, it not only becomes despotic but also disintegrates. Saint Augustine's own distrust of political authorities was considered suspect by orderly, consolidated mediaeval scholasticism, but its representatives could not deny the complications caused by pervasive sin.

Freedom to accept faith and the impossibility of freedom also appear in today's human rights arguments, although mostly not as problems of faith but of the ability to live autonomously. The problem is not whether one can be forced to believe in, be convinced of, accept and identify with it, but whether one can be forced into freedom, an autonomous life where the form of coercion is not necessarily violence, especially not physical violence, but education, the exclusion of certain opportunities (such as drug use) or, possibly prescribing specific actions or forms of participation (such as compulsory schooling or compulsory sex education). In this context, some elements of institutional continuity are also striking. Even though it is a simplification to say that the office of ecclesiastical teaching has only been replaced by the constitutional judiciary, or more broadly by the transcendence of the judiciary, the analogy and even the real lineage is nevertheless very strong.

Whether we look at the enlightened, more optimistic scholastic tradition or the gloomier (late) Augustinian tradition, at least Catholic theology and social doctrine can be said to be ambivalent and, of course, inclusive. In any case, it created from the outset a very broad space for interpretation, in which the course of interpretations developed in no small part under the influence of the political power-relations of the given age. In other words, the theological problem or dilemma was typically addressed along with some political conflict of interest, or perhaps was sought to be

decided. What was and has ever been conceptually and philosophically impossible, proved to be politically workable.

In this context, it becomes clearer why, in the face of the Reformation, especially the French Revolution and the intellectual movements that prepared it, the Magisterium's position, rhetoric, and reasoning on the doctrine of human rights became much more hostile, clearly in line with the Augustinian tradition. In Pope Gregory XVI's encyclical *Mirari vos,* cited in modern-humanist circles with holy horror and as an example of infamy, because it declares the freedom of conscience to be insane, and asserts that censorship, the index and similar institutions are necessary and useful, so much so that the author did not even shy away from praising book burning; we come across an extreme formulation that might have amazed even old Saint Augustine. However, it is fairly easy to see that the document is not exactly an example of in-depth theological reasoning but rather a pamphlet, despite the author's office and the sources he quoted, as well as the ecclesiastical terminology. The pope primarily pursues pastoral goals, declaring himself a pastor (not necessarily in the shrewdest way); stresses that there is a wealth of views and information (in today's language: *fake news*) poured on people who lack sufficient judgement, which sows the ground for the doctrine of complete freedom of conscience. I have quoted today's fashionable term to make it clear that what causes headache is living with freedom in practice. It was this practical problem then as it is today, rather than the theological axiom that no one can be saved against their will, that is, contrary to their free choice. The text, then, does not question this fact but the implicit idea that we are free because we can choose our own truth; and that since we choose, it must be absolutely true (it is not about the truths of science – the Enlightenment basically believed deeply in the truth of science, or rather in the scientific truth – but the truth of salvation).

John Newman provided a much more authentic and nuanced critique of such a theorem of freedom of thought and conscience. Newman's credibility is ensured by the fact that he was regarded by Catholics as a convert (not to Christianity, of course), after an extremely long journey and by the circumstance that his conversion was specifically a path of intellect and conscience, rather than that of mystical and therefore difficult-to-follow experience. The nuance is provided by Newman's acute awareness that the absence of external coercion and a deep internal urge were similarly important to his conversion as the influence of the necessary external authorities – living and dead. Hence, Newman rightly referred to liberalism and the problem that liberalism posed for him as the defender of freedom of conscience, being its beneficiary, in his notable autobiography *Apologia pro vita sua*.[26] Even a discussion of the explanation evokes a political context: Newman referred to

[26] John H Newman, *Apologia pro vita sua* (New York: William Norton, 1968). The book is not an autobiography in the sense we usually understand, but a 'history of his religious views' quoting the author's own clarifying remark. See pages 417–432.

French liberal Catholics, whose position he considered radically different from his own, and even pointed out that the history of French religious freedom is far from being the same as that of the English, as has already been discussed here.

This difference in political context is quite crucial. Newman, however, was not a politician, or more precisely he was not a secular politician; he was more of a cleric and an intellectual-spiritual opinion-forming public figure. This means that he had definite religious and ecclesiastical reform goals; paradoxically, sometimes in an almost comical way, he wanted to bring the bishops and superiors of his own church closer to a more hierarchical and authoritarian government, while consciously seeking to gain and exercise influence over Anglicanism. He ultimately failed in both areas, and attributed the failure in both areas to the influence of the liberal (secular) spirit, or else to liberal political theology. This led, on the one hand, to the weakness and political dependence of ecclesiastical government (Newman attributed his removal from Oxford to the influence of the Liberal Party, indicating with sufficient irony that liberal conceptions can be very intolerant), and to a rationalist theology on the other hand, which ultimately abandoned judgement-making and succumbed to the fallibility of human reason (Newman relied here on Augustinian arguments). Nevertheless, he firmly stated that 'freedom of thought is good in itself'.[27]

He concludes his explanations, however, with the exhaustive rejection of a series of theorems in a passage which is something of a statement of an anti-liberal credo, a theologian striving to conform to Rome. Some of his conclusions seem rather absurd to our contemporary eyes (for example, Newman argued for a quasi-theorem that there is a collective conscience and that collective punishment may be justified accordingly), others just seem to be liberal (Newman denied that secular power has the right to exercise ecclesiastical authority), but overall it can be interpreted in the context of contemporary English conditions rather than as a mature concept. Newman clearly saw liberalism as an opponent; a conception and a spirit of the age that seeks to subjugate the Church to its own logic through politics, that is, to the secular world, and therefore he rejected the doctrine of human rights, for all its personal merits and recognised values.

Alongside Newman's anti-liberalism, it is worth placing John Stuart Mill's notable essay on freedom, including the chapter on freedom of thought and expression.[28] The reason is that Mill, who grew up in the Protestant tradition (and from whom, contrary to popular belief, faith and religion were not at all far away), admitted that the Catholic Church, which was widely considered to be intolerant and to persecute freedom of opinion, was for some reason able and willing to consider dissenting opinions under certain conditions; moreover, it specifically deemed them necessary. At various points in the essay, Mill mentioned three such systems of conditions or specific exceptions, but he had not really thought through

[27] Ibid. 420.

[28] John Stuart Mill, *On Liberty*. Ed. by Gertrude Himmelfarb (Harmondsworth: Penguin, 1974).

any of them properly, though, to put it mildly, it might have been worthwhile. One of them is the famous *advocatus diabolic* role, which, even if the official terminology does not call it that, does exist,[29] and whose whole logic builds on the idea of *legal* freedom which is inferred from natural reason, and from its ability to question but at the same time to discover the truth.

Mill's other observation is that the Church actually retains full freedom of opinion and thought, but keeps it behind closed doors. It is available to those who are ordained and entitled to use it, but not to the masses. Mill himself was quite sceptical about the ability of the masses to see the truth through their own natural mental abilities (or to filter out and reject lies), yet he believed that progress toward rationality was undeniable. Probably not everyone thinks this way today, and certainly not in Mill's time, but even now there is no solution as to how harmful and detrimental beliefs can be controlled with greater certainty. It is worth noting, however, that there is, in fact, a political-governmental aspect behind both of his remarks. Mill was, of course, pushed in that direction by his own utilitarianism in the first place. Utilitarianism is naturally a more communal ethic than deontology, yet it is worth pointing out that Mill's first (briefly mentioned) example aptly illustrates that freedom of opinion itself has a well-defined benefit and value, and this determination may be found in the system of conditions of a particular *institution* – in our case, that of the ecclesiastical court, but in a broader sense, that of any court – the value of which is surely obvious to everyone.

Mill did not notice that the ecclesiastical example actually fits perfectly well in his own logic and methodology, which treats freedom of opinion within a certain set of conditions. Another issue – and this is illustrated by the second example – is that Mill did not think in such a well-defined institutional framework while trying to defend the value of freedom of opinion. He was speculating with some rather opaque world of knowledge, something that, according to Jürgen Habermas's ideas, can also be called a kind of deliberative community, whose *telos,* its internal logic, is the search for truth. If it is true that humanity as a whole actively seeks the widespread dissemination of knowledge and the truth, and to live a well-governed life, then perhaps, in principle, an institution such as deliberative democracy can be established, in which everyone participates as a cleric, that is, as an initiate. If we do not happen to believe this,[30] then in one way or another – most suitably hypocritically – we will replace it with experts,

[29] More precisely, it existed under the name *promoter fidei* until Pope John Paul II reorganised the procedure and abolished this function (instead, they can listen directly to opponents, even atheists).

[30] A major opponent of Mill's views is Judge James F Stephen. Similarly to Mill, Stephen professes the usefulness of freedom, but he looks at it not just from the viewpoint of the individual, but from that of the community: 'To me, the question of whether freedom is a good thing or a bad thing seems as meaningless as asking whether a fire is good or bad. It is a good thing or a bad thing, depending on time, place and circumstances.' James F Stephen, 'The Liberty of Thought and Discussion', in James F Stephen, *Liberty, Equality, Fraternity*. Ed. by Stuart D Warner (Indianapolis: Liberty Fund, 1993), 24–69, 34–35.

professional boards, ethics committees, constitutional courts, medical consultative bodies and the like, building the order or orders of a secular clergy instead of that of the Church. Mill did not go so far, but he insisted on his utilitarianism, which in turn made him completely open to the question of exactly how freedom of opinion itself must or should be thought of in a given society.

Finally, there is the third example, the mediaeval disputes (disputations), which, according to Mill, took place only seemingly in the spirit of complete freedom of opinion, since, he wrote, their premises were 'taken from authority, not from reason'.[31] Mill did not go into details here either; he did not notice, for example that the famous proofs for the existence of God advanced by Saint Thomas do not work with any theological premise at all, but seek to prove a truth with natural reason. God's existence was not doubted for a moment, yet its demonstration was not considered unnecessary. Today, we better appreciate the sincere and convincing rationalism of Scholasticism and the philosophical achievements of the Middle Ages. Mill's limited knowledge or prejudice is not particularly important here, but it is a blunder on his part that he passed over a fact that the university was an institution of the mediaeval Church. The university began to develop a knowledge-based community that went beyond the clerical–lay distinction in several aspects, opening the way to lay intellectuals or lay clergy in practice.[32] There is no space here to discuss on genealogy, only to point out the fact that without some institutional framework and, embeddedness, freedom of opinion does not really mean much. The teachers and students of the university and the knowledge they formed and handed down argued according to a certain system of rules, a pattern of thinking, driven mainly by the desire for truth, true and correct knowledge, faith in the Creator's ultimate intention or plan, and these scholars, in fact, identified the relevant issues and problems for themselves. This is now a commonplace in the philosophy of science. Although Newton, René Descartes, Gottfried Leibniz and their colleagues were not theoretically concerned with the problem of their own intellectual freedom (Blaise Pascal more so),[33] even less with the Augustinian and Thomist theological

[31] Mill, *On Liberty,* 107.

[32] There have also been disputes between people of different religions (typically Christian–Jewish disputations, a kind of duel of knights of faith, obviously on unequal terms). Moreover, we know that there have been debates between Orthodox Catholics and, for example, Albigensians. Carlo Ginzburg processed an inquisition procedure against a sixteenth-century miller (Domenico Scandella) (*The Cheese and the Worms,* Baltimore: Johns Hopkins University Press, 2013), which, in addition to many interesting facts, also shows how wide an opportunity – of course much more limited – even an uneducated person had to explain even quite complex theological views in his community or village, and then to his surprised judges who tried to argue with him. In the end, he did not escape the death penalty, but it means a lot that the case lasted for another 16 years after his first trial ended. The Middle Ages, the Early Modern Age were far more pluralistic than any other thinker like Mill in the nineteenth century seems to have known.

[33] To quote a typical line of thought: 'What then shall man do in such a state? Shall he doubt of all, doubt whether he wake, whether you pinch him, or burn him, doubt whether he doubts, doubt whether he is? . . .

problem of the corruption of the intellect, the methods they defined and developed targeted (and were raised to) the rank of authority, similar to the method of an open, though faith-embedded free speculative thinking of mediaeval theology.

Thus, if we examine specifically the problem of the right to freedom of conscience and opinion – and if there is a so-called fundamental right, this (or these) are indeed such right(s) – we find that even the allegedly fiercest opponent of these rights did not question the metaphysical content and truth of these rights (all mankind holds them by nature and is inconceivable without them), but, rather, opposed the transformation of this truth into a universal right. The Church's opposition had its own theological background (I have already quoted the Augustinian argument), but in the nineteenth century it was not this, but the context of political purposefulness and instrumentalization, that was decisive. This heated debate, which was often in bad faith, but was unavoidable in the political discourse about the freedom of conscience (concerning who is the friend and who is the enemy of this right) has made it virtually impossible to recognise, or at least appreciate from either side, that transformation into a right means some kind of institutionalisation.

The examples of the Middle Ages, also quoted by Mill, were themselves concrete institutions of free thought, and as such, shaped the (limited!) socio-communal possibilities of living free thought through constraints and rules, through spheres of competences and entitlements or licences. At a time of the unstoppable advancement of democracy in the Tocquevillean sense (democracy is a spirit and passion of the age), these means proved to be clearly inadequate. Despite the fact that the list of forbidden books survived and was still in force, no one could take seriously the notion that thousands of daily press articles, pamphlets and books would be able to be evaluated and judged by a Church office in a comprehensive and up-to-date way. These institutional frameworks became anachronistic. In a last-ditch attempt, Pope Pius X introduced the so-called antimodernist oath, which, however, he demanded only from certain (typically clerical) professions (which was abolished in 1967), and which thus became no longer an institution of internal freedom but of internal closure, and tended to contribute to the marginalisation of the Church.

VI The political triumph of political doctrine

The doctrine of human rights has thus won the political battle in both areas. On the one hand, by becoming a constitutional catalogue of values, and fulfilling

Shall he say on the contrary that he is in sure possession of truth, when if we press him never so little, he can produce no title, and is obliged to quit his hold? . . . Who will unravel such a tangle?' Blaise Pascal, *Thoughts*. Transl. by C Kegan Paul (London: Kegan Paul, 1888), 106. After that, Pascal saw no other solution than to refer to pervasive sin, which explains the desperate ambivalence of this confusion, namely the desire for certainty, and the shaking and questioning of all certainty.

Paine's most sanguine hopes, it swept away the Burke–Stephen arguments in ideological-principal terms.[34] At the same time, it is true that, especially in today's debates on freedom of expression, the question of what can be said, to whom, when and how, cannot be answered simply with universal validity. As Burke predicted, no definitive principle can be elaborated (see the problem of hate speech, the problems of the interpretation of publicity and the relationship between and demarcation of private and public spheres). This uncertainty has, in turn, had a massive effect on the interpretation of freedom of conscience (notable cases could be listed, primarily in terms of the representativeness and the constitutional protection of views on sexual orientations and their naturalness, in the context of the moral neutrality of the state). Nevertheless, those who feel threatened by their own freedom of conscience do little themselves and can do nothing but seek to use the doctrine of human rights as a political weapon, since if rejected, they would then either feel defenceless or simply become incomprehensible to others.

There are, of course, rights whose discussion quickly reveals the massive philosophical, worldview dilemmas beyond them, highlighting the fact that the ambivalence of freedom of conscience persists. Thus, for instance, there can be no human rights discourse on the status of the foetus as a human being, or on the essential duality of man; only a philosophical discourse. I quoted above Alan Gewirth's book, which seeks to establish human rights rationally in the most rigorous way possible and as far away from political theory as possible. However, when it comes to the issue of abortion, he deals with the problem very briefly by presupposing and assigning different generic rights (which meaningfully expand during development) to the foetus at the different stages of development: At first practically nothing, as 'it' is not able to formulate practical-rational goals and desires yet. Except, Gewirth adds, 'in some distant potential form'.[35] Indeed, but if it is already a potentiality, then with elementary Aristotelian metaphysical knowledge, or in fact with the use of natural common sense, the reader may wonder whether it really does not matter that, in a process, in virtue of the natural logic of things, something becomes something different, or rather, remains the same, though in a different way. Whatever we think of this, we must seek philosophical truth, and no political doctrine can help in this. The triumph of political theory in this sense is therefore the victory of politics

[34] As I have already indicated, in this essay I will not deal with other totalitarian political ideologies of the twentieth century or their consequences. It is worth noting in a footnote that the doctrine of human rights was rejected by both National Socialism, with its theory of community and race, and Marxism, with its theory of class struggle and ideology. The – deserved – fall of both has, by definition, confirmed and further increased the political power of the human rights doctrine, also showing that there are and may be historical situations in which a more vaguely conceived Burkean conception of rights may be vital for resisting a totalitarian system (protection of small circles of liberty), but Paine's system of intransigent principles (protection of liberties in principle) may also be equally important. Both elements also played a role in the dismantling of the Kádár regime: internal petty bourgeois resistance and liberal, principled protection of rights (among other things, of course).

[35] Gewirth, *Reason and Morality,* 142.

over philosophy as well, of course, not for the first time in history. However, since it is a political triumph, it can only be temporary, as it is provocative precisely because of its political content, and it has stimulated resistance as well as impulsive defence – examples of which could be listed all day long.

On the other hand, the doctrine has essentially abolished the previous institutional framework of human rights, or in other words, expanded it more than ever before – this is the other victory, as it were. Each individual is now his own institution, equal to everyone else, equally initiated, competent, and sovereign; 'owner' of himself, as Locke asserted. In any event, that is why human rights as a political doctrine does not really know what to do with collective rights. These collective rights are perceived or real collective grievances, but no matter how much they evoke and strengthen community and political anger, ultimately they also aim to expand the individual's free fulfilment and opportunities. In any case, the fact that the doctrine of rights has visibly become a major political force *as the protection of rights,* including the mobilising force, also proves that it has a robust political meaning and that it can institutionalise itself.

From time to time some kind of moral outrage brings people onto the streets, but it is hard to think of an example of protests for or in the name of a categorical imperative, or say, for honesty or for universal respect. Liberty, equality, fraternity – these were once the real political buzzwords, as well as the 'virtue' in the name of which terror was to be practiced. In the same sense, the doctrine of rights was able to become a political programme and idea, written on the flags of movements, parades, barricades and urban zones. One may finally wonder how much the modern branch of the judiciary, however far it is from street politics, has accepted or will accept the same political doctrine (insofar as it is part of the constitution, of course, it no longer has much choice). In any case, it is significant that this doctrine also has its own EU court built on it, which is a strong indication that, in modern systems of rule, doctrine, as part of the dominant ideology, also finds its own forms of institutional power.

In summary, human rights are a powerful political doctrine, a system of thought that has strong roots in the Western intellectual, philosophical and theological tradition, with its social antecedents as freedoms, and certain elements of it, such as freedom of thought and conscience also have institutional forms, but these were formed in specific political conflicts in which they triumphed. This process has been going on for many centuries, and of course it is not over today. It cannot be said at all that its philosophical foundations are indisputable and unquestionable; on the contrary: Despite all efforts, neither ethics or moral philosophy nor political philosophy have been able to solve the fundamental dilemmas of freedom and of the exercise of freedom. Political – constitutional and institutional – success thus remained unstable. It is the duty of the philosopher to be aware of this and to be prepared to confront the participants sincerely against the spiritual background of political conflicts and struggles, not forgetting to reckon with the inevitable political consequences of his own worldview.

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The Religion of Human Rights

Debates and Interpretations

Tamás Nyirkos

This essay will not be considering the extent to which the idea of human rights or certain human rights are Christian in origin – or more vaguely – of 'religious' origin. This is a question that can be decided on the basis of textual evidence, but does not touch on the substance of the problem, which is whether, regardless of their origin, it is possible to perceive human rights that are not treated in a substantially 'non-religious' way. In other words, I am not interested in how the idea of human rights and the catalogue of rights contained in it actually developed historically but in how the concept of human rights itself, the theory of human rights and its argumentation can be considered similar to what is usually called 'religious'. These are two different issues and the present investigation deals exclusively with the second.

Identifying human rights with religion is nothing new. It is well known in the literature and in political statements that discusses 'faith' in human rights or the 'religion' of human rights; sometimes, in a somewhat more modest, but at the same time, contradictory way, it is referred to as a 'secular religion', or at least as a 'substitute' for traditional religions. As an introduction, therefore, it is worth looking at the most typical examples of such statements and examining the basis on which some speak of an analogy with religions. In this connection, it will, of course, also be necessary to briefly address the extreme ambiguity of the concept of religion, which none of the definitions in circulation can dispel convincingly. We will then be able to return to the issue of human rights, in particular to positions that reject not only religious but also all other comprehensive foundations of human rights, examining in particular the hidden presuppositions which make it impossible to break free from such a way of speaking. The conclusion, correspondingly, formulates a thesis that, by omitting the concept of religion, allows for a more accurate grasp of the fundamental problem itself, and perhaps also contributes to a clearer understanding of the relationship between Christianity and human rights.

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I Faith, religion and secular religion

A suitable starting point may be the preamble to the Universal Declaration of Human Rights, which talks about 'faith in fundamental human rights'.[1] This could, of course, be a mere phrase, as could some of the other elevated clauses in the text, the 'Advent' of a better world, the solemn 'pledge' and the qualifier 'universal'. That this is not just a matter of arbitrary formulations was made clear by a number of authors in the following decades: Earl Warren, Chief Justice of the United States Supreme Court, asserted in 1968 that the Universal Declaration of Human Rights is an expression of 'our faith in humanity, the kind of faith that is based on things not seen'.[2] The reference is clearly religious, and even biblical, quoting Hebrews 11:1: 'Now faith is the substance of things hoped for, the evidence of things not seen.' A similar statement was made in 1980 by Vratislav Pechota, former Chairman of the United Nations (UN) Committee on Legal Affairs, who was forced to emigrate from Czechoslovakia precisely because of his commitment to human rights: 'A universal human rights culture built on faith in the dignity and worth of the human person.'[3] American law scholar Paul Brietzke similarly wrote in 1985 about 'faith' in human rights as the basis for additional rights (such as the 'right to development'), and similar examples could be listed at length.[4]

In the examples given so far, the notion of 'faith' in human rights has been used in a positive sense, but in parallel a narrative has emerged in which faith has appeared as a synonym for irrationality and a reference to faith as evidence of theoretical unfoundedness. The most famous representative of this narrative is Alasdair MacIntyre, whose 1981 work *After Virtue* asserted that the modern concept of 'rights' (including human rights) had no counterparts in premodern cultures; moreover, the concept itself was based solely on faith or even superstition:

> The best reason for asserting so bluntly that there are no such rights is indeed of precisely the same type as the best reason which we possess for asserting that there are no witches and the best reason which we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there *are* such rights has failed. . . . In the United Nations declaration on human rights of 1949 what has since become the normal UN practice of not giving good reasons for *any* assertions whatsoever is followed with great rigor. And the latest defender of such rights, Ronald Dworkin (*Taking Rights Seriously*, 1976) concedes that the existence of such rights cannot be demonstrated, but remarks

[1] Universal Declaration of Human Rights.

[2] Earl Warren, 'Address', in *The International Observance: World Law Day. Human Rights 1968* (Geneva: World Peace Through Law Centre, 1969), 44–45, 45.

[3] Vratislav Pechota, 'East European Perceptions of the Helsinki Final Act and the Role of Citizen Initiatives', *Vanderbilt Journal of Transnational Law* 13, no 2 (1980), 467–500, 468.

[4] Paul Brietzke, 'Consorting with the Chameleon, or Realizing the Right to Development', *California Western International Law Journal* 15, no 3 (1985), 560–601, 600. For more examples, see Robert Traer, *Faith in Human Rights: Support in Religious Traditions for a Global Struggle* (Washington, D.C: Georgetown University Press, 1991), 209–211.

> on this point simply that it does not follow from the fact that a statement cannot be demonstrated that it is not true (p 81). Which is true, but could equally be used to defend claims about unicorns and witches.[5]

What concerns us here is not how much MacIntyre refined this radical position later on, but how he drew attention to the problems which arise when establishing a belief in human rights while deliberately ignoring theoretical and historical arguments, and, as we shall see later, how such bias indeed characterises the practice of the UN and other international organisations to this day. In 1997, Malcolm D Evans put it bluntly that it was not just about faith but about an 'intolerant faith'. If UN human rights documents are taken at face value when they assert, for example, that religious freedom does not include the full freedom of religions that violate the human rights of others, it is difficult to avoid the conclusion that the idea of human rights has become a faith 'which is itself as intolerant of other forms of value systems which may stand in opposition to its own central tenets as any of those it seeks to address'.[6]

The mention of 'faith,' however, in either a positive or negative sense, says little about what kind of faith we are talking about. The English texts themselves alternate between the words 'faith' and 'belief', while having faith in something obviously does not mean the same as simply believing something, as it also suggests trust and commitment to the object of faith. (As it is also clear from the Universal Declaration of Human Rights.) However, the main problem is not this, as one can obviously only have faith in something that one at least believes exists, but that belief itself has two different meanings. If someone refers to his faith it does not follow that his belief is religious in nature. Why should we not accept that belief in the existence of human rights is simply belief and nothing more, without, so to speak, religious overtones?

Perhaps the best reason for not doing so is precisely the peculiar nature of 'religious belief'. If we insist on calling everything which involves some kind of believing a 'belief' because of the inaccuracy of everyday language, then at least it must be admitted that religious belief is very different from my belief that I am sitting in front of a computer now, and I am writing these lines. This latter belief, as Gábor Borbély puts it, is identifiable, lasting, context-free, truth-oriented, based on some kind of evidence, and does not depend on whether I want to believe it.[7] Religious belief, on the other hand, is the opposite: It is often contradictory, varies over time, is usually related to a particular context, does not refer to the actual state of the world but to how things should be, and requires a kind of existential decision. Belief in human rights is typically like this: Its causes are difficult to account for,

[5] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (London: Bloomsbury, 2011), 83–84.
[6] Malcolm D Evans, *Religious Liberty and International Law in Europe* (Cambridge: Cambridge University Press, 1997), 260.
[7] Gábor Borbély, *A lehetetlen másolatai: a vallásfilozófia alapjai* (Budapest: Osiris, 2018), 10.

and we do not always know exactly what it involves; it is admittedly normative in nature and, the declarations insist, we must decide in favour of it, irrespective of whether it can be substantiated by historical or theoretical arguments.

All of this, of course, can be an unpleasant conclusion for those who want to separate belief (or, in a more extensive sense, faith) in human rights from anything religious. Secular thinkers usually see it as a degradation of their own convictions if they fall into the same category as religion, while adherents of religious traditions feel similarly offended when the word 'religion' is used in such abroad sense. The best-known way around this is to distinguish between religious and secular beliefs or faiths. In relation to human rights, as early as 1972, Cornelius Murphy expounded that 'the Declaration can be viewed as the expression of a common secular faith in the worth of the human person'.[8] What makes this faith 'secular' and not religious is, of course, not explained by such rhetorical formulas, nor by those criticisms that reject even this 'secular' form of faith. Michael Ignatieff, for example, wrote in 2001 that the idea of human rights 'has become the major article of faith of a secular culture that fears it believes in nothing else'.[9]

At the same time, Ignatieff seems to have already used the terms 'secular faith' and 'secular religion' as essentially interchangeable, as his assertions were based on Elie Wiesel's famous claim, in a celebratory volume on the fiftieth anniversary of the Universal Declaration of Human Rights, that the defense of these rights has become a 'worldwide secular religion'.[10] All this was an implicit acknowledgment of the fact that secular faiths were in some sense religious, too. All that happened was that the problem of secular religions and religions per se, a move which hardly solves anything. And this is not a unique case. Irwin Cotler, for example, spoke of human rights in 2007 as the 'secular religion of our time';[11] and in 2010 this was repeated by Anthony Julius in his book *Trials of the Diaspora*.[12]

However, talking about a secular religion is even more controversial than talking about secular faith. As we have seen, secular faiths can exist in principle; the only question is whether some of them – in our case, the faith in human rights – are truly secular. The term 'secular religion', on the other hand, is itself an oxymoron, since the word 'secular' – apart from some historical meanings like 'temporal' or 'not

[8] Cornelius Murphy, 'Ideological Interpretations of Human Rights', *DePaul Law Review* 21, no 2 (1972), 286–306, 290.

[9] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), 53.

[10] Elie Wiesel, 'A Tribute to Human Rights', in Yael Danieli, Elsa Stamatopoulou and Clarence Dias (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Amityville, NY: Baywood, 1999), 3–4, 3.

[11] Irwin Cotler, 'The New Anti-Semitism', in Michael Fineberg, Shimon Samuels and Mark Weitzman (eds), *Anti-Semitism: The Genetic Hatred* (London: Vallentine Mitchell, 2007), 15–32, 22.

[12] Anthony Julius, *Trials of the Diaspora: A History of Anti-Semitism in England* (Oxford: Oxford University Press, 2010), 453.

belonging to a monastic order' – has always meant the exact opposite of what we call 'religious'.[13] It is also used in this way in the literature of secular religions, and from this point on it is virtually impossible to decide how something we recognise on the one hand to be secular (that is not religious) can at the same time be religious. A 'non-religious religion' is a contradiction regardless of how we define the second half of this oxymoronic compound, 'religion'.

The question, then, is not whether human rights fall into the category of secular religion, as such a category simply does not exist apart from a contradictory rhetorical use of language. The fact that a huge body of literature has amassed on secular religions does not change this either: The term itself originated sometime in the 1930s and was first applied to the ideologies of totalitarian regimes,[14] but as early as the 1950s, Hans Kelsen was already complaining that there was virtually no branch of modern social philosophy, science or politics to which this notion, which he considered meaningless, had not been applied.[15] (Since then, its use has broadened to include even such curious examples as taking selfies.)[16] However, the notion of secular religion will not make any more sense just because its use has become widespread: All that can be debated is whether any comprehensive philosophical foundation of human rights should literally be called a religion (without adjectives), or whether it is merely a play on words.

II Definitions of religion and human rights

To decide this, at the risk of deviating a little from the subject of human rights, it seems necessary to examine some definitions of religion. This is, of course, such a murky area that even much of the religious studies literature arbitrarily chooses from the definitions in circulation, but at least it is worth indicating what options are available.

One is to give an 'essentialist' definition that aims to grasp a common essence in all phenomena that are usually called religious. If the question is approached from the point of view of the aforementioned 'belief', it is customary to refer either to belief in gods or other spiritual beings, or at least to faith in some comprehensive world order, or an ultimate meaning. Belief in gods is obviously inappropriate, as there is at least one religion (Theravada Buddhism) that knows no deities at all,

[13] The discussion of dictionary definitions would go far beyond the scope of this writing, but anyone who reads the relevant entries of the *Oxford English Dictionary,* the *Merriam-Webster,* the *Macmillan* or relevant interpretive dictionaries can be convinced of the above.

[14] Emilio Gentile, *Politics as Religion* (Princeton: Princeton University Press, 2006), 2.

[15] Hans Kelsen, *Secular Religion: A Polemic Against the Misinterpretation of Modern Social Philosophy, Science, and Politics as 'New Religions'* (Wien: Springer, 2012).

[16] Mathias E Nygaard, 'Selfies as a Secular Religion: Transcending the Self', *Journal of Religion and Society* 21 (2019), 1–21.

but even those that do know them speak of gods in very different senses: It would be difficult to find a definition that may be equally applied to the Christian God, to the immortal but otherwise inner-worldly gods of Greek mythology, or to the impersonal absolute of pantheism. Categories like 'transcendent' or 'supernatural' are also difficult to use in cultures that ignore the disctinction between the natural and the supernatural as it developed in medieval Europe. Nor do such terms go far beyond 'belief in spiritual beings', because, unless we are radical physicalists, even our belief in our fellow human beings as thinking beings is something that attributes some spiritual reality to them. In other words, such definitions are either too narrow or too broad, and if the definition is expanded even further to include all sorts of belief in order and meaning, it will be practically impossible to say why deep ecology, historical materialism or indeed any comprehensive philosophical system will not count as a religion.

Identifying religions as types of feelings rather than beliefs cannot be pursued very far either, as a feeling can apply to anything, and, in the absence of an essentialist definition of religion, there is no way to tell whether a particular feeling is 'religious' or 'non-religious'. That is, again, we typically come up with broad definitions, and the same is true of functionalist definitions that designate moral cohesion, overcoming existential anxiety, or something else as the outcome of religious belief.[17] If we then – following the most fashionable method today – give up discovering any common essence in religions, and say that religion is but a 'cluster concept', defined by a weighted list of criteria, such that no one of these criteria is either necessary or sufficient, we will not be more succesful, either. This is because we will most likely come up with over-broad definitions again: In some cases, an ethical doctrine with some corresponding rituals will be called a religion, in others, a transcendent but otherwise purely philosophical system will also be called as such, while no one is able to say exactly how many criteria should be met in order to distinguish a religion from a non-religious belief system.[18]

All this, of course, would simply suggest that speaking of the religion of human rights is senseless because religions themselves do not exist (or if they do, we cannot say what they are). However, most authors still commit to some definition, which usually entails a combination of 'transcendent faith' and some 'ritualised action', despite the inescapable vagueness of both concepts. Nor does it help much to dispel the ambiguity of the 'transcendent' if it is replaced by something like 'if there were a perfect physical description of the world, it would be superfluous to that description'.[19] Or rather, its meaning is indeed clearer, but at the same time broader

[17] Gábor Borbély, *A lehetetlen másolatai: a vallásfilozófia alapjai* (Budapest: Osiris, 2018), 18–34.

[18] For further refinements of the cluster concept, although not satisfactory in my opinion, cf. Michael Stausberg and Mark Q Gardiner, 'Definitions', in Michael Stausberg and Steven Engler (eds), *The Oxford Handbook of the Study of Religion* (Oxford: Oxford University Press, 2016), 9–32.

[19] Borbély, *A lehetetlen másolatai,* 80.

than that of the metaphysically burdened notion of transcendence. Ritualised action is also something that either means regular action or it means nothing, because if it means regular *religious* action, it cannot be part of the definition of religion.

However, even if we accept the fact that the majority of authors – or more importantly, the religious laws of many countries – define the concept of religion in a similar way, it will be difficult to decide on what basis any worldview or overarching moral conviction is non-religious in nature. Returning to the problem of human rights: If the idea of human rights is really an idea, then it has nothing to do with the physical description of the world (which is so obvious that it is unnecessary to stress); it is a normative idea, so it is not about what the world is like but what it should be like, therefore it cannot be called secular in any sense. Do not be misled by the adjective 'human', which seems to mean something mundane: The human being, in this metaphysical generality, is as otherworldly as the gods of any transcendent religion.

No one has yet met the human being, or the human essence or human dignity. This is not to say that all of these are unnecessary or meaningless ideas, it only means that they are not parts of the physical world, and are not beings whose existence can be proved by everyday experience or scientific research. Nor is it true that belief in them is irrational – I do not think that the so-called 'religions' are irrational, either – only that this is indeed a belief and nothing else. It is also not true that this is a purely philosophical belief or faith to which no ritualised practices are connected: It is sufficient to recall the solemn proclamations and affirmations of human rights declarations, which are worded, moreover, in a clearly dogmatic form by an institution (the UN General Assembly), which acts as a kind of infallible teaching office in this regard.

III United Nations statements and criticism of foundation attempts

A good example of such use of language, in addition to the Universal Declaration of Human Rights, is the UN Millennium Declaration of 2000, Paragraph 1 of which, although not on the narrower subject of human rights, but on the UN and its Charter itself, confirms 'faith' in them, and then, in Paragraph 3, calls the objectives and principles of the Statute 'timeless and universal'.[20] As I have explained elsewhere before,[21] the use of the word 'timeless' is extremely remarkable,

[20] United Nations Millennium Declaration, www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx. The Hungarian translation is particularly interesting in this case: as if even the translator felt too strong the expression 'timeless' in the original text and tried to replace it with the neutral term 'time-proven' *(időtálló)*. UN Millennium Declaration, www.menszt.hu/hu/egyeb/millenniumi-nyilatkozat.

[21] Tamás Nyirkos, *Politikai teológiák: A demokráciától az ökológiáig* (Budapest: Typotex, 2018), 148–149.

because 'timelessness' is not simply synonymous with 'eternity', which can also refer to something that is limitless in time, had no beginning and will not end. Timelessness, on the other hand, implies that something is outside of time; the categories of time do not apply to it; that is, it is completely transcendent. If we recall that the original meaning of *'saecularis'* identifies the 'secular' precisely with the 'temporal', then it becomes even more obvious that the object of the faith (or, according to some, religion) mentioned here can in no way be called secular. The adjective 'universal' is no less religious (even if we remain for the time being within the vague but widely used concept of the word 'religion'). It has religious overtones not only because its Latin counterpart, *'universalis'* (not to mention the Greek word *'katholikos'*) has such connotations but also because we are dealing with a universality that, as I have indicated before, is not something that actually is but something that should be. If the universality of goals and principles had already been achieved, and if none disputed it, the UN would not have had to set out tasks in relation to them either.

As Paragraph 120 of the 2005 Summit Outcome document states even more strongly, now specifically on the subject of human rights: 'The universal nature of these rights and freedoms is beyond question.'[22] The reality, of course, is that *it is not beyond question,* for if that were the case, it would be superfluous to attempt again and again to close these debates. Paragraph 121 of the document implicitly acknowledges the existence of such debates, stating that the 'significance of national and regional particularities and various historical, cultural and religious backgrounds' must be taken into account, but reaffirms that respect for human rights is an obligation independent of political, economic and cultural systems, and therefore ultimately an absolute obligation. Accordingly, the Sustainable Development Framework (Agenda 2030) issued in 2015 no longer refers to differences of opinion on the universality of human rights, while the term 'human rights' appears fourteen times in the text. Instead, it takes the previous documents, the Charter, the Universal Declaration of Human Rights, the Millennium Declaration and the 2005 Summit Outcome as a starting point, as a dogmatic foundation, as it were, on which to build in the future.[23]

The relation to foundationalist approaches is thus somewhat paradoxical: While official documents set out absolute and unquestionable principles, they also reject any attempt to place them on any absolute and unquestionable philosophical or religious basis. The 'religion' of human rights, as we have seen, occurs in the vocabulary of some politicians and theoretical authors, even though the UN itself has never declared such a thing, apart from vague references to 'faith' (but never

[22] Resolution adopted by the General Assembly on 16 September 2005, https://undocs.org/en/A/RES/60/1.

[23] United Nations, 'Transforming our World: The 2030 Agenda for Sustainable Development', 2015, https://sustainabledevelopment.un.org/post2015/transformingourworld.

religious faith). The main reason for this, of course, is that 'religion' – or rather 'religions' – is a collective noun today, and no religion can be invoked in such a way that its universality cannot be disputed in the name of another religion. Furthermore, the greatest danger lurking for the idea of human rights has always been that either its origin or the list of rights it contains proves to be particular, and that is exactly what the UN declarations is at pains to rule out. As Jacques Maritain put it when the Universal Declaration of Human Rights was drafted: 'We agree about the rights, but on condition that no one asks us why.'[24]

Maritain, of course, thought that we all have an intuitive belief in the dignity of the human person, human freedom, and related rights that are present in all great cultures; that is, we do not need to refer specifically to their foundations in one tradition or another. However, there are also theoretical authors – and they are currently in the majority – who do not think it is necessary to seek such a foundation at all. As Ignatieff, quoted earlier, has argued, an argument in favour of human rights would more usefully address what *they do,* and not what vague and controversial terms such as 'human dignity' or 'human nature' *mean,* which are at least as metaphysically burdened as any 'religious' concept.[25]

The only question is whether the problem of foundations, that Ignatieff calls metaphysical and religious, can really be circumvented in this way. He himself prefers the terms 'grounding', 'base' and the like, as opposed to 'foundation', but this can only define another form of foundation:

> Such grounding as modern human rights requires, I would argue, is based on what history tells us: That human beings are at risk of their lives if they lack a basic measure of free agency; that agency itself requires protection through internationally agreed standards; that these standards should entitle individuals to oppose and resist unjust laws and orders within their own states; and, finally, that when all other remedies have been exhausted, these individuals have the right to appeal to other peoples, nations, and international organizations for assistance in defending their rights.[26]

A closer look at the text also reveals that this grounding is not even of a different type to what used to be called metaphysical or religious. Despite the fact that the starting premise – the value of the individual's life above all else, from which everything else follows – is not openly declared, it remains thoroughly philosophical. The reference to historical experience is also only correct if we accept this basic statement and do not argue, for example, that an individual's life can even be sacrificed for the sake of a greater good, such as the good of the community. Most of us today would reject such an argument, but it is difficult to say on what basis if we disregard the concept of the inherent value of the human person. But this is only about one fundamental

[24] Human Rights: Comments and Interpretations, with an Introduction by Jacques Maritain. Paris, UNESCO/PHS/3 (rev.), 1948, http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf.
[25] Ignatieff, *Human Rights,* 54.
[26] Ibid. 55.

right, the right to life. To extend the concept of 'free agancy' to include resistance against unjust laws would require further philosophical justification. In natural law, theories, it is easy to argue for an objective standard of what is right, but here the author himself rejects such arguments. The fact that international organisations are generally more effective in protecting rights than nation-states is also something that is either historically justifiable or not, but, as a general theorem, certainly goes beyond empirical facts.

It is true, of course, that a 'prudential' and 'historical' argument would leave more room for the moral pluralism of different cultures than one that is purely theoretical and dogmatic. The issue here is simply why a complex system of rights derived from a single fundamental human right – the right to life – is not theoretical and dogmatic in itself: Why could Ignatieff say that '[s]till, victims cannot enjoy unlimited rights in the definition of what constitutes an abuse'[27] if there is no objective standard that defines these, independently of human wills and feelings? That goes, perhaps, beyond what is worth saying about foundationalism and its critique. Human life, the value of the human person and the rights of the individual will be no less metaphysical concepts by not building a full-fledged dogmatics upon them. If someone does not like the word 'religion', they can use 'ideology', and they might even say it is a 'thin-centred ideology', and thus not an ideology that encompasses all areas of life.[28] Even then, however, they must acknowledge that such ideologies replace what is commonly referred to as a 'religion' by any vague collective noun, as did Torkel Opsahl, a former member of the European Commission of Human Rights, and Louis Pettiti, a European Court of Human Rights judge.[29] We can only replace something with something else if the two things share at least one or two features or functions; that is, regardless of the wording, we only arrive at the point where the ideology of human rights – I use the word here in a neutral sense as a system of principles and values – becomes extremely difficult to distinguish from so-called 'religious' ideologies.

If we wish to avoid all such words, there remains nothing but a kind of positivist conception of human rights: Human rights are what legal texts define as such. This undoubtedly avoids all the pitfalls of grounding: The only problem is that human rights are typically metajuristic norms, which we typically refer to when the laws or practices of a particular state are *not* consistent with these, or when we want to give guidelines for creating positive laws. Human rights – and there seems to be a consensus on this – did not arise when they were proclaimed

[27] Ibid. 56.

[28] The term 'thin-centred ideology' most often occurs in Cas Mudde's writings on populism, but Ignatieff also calls his own conception of human rights a 'thin theory'. Ibid. 56. Cf. Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford: Oxford University Press, 2017), 6.

[29] See Traer, *Faith in Human Rights,* 210.

by the Universal Declaration of Human Rights, but have always been with us, regardless of whether they have been recognised by a legal text or not.

Let me emphasise once again: The difficulty of establishing its nature does not mean that the idea (or even ideology) of human rights is superfluous or meaningless. It is true for all ideas, systems of ideas and worldviews that they are not based on scientific foundations but on the acceptance of values and principles. If these values and principles are treated as absolute, one may even feel a temptation to call them 'religious'. For my part, however, I have never claimed, and still do not claim, that all ideological or philosophical systems, including human rights, should be called a religion. The concept of religion is so vague that I prefer not to call *anything* a religion, and therefore, in conclusion, I will not examine whether there is something like the 'religion of human rights' but to which traditions, sometimes called religions the concept and theory of human rights is most closely related to.

IV Parallels of human rights

As has been shown so far, the concept of human rights in any case presupposes some kind of absolute. This absolute can be the idea of human rights itself, or something to which human rights can be traced back, human dignity, the inherent value of the human person or individual freedom. These are absolute in that they can be analysed no further, there is no room for debate about them, and they are the basis for all other claims. It is questionable from the outset whether all so-called religious traditions have such a mature notion of the absolute, but the difference is even more spectacular when we consider that this absolute is utterly transcendent, in the sense that it is non-empirical: It is not something we can be convinced of in any form in this world. 'Religions' that conceive deities as natural beings are therefore excluded as possible parallels; so-called 'natural religions' are called this precisely on the basis that they personify or endow natural phenomena with extraordinary significance.[30] A truly supernatural absolute, on the other hand, is still not necessarily universal, since we know many tribal and national deities that belong to a different category. (Remember that this was characteristic even of the image of the gods of early Judaism: The commandment to 'have no other God' does not rule out the existence of other gods; it merely forbids the community to worship the latter.)

[30] As Thomas Molnar says, 'For the ancients, then, the sacred was not so much something to be believed in; it was there as a matter of unquestioned reality. Unquestioned because it was supported by two undeniable sources: our experience of sorrounding nature and the daily observation of our own and other people's psychic motives.' Thomas Molnar, *Twin Powers: Politics and the Sacred* (Grand Rapids, MI: Eerdmans, 1988), 26

In addition, human rights are not only absolute, transcendent and universal values but also *moral* values, and it is well known that, for example, Greek or Roman mythology was very far from formulating moral commands. It is no coincidence that most ancient philosophers tried to derive ethics from a kind of philosophical theology (natural theology), just as city-states distinguished the political theology that underpinned civil virtues from mythical theology. Moreover, as we have seen, the moral system of human rights always focuses on the individual, putting it in contrast to 'religious' systems, where the sin and virtue of the whole community is more fundamental than individual sin and virtue, as can be seen in the case of Judaism (or, in the Hungarian national anthem: 'This people has already paid for the sins of past and future').

The system of human rights, which formulates absolute, transcendent, universal, moral commands and emphasises the importance of the individual, also presupposes that we are indeed talking about a *system,* dogmas that can be understood using human reason, accurately explained and described in an itemised manner (once again, I use the word 'dogma' in a neutral sense, without its negative overtones). Thus, there are few parallels with, for example, Indian traditions, which proclaim that ultimate truth is unknowable, or with 'religions' that are generally devoid of itemised creeds, and let us not forget that almost every tradition other than Christianity lack them.

It should not therefore come as a surprise that human rights (and their broader framework, the UN Charter) are not only hostile to any rival theory but also attribute a redemptive power to themselves. This may be less obvious to superficial readers of the documents, but – as the Finnish scholar Mika Luoma-aho argued – when the Charter identified the horrors of the two world wars and the avoidance of similar ones as the main reason for establishing the UN, it did nothing else, than giving meaning to a fact that seemed meaningless to many, the death of tens of millions of people. 'The leaders did not want to write off the dead bodies of the World Wars as a meaningless loss of human life. What they did instead was that they wrote of it a new beginning: Made it into a meaningful sacrifice that commits – no: *must* commit – the succeeding generations to one another.'[31] Once again, the gesture of investing meaning in events and affirming belief in the future of humanity is not just a common feature of 'religions', as most traditions are based on the idea of cyclical time, and even a gradual decline within the cycles. However, even traditions that reject the idea of circular time may lack faith in the redeeming power of suffering and death, such as Islam, for which the death of Jesus Christ on the cross remains unacceptable for this very reason.[32]

[31] Mika Luoma-aho: *God and International Relations: Christian Theology and World Politics* (New York: Continuum, 2012), 104.
[32] Quran 4:157–158.

Of course, it is impossible to list all the traditions of the world that are commonly referred to as 'religions', but perhaps this shows that the religion of human rights is misleading, not only because the word 'religion' itself is confusing but also because it is not in the least similar to most phenomena generously classified as such. If there are any parallels at all, we find these mostly in Christianity: Belief in a transcendent absolute that formulates universal moral commandments, respects the human person, attaches meaning to history, and, while seeking to reduce human suffering, does not deny the reality of suffering that confuses the human intellect.

All this, however, will not prove that the idea of human rights is exclusively Christian. Only historical studies – rather than conceptual analogies – may reveal anything about its origins. Conceptual analogies are themselves problematic, for the belief (or faith) in human rights does not suppose a personal God, and the hope of realising them is also thoroughly mundane. The most that can be said is that the theory of human rights stands very close to Christian theology in some respects, while diverting from it in others. What Christians nevertheless should bear in mind is that nothing, not even the most positive ideas should replace God either in this world or in another.

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Pierre Manent on Natural Law and Human Rights

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I Introduction

A book by senior French philosopher Pierre Manent was published in 2017, entitled *La loi naturelle et les droits de l'homme*.[1] Since then, an English translation of the volume has also appeared.[2] This paper will deal with this work, as it touches on topics that are decisive in the relationship between Christianity and human rights. In choosing the title, the author, who claims to be a Catholic, referred back in two directions at once. On the one hand, he recalled a book by Jacques Maritain, the dominant figure in French and international Catholic philosophy, written during World War II, *The Rights of Man and Natural Law*.[3] The other point of reference is the famous work by Leo Strauss, a German–Jewish political philosopher from North America, *Natural Right and History*.[4] This work was also written in the post-World War II global situation, shortly after the Universal Declaration of Human Rights was drafted.[5] Manent's book is therefore worth reading in this context as a kind of response to the suggestions of the above two authors and to the document of global political significance.

Of course, neither of these authors represented a single direction completely. Maritain was a representative of neo-Thomist French Catholic thought, who also exerted a decisive influence on the spirituality of the Declaration itself.[6] Strauss,

[1] Pierre Manent, *La loi naturelle et les droits de l'homme* (Paris: Presses universitaires de France, 2017).

[2] Pierre Manent, *Natural Law and Human Rights: Toward a Recovery of Practical Reason*. Transl. by Ralph C Hancock (Notre Dame: University of Notre Dame Press, 2020). An important difference between the two editions is that the English edition has a subtitle that assumes the reconstruction of the concept of practical reason to be the author's intention, and the English edition also includes a separate study entitled 'Recovering Law's Intelligence', as an appendix. This study was originally published in 2014 in the *Revue thomiste,* with the title 'Retrouver l'intelligence de la loi'.

[3] Jacques Maritain, *Les droits de l'homme et la loi naturelle* (New York: Maison Française, 1942).

[4] Leo Strauss, *Natural Right and History* (based on the 1949 Walgrene Lectures, Chicago: University of Chicago Press, 1971).

[5] This context was set by José A Colen, 'What is Wrong with Human Rights?', *Interpretation. A Journal of Political Philosophy* 44, no 3 (2018), 451–469.

[6] Ibid. 451.

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on the other hand, can be seen as one of the earliest philosophical critics of the emerging human rights movement, who in turn sought to resurrect classical natural law as opposed to the modern ideal of natural rights. Interestingly, then, Manent has attachments in both directions, which means that his work also forms a bridge between Maritain and Strauss, and between supporters and critics of human rights discourse. On the one hand, he is attached to the scholastic tradition that Maritain sought to renew. On the other hand, he is very critical of the discourse that developed in the post-war Western world as a result of this Maritain-inspired Declaration. Manent does not see it as his job to form a historical reconstruction of how the Declaration was drafted, in very particular political circumstances. However, José Colen's study, which explores the possible historical contexts of Manent's book, reveals that 'consensual' is not the right term for the Declaration, which can be considered 'at best only a problematic "compromise"', although it was voted through with no votes against by the UNESCO General Assembly, only with eight abstentions.[7]

Manent starts his own story from the soul-searching which took place after World War II rather than from the Declaration. Instead, he reconstructs a larger-scale process of the history of ideas – the main stages of which need to be addressed in order to interpret Manent's narrative. The focus of this broader historical perspective is on the changes that resulted in natural law being relegated to the background in the early modern period (sixteenth and seventeenth centuries), and replaced by a rhetoric which was based on the assumption of natural human rights without questioning the basis of these rights. This historical framework is also reminiscent in many respects of Strauss's critique of modernism, although Manent does not become an anti-modernist like Strauss. Depoliticisation and dechristianisation, on the other hand, are important topics in his critique of modernism. After recounting the emergence of modernism, presented as a story of decline, Manent enters into a philosophical analysis. Presenting the logic of obedience to the world of politics in a realistic way, he attempts to explore how human rights discourse contributes to the marginalisation of this logic, and thus how it has caused a politically difficult situation – more or less since the revolutionary events of 1968.

An important building block of Manent's own philosophical analysis is his proposal to build natural law on the three pillars of human motivation – namely on the concept of the pleasant *(l'agréable),* the useful *(l'utile)* and the honest *(l'honnête).* I will argue that this Thomistic-rooted idea in Manent's presentation is not really convincing, as it remains too vague and undeveloped. A more robust theory is needed, but of course developing it would significantly increase the (partly political) risk to the acceptability of Manent's natural law proposal. More convincing seems to be a critique of the Kantian position on the conceptual separation of 'is' *(sein)* and 'ought' *(sollen),* as well as a reconstruction of an Aristotelian–Thomistic terminology

[7] Ibid. 457.

that is based on prudence or practical reason (*raison pratique;* this term was included in the subheading of the English edition) which is based on the concept of the common good.[8] Another important element of this set of practical philosophical proposals is the juxtaposition of action based on rational considerations with that of the passion-driven individual. Manent's considerations coincide in part with the theses of an Aristotelian conservatism that I myself have offered in my book entitled *A Political Philosophy of Conservatism: Prudence, Moderation and Tradition*.[9]

II The contradiction of the contemporary human rights discourse

Manent's starting point is a striking contradiction that can be found in contemporary public discourse: While prominent human rights advocates zealously spread the word within their own ranks and culture, defining and demanding an ever widening range of human rights, they do not demand the same elsewhere. Outside Western culture, they regard as acceptable different moral approaches, referring to the necessarily different set of social rules of those cultures. The problem of the Western intellectual is, of course, not new. It is, in fact, a clash between modernist left-wing universalism and postmodern also left-wing relativism, a tension within the universe of left-wing thinking that would be difficult to resolve permanently. It is more exciting to ask why the issue outlined by Manent became topical at the time the book was published. It was published in its original language in 2017, and the author seems to have felt the growing pressure of the debates about migration in his native country. Even though by that time there were already large migrant communities, which have been living for several generations in France, the issue was still rather hot. Therefore, the external–internal division of moral judgements that the philosopher spoke about got even more confusing. It was in those years that human rights universalism was adopted within the French border so as to be applied to the members of the Muslim communities present in French society. However, according to critics, official demands to keep law and order had different standards, when applied to migrant groups and to the majority society. Manent's point is logical and not political: He compares the high moral ground of the human rights discourse at home, with a postmodern reluctance to its use in a culturally different context.

At this point, Manent detects another problem of philosophical relevance in contemporary human rights discourse. He detects the denial of a biologically given human nature, in the ever growing intensity of the exaggerated disputes over gender, manifested in the denial of inborn sexual differences or in the extension of the concept of marriage to LMBTQ+ couples. The kind of constructivist thinking

[8] The concept of *raison pratique* appears on page 27 of the French edition: Manent, *La loi naturelle*.

[9] Ferenc Hörcher, *A Political Philosophy of Conservatism: Prudence, Moderation and Tradition* (London: Bloomsbury, 2020).

that holds man capable of questioning and reshaping all his natural endowments is likened by the philosopher to the Transformers toy (10).[10] It is at this point that he foreshadows why he thinks that natural right should be distinguished from natural law.

> While natural law issued commands in the name of a teaching implicit in human nature, in a tendency of human nature to society and to knowledge, or in a natural difference among ages, sexes, and capacities, . . . modern natural right begins with a proposition concerning nature that reduces it to identity and separation: the bearers . . . of rights are sufficiently or even exhaustively defined by the fact that they are identical, or similar, and separate. (10)

In this way, natural law is identified with equal rights – everyone has the same rights, since everyone is equal and identical. As for a society characterised by such aspirations, Manent also states from the outset that 'a society necessarily carries on a ceaseless battle against the "common sense" in which a thousand centuries of human experience have deposited the reference points of human life' (35). Regarding the institution of marriage, for example, the view that marriage is the privilege of heterosexual couples, is common sense, based on the hypothesis that natural law is a reliable guide of human life. However, when the former is questioned by positive law, the very purpose of this shift in legislation turns out to be nothing less but convincing society that 'there is no natural law, or that the human world can and must be organized without reference to a natural law' (17). In this sense, the whole project of modernity will be, for him, a movement to attack and delegitimise natural law.

III Turning away from the world of natural law and practice

The book was born in response to the questions facing French society and, through them, to the abstract ideal of universal progress, which radically transforms society. It is in order to answer these contemporary questions that the French philosopher turns to a specific analysis of the history of political thought. Hence, the historical detour is not an end in itself, but has a clearly defined purpose. It aims to show the fate of natural law in the early modern period and the age of Enlightenment. Like most histories of science and philosophy, Manent's grand narrative recognises the problem as a conflict between a worldview based on modern science and another based on Aristotle's practical philosophy. According to him, practical philosophy and its subject, the questioning and critic of practice, are the natural fruits of human nature. According to Manent, practical philosophy has formulated, in a way that is recurrent in the book, his question 'what must I do', which is also the prime one in

[10] I indicate in brackets in the main text the page number of the English edition. I refer to the French edition ('fr.') if it is relevant for comprehension.

the world of politics, in addition to morality. This is the first question of Aristotle's practical philosophy, but also of Immanuel Kant in relation to practical reason: *'Was soll ich tun?'* ('What must I do?'). Moreover, in contemporary philosophy, it obviously resonates with the contemporary realist conception of politics which is associated with the names of Bernard Williams and Raymond Geuss, through which the grand narrative points back to the Leninist *'Chto delat?'*.

Thus, in addition to Aristotle, Kant, Vladimir Lenin and the contemporary realist school are also featured in Manent's free floating discussion. On the other hand, he is rather critical about scientism, a view of science that is considered by him to be too abstract, while it also has unpronounced political aims. Manent speaks in a Burkean and Oakeshottian manner of the 'hypertrophy of theory' (24), which overturns the order of everyday thinking and creates an isolated liberal individual, an individual who no longer acts but merely triggers causes; who does not have features characterising only him, but who, in essence, is completely identical to others. The creature imagined in this way is denoted by Manent using the concept of *conatus*. This term means effort or experiment, and when he identifies the individual with it, he actually means the deprivation of a political being of politics: He turns out to be a being who is essentially driven by mere self-love, by selfishness, but who is not even compelled to Kantian 'reflective' action. This individualised person is obviously no longer able to read commands from the book of nature – for him, nature is an object of cognition, and knowledge becomes the most important characteristic of man in this paradigm. In this connection, the biblical story is worth recalling that accuses Adam of sin in failing to keep the divine commandment when, at the encouragement of the serpent and Eve, he ate of the tree of knowledge. It seems that the man of the early modern age commits precisely this sin, according to Manent, when, turning away from the practical world, he becomes a believer in theoretical knowledge, instead of living and acting according to God's revealed commandments.

IV The birth of human rights discourse – from Machiavelli to Hobbes

Manent highlights three thinkers from the early modern era: Niccolò Machiavelli, Martin Luther and Thomas Hobbes whom he regards as chief protagonists creating a new way of thinking about rights. They turn their backs on the divine commandment in order to become priests of a new form of knowledge. Manent's reading is original, putting his heroes in a new light that, while plausible, allows us to better understand his own thinking. Although Manent's story begins in chronological order with Machiavelli, as is customary in histories of political thought focusing on the birth of modern liberal principles, yet a passage about Hobbes still precedes his detailed account of Machiavelli. Hobbes emerges here as a thinker in favour of a political order that is based on the concept of *conatus*. According to Manent, the British thinker employs a fatal simplification. He homogenises all human

motivations, and suspects that the desire for power lies behind them all. By thus falsely representing man as a prisoner of his desire, he obviously rejects the classic category of practical reason. Manent begins this story with him because, for him, practical reason will remain the central value to be defended and renegotiated. For him, moreover, the political actor remains the basic unit of political thought rather than the individual, distinguished from the latter by the fact that he is not addicted to his own desires and is accordingly able to apply practical reason and take rational, reflective action. But this is only a cautionary prelude to Manent's detailed interest in the history of ideas. The early modern train of thought really begins with Machiavelli. He considers Machiavelli to be the founder of the realist or scientific point of view. Manent starts from a famously challenging excerpt from *The Prince:*

> But since my intent is to write something useful to whoever understands it, it has appeared to me more fitting to go directly to the effectual truth of the thing. . . . [I]t is so far from *how one lives to how one should live* that he who lets go of *what is done for what should be done* learns his ruin rather than his preservation. For a man who wants to make a profession of good in all regards must come to ruin among so many who are not good. Hence it is necessary to a prince, if he wants to maintain himself, to learn to be able not to be good, and to use this and not use it according to necessity.[11] (25–26, italics added.)

According to Manent, Machiavelli's starting point is the gap (the French thinker quotes Machiavelli's Italian expression in the original language, *tanto discosto*), which separates the way one lives from the way one should live, or at least from the way one is supposed to live. Manent himself agrees with this description of the human condition, but he believes that Machiavelli drew the wrong conclusion from his correct statement. He did not draw the lesson that, therefore, man is a sinful being who is to (or should) nevertheless strive towards the set goal (after all, how one should live is a requirement of the natural law itself). Instead of that, he tries to shrug off the confusing expectation that the acting individual is better than he is now, as a whole, because he thinks it will kill the action outright. William Shakespeare also shared this belief in the uselessness of examining one's conscience in connection with actions in certain situations. See, for example, the statement in Hamlet's famous monologue: 'And thus the native hue of resolution / Is sicklied o'er with the pale cast of thought, / And enterprise of great pitch and moment / With this regard their currents turn awry / And lose the name of action.' However, it would be difficult to say of Shakespeare that his plays displayed some kind of Machiavellian acceptance of human fallibility. The playwright often showed what sins those in power must 'commit', but did not question the validity of natural law. However, in Manent's reading, Machiavelli undertook something like this. Although he did not make explicit his denial of natural law, he denied that society could be cohesive through the presumption of natural law.

[11] Niccolò Machiavelli, *The Prince*. Transl. by Harvey C Mansfield, Jr (Chicago: University of Chicago Press, 1985), 61.

As Manent interprets him, Machiavelli saw outright that only fear can really bind people together. Moreover, from the fear-motivated human world, Machiavelli excluded Aristotelian practical action because, paradoxically, it would precisely restrict the freedom of action of the actor by confronting him with the distance between the 'is' and the 'ought to'. The political leader, the prince, is given essentially complete freedom; his action may not be compared with any ideal norm. In doing so, Machiavelli 'invites us to reconstitute the political order from top to bottom' (33). The driving principle of the re-created order is fear – the prince arouses fear and the citizen is afraid. This system of relations organised from the top, based on fear, takes over the logic of obedience to command, which was previously based on the natural law. However, with this simplistic solution, which ignores the finer circumstances, the Renaissance thinker adopted an abstract scheme that is unable to account for the questions of practical life that are characteristic of the thinking and acting man. Of course, compared to Aristotle's way of thinking, Christian thought has already passed over the issues of practical philosophy. More specifically, instead of bypassing the gap between 'is' and 'ought to' (which was Machiavelli's strategy), it sought to conceptually separate the two as with Saint Augustine of Hippo's two conceptions of cities. The purpose of the distinction was that one should not abandon the divine commandments, acknowledging, of course, that man is by nature a fallible and sinful being, so that biblical commandments will probably never prevail in earthly life. In Christian moral theology, commandments remain a constant requirement for political actors.

A special mix of influences from Machiavelli and the teaching of Christianity appeared in Luther's socio-political thinking. According to Manent, Machiavelli renewed the virtue-based conception of ancient philosophy, while Luther rethought the moral theology of Christianity. While Christian doctrine had until then retained much of the Aristotelian tradition and left room for the Christian political agent, Luther left only the believer – that is, he left out the whole dimension of practical action and practical wisdom. For him, the law no longer set a specific goal for action, but was a source of knowledge about sin and virtue. Conscience could no longer become a direct driving force for action. Instead, faith became primary. As Manent paraphrases Luther: 'The virtue of faith tends to become an art of believing, and the believer a virtuoso of faith' (39). Christian liberty no longer respects the laws but makes decisions without taking laws into account.[12] This freedom, through faith, lifts the Christian believer out of practical life. Thus, like Machiavelli, Luther successfully postulated a situation in which we could ignore the system of practical concerns so characteristic in human life. Based on the bold conceptual innovations of these three thinkers, a new kind of human being emerges, leaving behind the traps of the practical life and avoiding the gap between real life and the law. Manent seems to view these developments with serious reservations, as a result of which we

[12] Manent here refers to Calvin rather than to Luther.

have forgotten about the gap between the 'is' and the 'ought to', and also for what purpose and from what we have freed ourselves. While Machiavelli destroyed the Aristotelian tradition, Luther destroyed Thomist teaching with great efficiency. As a result of their thinking, a new kind of vision was born, which turned away from natural law; Hobbes and Machiavelli substituting it with the logic of fear, Luther demanding a leap of faith from man. But how does Manent's analysis of Hobbes develop this train of thought further?

It was Hobbes who worked out the concept of the state for early modern political thinking. While Machiavelli freed the prince from all forms of bondage and Luther chose the believer as the subject of Christian freedom, Hobbes' main concern was not the prince, nor the believer, but institutionalised politics. He was interested in identifying the role of the state in the service of the new type of man outlined by his predecessors. For Hobbes too, fear organised society, and it was elevated by the philosopher's theory to a society-shaping force. Namely, the fear of death played a key role for him, suppressing the boasting of selfishness and futile vanity, thus forcing the individual to live within the framework of the state. There is another peculiarity of the Hobbesian natural law in addition to the fact that everyone is at war with everyone, which the state can remedy precisely by arousing fear. The other peculiarity of the Hobbesian state of nature was that it also presupposed rights – that is, it attributed such rights to each human being, and these rights can be extended to essentially everything. This underdetermined notion of natural law, according to Hobbes' idea, also deprives the state of its morality – it merely functions as a neutral organisation that brings together power and justice. What remains was irresistible, fearsome power and equal justice, without having its own characteristic morality. This state without *telos* was completely novel, fundamentally different from the teleology assumed by Aristotle, for example, but also from the mediaeval Christian ideal of the common good.

For Manent, Hobbes's assumption that a person in a natural state already has rights is something that is not only contradictory and therefore unfeasible, but also explicitly empties the notion of human rights. If we consider human rights to be extensible to anything, it will truly remain a mere empty form. As Manent writes: 'Once established in its exclusive legitimacy, the idea of rights tends to become an empty form in search of its matter, and everything, literally everything, can become matter for this form' (48). Such vagueness in the content of human rights leads Manent to the statement that the concept does not really refer to anything, or more specifically it refers to nothing: 'Thus, whether we define the human being as "the being with rights" or as "having always and everywhere the right to claim human rights", we say *nothing* concerning what *constitutes* or *gives form to* human life' (51). Then he puts it even more succinctly: 'The truth is that *nothingness* haunts this definition' (51).

This hollowness appears in Manent's analysis of Hobbes not only in relation to rights but also in relation to the state. Manent refers back to Strauss and his notable Hobbesian analysis when he argues that the state lost its own morality

with Hobbes.[13] This is obviously Hobbes, read back from the liberal state, who attributes to the state the ultimate basis of legitimacy that it secures man's natural right to survive (and other rights, too), but does not have any other purpose for its operation. According to Manent, Hobbes emptied the state not only morally, but also in a political sense. It became a kind of abstract mechanism, an administration, no longer dominating and governing the members of a community. Politics as a practical activity implemented in and for the community gives way to a concept of politics in which it becomes mere state theory or political science: 'Modern political science is a science of the state; at the same time it is, inseparably, a science of obedience' (63). The crux of the matter is that, although the individual appears to be freed from arbitrary domination over him, the state still gains power over him, against which the state itself must empower the individual with rights. This contradiction leads Manent to the theorem that a society organised by the state is not transparent, but opaque *(l'opacité spécifique de la société moderne)* (82, fr.); in a sense a hypocritical form of organisation. It claims something different about itself to what it actually accomplishes.

V Politics as a world of command and obedience

After his demonstration of the nature of state hypocrisy, let us turn to Manent's own philosophical theorems describing natural law. It is first necessary to discuss the very emphatic pair of concepts: command and obedience. When Manent explains his concept of politics, he ultimately builds on this conceptual dichotomy. In a system of political relations, one can always distinguish between the two forms of action of command and obedience. Command is attached to the leader(s) of a given community as a form of action, and obedience responds to this on the other side, by those they lead. In the conceptual rearrangement that he traces from Machiavelli to Hobbes and beyond to Jean-Jacques Rousseau, Manent claims that a forgetfulness concerning the forms of action of command and obedience has arisen, which derives from or supports the system of the state (67). Through the authority (legitimacy) acquired by the state, both command and obedience are obscured and pushed into the background; 'the state obliges members of society to live in a social-political world in which neither commanding nor obeying is any longer clearly visible' (67). It is not difficult for the citizen to comply with the orders of the state – instead, he becomes easily shaped by the moulds of society.[14] However, he also loses control of himself – in fact, the political actor disappears from the stage, and the political community becomes a faceless mass, trying to conform to an impersonal mechanism.

[13] Leo Strauss, *The Political Philosophy of Hobbes: Its Basis and its Genesis* (Chicago: University of Chicago Press, 1952).
[14] *Pli de l'État,* 76, fr.

This construction, which Manent calls a man-made masterpiece,[15] is given legitimacy by the fact that it cannot only provide the individual with order and security (albeit via intimidation) but also with the freedom of the moderns.

The abolition of the order of norms, external to the state, which constituted natural law, made it possible to liberate the individual – the concept of natural human rights supported this process of liberation. Yet the relationship of the new concept to the state was contradictory. On the one hand, it was from the state of nature prior to the state that human rights were deduced; on the other hand, it is through the state that it becomes possible to implement and enforce these rights. The state does no more than liberate the tendencies inherent in nature: '[M]odern freedom was born as nature liberated, as nature unbound' (86). As an example of the latter, Manent cites the example of sexual freedom: '[W]hat is this freedom if not the suppression of all material, legal, and moral obstacles to the satisfaction of sexual desires?' (86). In this sense, it represents a radical transformation of the concept of nature. While nature has earlier appeared to be the source of order and law, in the eye of modern generations, nature is the world of unlimited freedom. While, in earlier times, power used to act on the basis of laws read from nature, the new form of power, that is the state, serves to guarantee a natural law understood as natural freedom. While previously the state commanded on the basis of natural law and the individual obeyed, the modern state does not command. Instead, its main task is to guarantee the individual's freedom given by nature, even vis-à-vis the state, to himself.

It is fitting that the chapter in which Manent discusses this topic is entitled *laissez-faire, laissez-passer*. He argues that the individual pays a heavy price for winning these new rights and freedoms. He loses his own decision-making capacity, the potential through which he was considered a political actor at all; instead he is now only a passive recipient, as it were, a sufferer of what the state does, in principle, to him, the individual. It is small wonder that when he relies on this modern notion of freedom to explain the new arrangement of power, the birth of the modern state, Manent identifies the modern state, in essence, with the liberal project. Moreover, he also mentions not only Rousseau but also Baruch Spinoza and Pierre Bayle as followers of Hobbes.[16] All this is important because Manent boldly criticizes this image of the nature and conception of the state that he calls enlightened. He confronts both state-centred political thinking and the presumed overemphasis on individual rights.

His confrontation takes place in two phases. He deliberately returns to earlier epochs in the history of thought. First, in connection with Christian natural law, he attempts to reconstruct a minimal concept of it, with the intention of setting some kind of external, and to an extent non-voluntaristic, standard against which to measure

[15] *'L'artifice le plus puissant . . . construit par les hommes'*, 70, fr.

[16] These authors also play a key role in Strauss's interpretation of modernity. See Winfried Schröder (ed.), *Reading Between the Lines: Leo Strauss and the History of Early Modern Philosophy* (Berlin: De Gruyter, 2015).

the completely meaningless, emptied natural rights. After that, he carries out a specific reconstruction of antique practical philosophy, rehabilitating its central concept: prudence. The truth, however, is that the first step in particular, the reconstruction of natural law, remains undeveloped to some degree, as if the author did not want to dig deeper into the substantive analysis of natural law. Of course, it is a great challenge, in the current phase of the debate over secularisation-laicisation, to stand up for natural law, it is risky not only as a philosophical task, but also in connection with the debates of the contemporary public, whereby the thinker acquires many discussion partners.[17] Compared to the discussion he offers of natural law, his analyses of prudence are much more convincing and, especially after the current renaissance of virtue ethics, are likely to generate even more interest than natural law reasoning. Overall, even the bold, Catholic-conservative theory of Manent's has retained a cautious, moderate level, which is far from Strauss's own one, which is in many respects much bolder, more controversial as a rhetorical performance.

VI The minimal concept of natural law in Manent's theory

Manent begins to outline his conception of natural law only after the above-mentioned contemporary critique and ideological reconstruction. According to him, natural law 'presupposes or implies'[18] that we have the ability to judge human conduct according to criteria that are clear, stable, and largely if not universally shared' (106). Natural law, thus defined, is only possible if there is indeed a human nature that can be considered relatively permanent. This constant human nature is revealed by analysing how people act, understanding their intentions, and shaping our judgement of those actions based on all of our experiences.

Manent separates the three defining motivations of permanent human nature conceptually (and two more features in parentheses). He believes that an action is successful if it can properly balance these three (plus two) factors. They are, as mentioned earlier, being pleasant, useful, and honest *(honnête)* (as well as fair and noble). This definition can be traced back to Thomas Aquinas, who wrote about the three varieties of good: '*honestum, utile et delectabile*'.[19] These terms have traditionally been translated as follows: 'The useful good *(bonum utile),* the pleasing good *(bonum delectabile)* and the moral good *(bonum honestum).*'[20] The question is whether these concepts can really fulfil the task that Manent assigns to them. He argues that the useful and the pleasing can be determined

[17] For my attempt to rethink natural law today, see Ferenc Hörcher, *Prudentia Iuris: Towards a Pragmatic Theory of Natural Law* (Budapest: Akadémiai, 2000).

[18] *Suppose ou implique,* 119, fr.

[19] Saint Thomas Aquinas, *Summa Theologiae*. I, Q 5, A 6, https://aquinas.cc/la/en/~ST.I.Q5.A6.

[20] Alfréd Turay, *Az ember és az erkölcs. Alapvető etika Aquinói Tamás nyomán*. https://mek.oszk.hu/08700/08783/html/etika.htm.

with universal validity and sufficient precision, and can be regarded as objective in that respect. This is not so for the moral, which he also admits to be a much more plastic concept, together with the fair and the noble (which presumably means that it is much more difficult to define them with universal validity).

However, one should consider a more serious criticism of the reduction of the natural law to these three values (plus two). These concepts present only a very constrained definition of human nature, the theory being somewhat unambitious in this sense; not taking risks, as opposed to the much more abundant raw material of the mediaeval natural law. As such, it remains undetermined and therefore less convincing.[21] An example of when this definition appears to be insufficient can be found in Manent's critique of communism. Manent maintains that a society, regime or institution can be well judged by these three 'marks' or criteria. A society or system of power that does not provide adequate opportunities for the development of these three motivations can be said not to function in accordance with the natural law (107). As he saw it, in communism too little attention was paid to the useful and pleasing, and on the basis of its disregard of these criteria one can state that the communist system was contrary to the natural law. While admitting that this criticism is not complete, he says it allows for a clear assessment of the system. I spent the first quarter century of my life under communism, and on the basis of this experience I cannot confirm that the deprivation of the pleasing and useful is a sufficiently convincing hallmark of the communist regime. A more robust description of the system is that it lacked honesty and justice. But even this does not define the particular way in which the communist order cynically widened the gap between its ideology and its everyday practice and institutional system, and maintained an everyday culture of institutionalised violence with which it was able to keep individuals under constant control. Obviously, this everyday practice of state and party violence eroded every natural sense of justice, and it seems that only a richer description of natural law can give us the key to a more convincing definition of this system – which, of course, is obviously not within the purview of this chapter.

As well as the three (five) motivating forces that characterise human nature, Manent adds another important element to the image that he paints of natural law. This concerns the relationship between the 'is' *(l'être, sein)* and the 'ought to' *(devoir-être, sollen).* According to him, modern philosophers unfoundedly cast their eyes on their predecessors, and even some of their contemporaries, to blur these two spheres, and thus they commit the fault of naturalism *(sophisme naturaliste).* '[I]n reality there is neither a leap nor a chasm nor an abyss between "is" and "ought", but only a gentle slope *(pente douce)* along which

[21] This critique draws on the distinction between the 'thin' and 'thick' descriptions of human-social phenomena in philosophy (Gilbert Ryle), anthropology (Clifford Geertz) and, more broadly, in the social sciences. In particular, the criticism formulated by the communitarian critique of liberalism serves as an example to me. See, for example, Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press, 2008), in particular the chapter entitled 'Self: Thick and Thin'.

we can walk with modest confidence' (107).[22] The opposition between 'is' and 'ought to', of course, refers to the well-known conceptual opposition of David Hume, which Kant 'solved' *(sein-sollen).* However, for us now, the significance of this remarkable episode in the history of philosophy is provided by the fact that it serves as the basis for the usual distinction between natural law reasoning and positivism. The positivists argue that we cannot know from the description of a socio-political phenomenon what to do in a given case, that is, the norm for a solution cannot be read *from* the situation, or digged *out of* the situation. This norm is created by the 'arbitrariness' of the legislator, who does not infer from the 'is' to the 'ought to', but acts to fulfil a legislative intention – presumably for the common good. However, Manent does not share this modernist-positivist position and believes that classical natural law was not characterised by such a sharp separation of the two spheres. He claims instead that, 'to consider attentively the way in which human beings act, to grasp the reasons of their actions, and from this to discern the best way to judge and guide such actions – this . . . constitutes the only way to proceed if we want to escape the alternative of deciding arbitrarily what rule, norm, or law we will declare valid' (107).

The natural law is an alternative and defining element of positivist voluntarism, by the norms of which it can be judged, and out of which the actions and the arguments concerning them can be read. While we did not find his idea of the three attributes of the human motivational basis really and fully convincing, Manent's picture of a slight ascent between the 'is' and the 'ought to' seems indeed convincing. Of course, this only holds if we accept the tradition of Aristotle's practical philosophy, and especially its parts concerning practical wisdom and the common good. Therefore, in the last part of the paper, I will explain Manent's idea of Aristotle's *phronesis* and the common good.

VII Manent's rehabilitation of practical philosophy

The key concepts of practical philosophy are only included in the English version of the book, in an appendix that the American editor attached to the original French book. Interestingly, this very important text is missing from the original French edition. Yet it is indeed a powerful summary of the main theme of the book, the Manentian reconstruction of natural law, tracing it back to Aristotle's practical philosophy. Moreover, the appendix is closely linked to the main text, at the end of which we read that natural law does not make any exhaustive list of the institutions of thriving human life, and this flexibility liberates our thinking from the 'tyranny of the explicit'. Manent does not conceal the fact that he interprets natural law in contrast with the doctrine of human rights. The latter is explicit and exhaustive, and consists of absolute propositions, in connection with which there is no chance of practical deliberation. The natural law, on the other hand, excludes all dogmatically explicit claims and leaves

[22] The source of the last four French terms: 120, fr.

room for the 'play' of practical life (111). Here Manent explicitly contrasts natural law with the rigidity of Kantian moral philosophy: 'So conceived, natural law is not like Kantian moral law, in relation to which the agent must always necessarily fall short. Natural law guides action but does not determine it, and thus does not command it' (111). He later adds: It 'does not define an ideal, but rather helps us to find the point of equilibrium and the optimal rule for a happy life, that is to say a reasonably pleasant, useful, and noble life' (112).[23] Later, Manent adds to this formulation the thought that the dogmatism of rights has not only destroyed the architecture of practical life, but has also become an obstacle to political law, thus hindering the logic of political obedience, without which no well-functioning human community can survive.

The last part of the text, after a critique of the rigid human rights discourse, presents the framework of the practical life within which we must take decisions in individual life situations, following the guidelines of natural law. Manent argues that human action seeks to improve human conditions, and therefore we need to get a detailed knowledge of its natural medium, which it can influence. Among other things, we need to re-learn what the concept and meaning of the law itself is. The role of law (divine or natural) in human society has been pushed into the background during the modernist era and has been replaced by the discourse on human rights (120). By putting individual freedom on a pedestal, we have forgotten that, without common norms, a peaceful and orderly form of coexistence is inherently hopeless. Manent cites examples such as the conservation of nature, the institution of marriage and the protection of the family.

Human action follows rules, so when one begins to flee from the rules, the meaning of this action becomes vague. However, the modern concept of freedom, which serves the gratification of desires claims that the individual is his own creation and therefore does not tolerate legal limits. Nevertheless, for example, 'laws of marriage and of filiation in a way make up the original laws of the human world' (122–123). This remark, referring to the Old Testament, makes it clear that Manent's starting point is a concept of law which is present in both Christianity and Judaism. His approach also involves a moment inherited from antiquity, according to which the law also serves as a measure; that is, without a law, one cannot find the right decision. In contrast, today we are without a 'rule or measure'. This absence of a rule or standard means that 'we are finally living . . . outside the law' (123).

For Manent, the standard is Saint Thomas, more precisely his dissertation on law.[24] He believes that it has caused great trouble that the teaching of this work has been relegated to the background over the centuries – along with the Catholic Church, he adds. He believes that today we have fatally forgotten Saint Thomas's way of thinking. To regain the natural law, it would first be necessary to assess what led to its marginalisation; then we should try to reconstruct the notion of law

[23] *Agreáble, utile et noble*. 120, fr.

[24] Saint Thomas Aquinas, *Summa Theologiae,* I–II, Q 90–108, https://aquinas.cc/la/en/~ST.I-II.

as a manifestation of practical reason that encourages and governs human action, especially human action that is directed at the common good (124).

Manent is aware of the difficulty of seeking to restore the natural law and recover a lost concept of law. As he puts it, all modern political thinking, which focuses on rights and self-interest, is built against this concept of law. Hobbes, the 'confessor' of the modern state, developed his own conception in opposition to Aristotle and Saint Thomas. According to Manent, in the early modern era, a 'coup' took place, the essence of which was that the state no longer derived its legitimacy from supporting the public good, but instead by being able to protect the rights of every single person. The French philosopher does not, however, propose to return to a premodern state, for example to reverse the separation of state and church – he would merely reinvigorate the original meaning of the concept of law which would allow the renaissance of natural law.

Manent warns that it is our concept of law, and through it the ideal of the rule of law, that is in danger today. The ideology of the unrestricted rights of the individual has destroyed not only the actual idea of democratic government, but also the accountability of the government by its political community. This ideology, according to Manent, is quite divorced from the idea of a government representing the community of citizens. Instead of the rhetoric of the language of rights, which leads to passivity, we need to recall the idea of human bonds, common action, and the command of the law – that is, the concept of practical reason, in which the law commands.

When Manent encourages Catholics, who he thinks have been passive for too long, to take action in this regard, he is certainly not taking over the role of a political activist. In this sense, Manent's teaching is not an ideology, but a political philosophy that appeals to our political responsibility and wants to sharpen our political judgement, no matter, if we are believers or not. It is not by chance that the author emphasises the virtue of sobriety. But, as we saw, he also returns to the central concept of the Aristotelian–Thomist practical philosophical tradition, the virtue of prudence, diagnosing the 'disappearance of all political prudence in Europe' (130). Manent argues that, ultimately, the practical virtue of communal self-government based on individual responsibility is needed, in agreement with the traditional Thomistic teaching of natural law. Moreover, this cooperation is needed not only within a nation, or even smaller political units but also between European nations if we accept the 'civic and Christian' (130) perspective offered by the concept of Europe.

VIII Manent's Catholic realism

If we want to remain true to the spirit of the book, we should close this analysis by simply quoting the concluding sentence of the volume. According to Manent, the destiny of Europe is 'as precarious as all human things, that is, as dependent equally on our wisdom and on our prayers' (130).

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The Duty of Disobedience

A Source of Modern Political Imagination

Attila Károly Molnár

For us Hungarians, the notion of *ius resistendi* has long been an important element of our ancient constitution since the Golden Bull, which has parallels with the English or the Poles. The problem can be seen as whether a good Christian can do anything against a ruler who has become a tyrant, in an era when it was clear that repeating the rebellion of Lucifer and then Adam was the chief sin (Romans 13:1–5). This paper does not chiefly concern constitutional resistance to a tyrant but the duty of personal disobedience, which first appeared among the clergy, but can arise in any hierarchical institution. The question is not merely whether one has a right to resist but whether one has a duty to resist. Resistance and disobedience have always existed in written history, but the peculiarity of early modern and modern culture in Europe is that it made disobedience a moral duty, first citing the danger of damnation and then, in recent times, omitting any particular attempt at justification.

The idea of a moral duty to disobey, promoted by Martin Luther and the Protestant Reformers, stems from debates on conscience during the scholastic period. The prehistory of the concept of conscience is beyond the scope of this paper. Suffice to note here that in the patristic literature, conscience became a motivator for action: The source of need is an escape from spiritual torment, and a longing for the divine blessing already experienced in earthly life, which is a calm, undisturbed and good state of mind. Punishment therefore does not have to wait until after death, it is already present in this world.

In contrast to the Greek (negative) notion of conscience, the importance of a good conscience increased among the early Christian authors, because good conscience and Truth (God) are intertwined: '[M]y conscience will rejoice, and my mind will be glad to be working in the light of truth, which is the food of the soul and steeped in unbelievable delight.'[1] Self-examination and penitence are required to achieve this. Conscience assumed an increasing role in the assurance of salvation, as the sinner has no peace of mind because of the bad conscience that plagues him. The bad state of conscience has rarely been linked to salvation as clearly as in Saint Isidore of Seville's *Sententiae:*

[1] Lactantius, *Divine Institutes* (Liverpool: Liverpool University Press, 2003), caput 12, 282.

https://doi.org/10.36250/00907_10

> 26.1 While the human condition confuses the mind with diverse depravities, it [the mind] suffers the punishments of conscience even before the punishment of hell through the confused striving of the soul.
> 26.2 A man will be able to flee from anything except his own heart. For one cannot depart from oneself. Because wherever he may have gone, the conscience of his sin does not leave him.
> 26.3 Even if everyone who did wrong were to escape human judgements, they would not be able to escape the judgement of their conscience. For although he could hide from other what he had done, he cannot hide it from himself, who has fully recognized that what he did was wrong. So a double judgement is passed on him, because he is punished for his sin here and now by conscience, and in the beyond he is sentenced to eternal punishment.[2]

Conscience is God's judgement of the individual, not just of certain deeds, and from this he can know in earthly life what awaits him at the Last Judgement. If the subjective experience of spiritual well-being and satisfaction can only be obtained by a good conscience, then the experience of a good conscience is a hope for salvation. Because a pure conscience and humble consciousness come from God, these are the signs of the new man, of grace.[3]

A good conscience meant that someone had met the Lord's expectations and was therefore looking forward to his reward, and was not worried.[4] In addition to being a sign of good conscience, joy and enjoyment, above all else: 'A peaceful conscience and a calm innocence work out a happy life.'[5] Peace of conscience is paramount,[6] because a clear conscience brings joy and peace, which is the sign of the true Christian, the knowledge and action of the truth, and goes hand in hand with certainty: '[A] light as it were of serenity infused into my heart, all the darkness of doubt vanished away.'[7] Grace, then, comes with a clear conscience and courage.[8] Love, faith, and a good conscience go hand in hand, because 'the secret of faith is a clear conscience',[9] although it is not explained how. Just as obedience to God's command is an unconditional command, so, over time, obedience to the 'command' of conscience became similarly unconditional. In patristics, the assumption of a close connection between the voice of conscience and God's command was consolidated and spread. Because of this, the experience of good conscience and the resulting

[2] Isidore, *Sententiae*. Liber II, caput XXVI, 'De conscientia', 1–4; quoted by Anders Schinkel, *Conscience and Conscientious Objections* (Amsterdam: Vrije Universiteit, 2007), 169.

[3] Athanasius, 'Letter I', in Athanasius, *Select Works and Letters*. Ed. by Philip Schaff and Henry Wace (Grand Rapids, MI: Eerdmans, 1987), 897.

[4] Saint Ambrose, 'The Treatise Concerning Widows', in Ambrose, *Select Works and Letters*. Ed. by Philip Schaff (Grand Rapids, MI: Eerdmans, 1989), caput 12, para 74, 939.

[5] Saint Ambrose, 'On the Duties of the Clergy', in Ambrose, *Select Works and Letters*, Liber II, caput 1.1, 86.

[6] Saint Augustine, 'Letter LXXIII', in Saint Augustine, *The Confessions and Letters of St Augustin*. Ed. by Philip Schaff (Buffalo, NY: The Christian Literature, 1886), 333.

[7] Saint Augustine, *The Confessions of St Augustine*. Transl. by Edward B Pusey (New York: PF Collier & Son, 1909), Book VIII.

[8] Athanasius, 'Letter LII', 975.

[9] 1 Timothy 3:9; Saint Jerome, 'Letter XIV to Heliodorus', in Saint Jerome, *The Principal Works of St Jerome*. Ed. by Philip Schaff (New York: Christian Literature, 1892), 83.

confidence felt by its possessor later became the overriding argument in political and moral debates. A good conscience is above the judgement of men because the direct source of a good conscience is God, 'who absolves the conscience'.[10]

Conscience has already lost its original meaning of 'knowledge shared with others', but, as a knower of truth, it could also make one confront others and the sinful world, as a good conscience is more important than respect, glory and pride in others.[11] Shame before other people does not qualify an act as good or bad. '[T]he Apostle took not the praise of men for any great thing, saying in another place, "But to me it is the least thing, that I be judged of you, or of day of man"; and in another place, "If I were pleasing men, I should not be a servant of Christ". . . . [One] cannot on every side avoid most malevolent suspicions, when for our good report we shall have done whatever we rightly can, . . . let there be present the solace of conscience, and clearly also the joy, in that our reward is great in Heaven, even when men say many evil things of us, and we yet live godly and righteously.'[12] Human judgement is mostly wrong, it is a spiritual force to despise in a calm and clear conscience,[13] at the same time, even if the approval of other people is not sought, their outrage should be avoided.

Contrary to the pagan Greek notion of conscience, the judgement of the Christian conscience is not based on the approval of other people.[14] A good conscience is good in itself, but praise from others does not necessarily mean that one has done good. God is the 'Searcher of the conscience. And whatever proceeds from the purity of that conscience is so much the more praiseworthy, the less it desires the praises of men.'[15] The search for God is more important than the opinion of men, and since God is infallible,[16] approval of conscience is therefore sufficient; there is no need for other people to appreciate one. 'I do not seek honor; the approval of my conscience is enough for me.'[17] At the same time, a good conscience is not afraid of the public. Although it has lost the pagan meaning of common knowledge, it does not necessarily turn one against the opinions of other people. 'A good conscience is afraid of no man's eyes. . . . Pray, open your ears and listen to the outcry of the whole city.'[18] However, as much as conscience is related to Truth, in patristics, no

[10] Saint Ambrose, 'Epistle LVII', in Saint Ambrose, *Select Works,* para 10, 1036.

[11] Saint Augustine, *The City of God,* Liber V, caput 12; Liber XII, caput 8.

[12] Saint Augustine, 'Of the Good of Widowhood', in *St Augustine on the Holy Trinity. Doctrinal Treatises. Moral Treatises, III.* Ed. by Philip Schaff (Buffalo, NY: The Christian Literature, 1887), 453, caput 27.

[13] Saint Augustine, *The City of God,* Liber I, caput 22.

[14] Ibid. Liber XIV, caput 18.

[15] Saint Augustine, 'Sermon on the Mount', in Saint Augustine, *Sermon on the Mount. Harmony of the Gospels. Homilies on the Gospels.* Ed. Philip Schaff (Grand Rapids, MI: Eerdmans, 1886), Liber II, caput 1, para 1, 86.

[16] Saint Ambrose, *Select Works and Letters,* 59. Cf. Saint Ambrose, *Select Works,* 939.

[17] Saint Jerome, 'Letter XIV to Heliodorus', in Saint Jerome, *The Principal Works,* para 7, 16.

[18] Saint Jerome, 'Letter CXVII to a Mother and Daughter Living in Gaul', in Saint Jerome, *The Principal Works,* para 9, 219.

one can use it as a basis for opposing secular laws: God, and even secular laws, must be obeyed for the sake of conscience.[19]

The hidden debate of patristicism revolved around whether everyone had a conscience. If not, then not everyone is responsible for their actions, as they have no knowledge of good. If everyone has one, how can they disobey it? Patristics did not give an elaborated answer to this, and later scholasticism tried to distinguish between *synderesis* and *conscientia* and to connect them in a systematic manner. This distinction was then developed by scholasticism, explaining why there are many different commands of our conscience in practice; namely why people can confront and contradict each other by following the commands of their consciences. The patristic concept of conscience also points forward *(antecedents);* that is, it decides on actions, and not only backwards, not only delivering ex post judgement (*subsequens* or *consequens*) of past actions.[20] In the patristic literature, conscience is a judge and legislator whose judgment must be followed. Much later, the duty to follow the command of conscience became the basis for resistance against other duties, which was confirmed by the letter to the Romans, originally not related to conscience but confirmed by the appeal already attached to it by Saint Jerome. 'Each of them should be fully convinced in their own mind.'[21] He who does not follow the commands of his conscience in action will fall into the most miserable state.

If the conscience of a judge is the same (*subsequens* or *consequens* conscience), then by what law does it judge, and how does it know it? The Latin Stoic answer was that a *conscientia* contains knowledge of natural law. This property of the *conscientia* was transposed to *syneidesis* in the writings of Saint John Chrysostom,[22] who asserted that *syneidesis* is the law of nature planted in us (*lex nata,* or *lex naturalis* which is also mentioned by Saint Augustine). Because God wrote the law of nature into all people, the sinner also knows it and is therefore responsible.[23] According to the Church Fathers, *conscientia* is an inner voice that speaks of the divine law and the duties that flow from it, and of the punishment for their transgression. Since they insisted that everyone has a conscience, an inner judge, it therefore had to be accepted that the law of nature was written into everyone; everyone could recognise it from their own inner experience. '[N]either Adam, nor any body else, can be shown ever to have lived without the law of nature.'

19 Lactantius, *Divine Institutes,* 506.

20 Saint Ambrose, 'Epistle LI', in Saint Ambrose, *Select Works,* 1029.

21 Romans 14:5; Saint Jerome, 'Letter XLVIII to Pammachius', in Saint Jerome, *The Principal Works,* 215.

22 'When God created man, he planted the law of nature in him from the beginning. And what was the law of nature? He has given commandments to the conscience within us, and all his good knowledge comes from it.' Saint Chrysostom, 'Homily XII addressed to the people of Antioch' in Saint Chrysostom, *On the Priesthood. Ascetic Treatises. Select Homilies and Letters. Homilies on the Statutes.* Ed. by Philip Schaff (New York: Christian Literature, 1886), 9.

23 Saint Augustine, *Sermon on the Mount,* 1.

This is because when God created Adam, he planted in him the law of nature for the good of all mankind. Furthermore, he does not seem to call the law of nature anywhere a commandment. But Saint John Chrysostom calls the commandment 'just and holy', and 'spiritual law'. The law of nature does not exist in the mind as a result of grace, because Greeks and barbarians and other people also have knowledge of this law.[24] 'For it was God that was the principal doer of that also, in that He gave us the law of nature, and added the written one to it.'[25]

> I praise the law, he says, in my conscience, and I find it pleads on my side so far as I am desirous of doing what is right, and that it invigorates this wish. For as I feel a pleasure in it, so does it yield praise to my decision. . . . It is, I agree with it as right, as it does with me when wishing to do what is good. And so the willing what is good and the not willing what is evil was made a fundamental part of us from the first. But the Law, when it came, was made at once a stronger accuser in what was bad, and a greater praiser in what was good. Do you observe that in every place he bears witness to its having a kind of intensitiveness and additional advantage, yet nothing further? For though it praises and I delight in it, and wish what is good the 'evil is' still 'present with me', and the agency of it has not been abolished.[26]

The knowledge of the law of nature that exists in every human being has been called *synteresis*. The literature of scholasticism on conscience largely revolved around the relationship between *conscientia* and *synderesis* (originally *synteresis,* but the *synderesis* form became widespread).

Until Thomas Aquinas, the glossary of Saint Jerome on Ezekiel's vision dominated the prevailing thought on conscience. Saint Jerome is a frequently mentioned author in the literature on conscience, due to his introduction of a new concept, *synteresis*.[27] The Christian authors were able to combine the Stoic and Pauline conceptions of conscience with a distinction between *synteresis* and *conscientia:* Conscience is both divine *(vox Dei)* and human. Conscience is infallible because of its divine yet fallen human nature. Its infallibility is evident in the case of a bad conscience about the past, while its incapacity arose mainly in connection with the forward-looking judgements of planned action. Yet how can it be both divine and infallible, yet human and fallible? The distinction between *synteresis* and *conscientia* helped to solve the problem of sin and the bad or false conscience: If sin is pervasive, how is it possible that everyone has a conscience (knows the law) and can be held accountable for their evil deeds? According to Saint Jerome's commentary on

[24] Saint Chrysostom, 'Homily XII on Romans', in Saint Chrysostom, *Homilies on the Acts of the Apostles and the Epistle to the Romans*. Ed. by Philip Schaff (New York: Christian Literature, 1889), 423.

[25] Saint Chrysostom: 'Homily XIII on Romans', 432.

[26] Ibid. 429.

[27] Saint Jerome, 'Commentary on Ezekiel 1:7', in Timothy C Potts (ed.), *Conscience in Medieval Philosophy* (Cambridge: Cambridge University Press, 1980), 79–80; Douglas Kries, 'Origen, Plato and Conscience *("synderesis")*', *Traditio* 57 (2002), 67–83.

Ezekiel, the four monsters in the vision are a metaphor for parts of the soul – four creatures come out of the earth, each with four faces: a man, a lion, an eagle and an ox.[28] These are, according to him, the three aspects of the soul described by Plato and the *synteresis*. According to Saint Jerome, the human face is human rationality, the lion is the emotional part, the ox is the longing part and the eagle is the image of *synteresis,* which Cain did not lack either: Man is able to recognise his sins and be held accountable because of the indelible *synteresis*.

Saint Jerome's commentary on the New Testament uses the term *'synteresis'* instead of *'syneidesis',* although in a different sense. The *synteresis* in the text is either identical to conscience later, or a peculiar part of it, its spark. *Synteresis* retained the notion of stoic *logos* and divine reason in the concept of conscience. From its origin, the term concerned conscience, to which it was related on the basis of the Greek verb *tereō* (to supervise, to guard).[29] Conscience also bore the meaning of guardian and educator for the Latin Stoics and Saint Augustine.[30] Over time, *synteresis* started to be spelled *synderesis* and also spread in this form. *Synderesis* was considered an indelible principle, habitus or tendency from the beginning. It is an infallible natural moral knowledge that is recognised directly and evidently by all. It is not based on a decision, nor on consent. It is intact and unchanging; that is, it is not affected by original sin. Thanks to it, man leans towards the good and rebels against evil. It is a remnant of the original moral integrity that humanity did not completely lose at the time of the Fall. S*ynderesis* was called the spark of conscience from God *(scintilla conscientiae).* The idea of *scintilla rationis* (knowledge of God in man) was used by Saint Augustine in *The City of God,*[31] then this *scintilla* became the interpretation of *synderesis,* and this metaphor became prevalent in the twelfth and thirteenth centuries. The Book of prophet Jeremiah, chapter 31:33, and the Book of Romans, chapter 2:15, interpreted the 'law written in the heart' as did biblical formulations of *synderesis* in the Middle Ages. This law is very simple: Do good, avoid evil and honour God. It motivates man to do good and punishes evil, thus *synderesis* leads the man in the decision. S*ynderesis* was related to concepts of *conscientia* and *instinctus naturae* belonging to the New Testament image of man[32] within the Stoic Natural Law Glossary – which later appeared in Francis Hutcheson's concept of moral sense.[33] The terms *recta ratio, superior pars rationis, vertex animae, scintilla intelligentiae* and *lumen modification* were used in the same sense as *synderesis* later on.

[28] Ezekiel 1:4–14.

[29] Robert A Greene, 'Synderesis, the Spark of Conscience, in the English Renaissance', *Journal of the History of Ideas* 52, no 2 (1991), 195–219.

[30] Augustinus, *Confessions,* 230.

[31] Saint Augustine, *The City of God,* Liber XXII, caput 24.

[32] Romans 8:26; 1 Corinthians 2:11 and 1 Thessalonians 5:23.

[33] Robert A Greene, 'Instinct of Nature: Natural Law, Synderesis, and the Moral Sense', *Journal of the History of Ideas* 58, no 2 (1997), 173–198.

Petrus Lombardus was the first to quote the text of Saint Jerome in the *Sententiae,* but without the concept of *synderesis* referring to *scintilla conscientiae*.[34] Philippus Cancellarius's *Summa de bono* was the first mediaeval dissertation on conscience.[35] According to him, *synderesis* is the source of *conscientia,* ability and opportunity. The relationship between *synderesis* and *conscientia* then became widely disputed. *Synderesis* deals with the general level of moral judgement, while *conscientia* applies to the specific level and thus to individual cases. This became the basic structure of the concept of conscience in scholasticism and later casuistry. *Synderesis* consists of rules and cannot be wrong; *conscientia* is the application of these rules and may therefore be wrong. Bad actions are only possible where there is a choice. The judgement of *conscientia* is a deductively derived conclusion from the premises. The free choice of practical syllogism lies in accepting the theorem of *proposition minor,* that is, in interpreting the situation. Every situation may be described and interpreted in many ways and, because interpretation can be misleading, it is a source of false conscience and bad actions. The question is thus who interprets the situations: the church, the secular power, the community, or the individual? If it is entrusted only to the individual, he, unless he is holy, will surely make the wrong decision.

Education and training attempt to close the logical gap between the rule and its application: They teach how to interpret individual situations in practice, for example, what is stealing. *Synderesis* is an option; however, the practical skills acquired need to update it. This skill is a kind of ability, which people possess to differing degrees, but not radically. In contrast to the conscience of patristics, which is the result of a direct perception,[36] the concept of conscience in scholasticism can be taught, because of the importance of practical knowledge. Thirteenth- and fourteenth-century writings on conscience commented on Lombardus. Lombardus also addressed the question of how a false conscience is possible if everyone has *synderesis* in them. Subsequently Saint Thomas summarised and systematised the literature on conscience.[37] According to this, *synderesis* is given by nature, man is born with it, and it is not identical to intellectual abilities (which have been corrupted by sin). In *De veritate,* it was still questionable for him whether *synderesis* may be wrong, but this is

[34] Potts, *Conscience in Medieval Philosophy;* Timothy C Potts, 'Conscience', in Norman Kretzmann, Anthony Kenny and Jan Pinborg (eds), *The Cambridge History of Later Medieval Philosophy* (Cambridge: Cambridge University Press, 1980); Heinrich Appel, *Die Lehre der Scholastiker von der Synteresis* (Rostock: Universitäts-Buchdruckerei, 1981); Michael B Crowe, *The Changing Profile of the Natural Law* (The Hague: Martinus Nijhoff, 1977); Oscar J Brown, *Natural Rectitude and Divine Law in Aquinas* (Toronto: Pontifical Institute for Medieval Studies, 1981); Joseph V Dolan, 'Conscience in the Catholic Theological Tradition', in William C Bier (ed.), *Conscience: Its Freedom and Limitations* (New York: Fordham University Press, 1971), 357–368.

[35] Philip the Chancellor, 'Summa de bono', in Potts, *Conscience in Medieval Philosophy,* 94–109.

[36] Athanasius, 'Apologia contra Arianos', in Athanasius, *Select Works and Letters,* 283.

[37] Appel, *Die Lehre der Scholastiker;* Hayden Ramsqay, 'Conscience: Aquinas – with a Hint of Aristotle', *Sophia* 40, no 2 (2001), 15–29.

no longer the case in *Summa Theologiae*. Saint Thomas also separated *synderesis* from *conscientia* – the former produces binding statements, is natural and not intuitive and contains the law of nature, infallible and ineradicable from man.

The statements of *synderesis* are known to man without ratiocination, a rational attitude which is contrary to a sinful tendency. *Synderesis* is an ability to formulate evident statements and to conceive directly of statements such as $2 \times 2 = 4$. *Synderesis* is the grasping of principles *(ideata innata)* such as moral principles, knowledge of the existence of God and so on – it is a source of inner certainty or proof. *Synderesis* is instinctive rather than discursive knowledge like the *instinctu divino* used by Marcus Tullius Cicero or Titus Livius's *divino spiritu* instincts. *Conscientia* is knowledge that is applied to certain, individual cases: What to do in such and such a situation. *Conscientia* is discursive, a reasoning intellect and practical knowledge. Its ontological basis is *synderesis,* which derives from nature, therefore everyone has a conscience by nature. *Conscientia* is the application of *synderesis* through syllogism, and this became the core of the intellectualist interpretation of conscience that still dominates casuistry today.

Saint Thomas linked conscience to the rule of law more closely than previous authors: The law binds by directing the conscience to follow the law and to punish men for violating it. This also suggests that the coercive power of secular power may rest on (rational) moral grounds, which contradicts Saint Augustine.[38] The legislature and law enforcement can judge on the basis of good conscience, which operates under the law. The law, then, is the work of the intellect.[39] The laws of nature are physical or moral, which apply to rational, free beings. The latter include men who, therefore, do not obey blindly but recognise by their intellect what they must do. The first rule of *lex naturalis* (the content of *synderesis*) is that good must be done, evil must be avoided. Good must be done, and good is that which corresponds to human nature. Only the wise can act well, because they can apply moral law to individual cases and changing circumstances.[40] It is also a way to maintain a good conscience. The law of nature *(synderesis)* cannot be eradicated from man, neither by persuasion nor by corrupt habits, and therefore there can be no error in the main proposition of practical syllogism, which means it should be applied.[41] *Synderesis* is the intuitive grasp of the principles of action, the law of nature *(participatio legis aeterna in rationali creatura):* avoid evil, do good and respect human life;[42] it is the propensity for good.[43] *Synderesis* is an infallible natural habitus in all people.[44] It cannot be completely exterminated, not

38 Henrich A Rommen, *The Natural Law* (Indianapolis: Liberty Fund, 1998), 4.
39 Saint Thomas Aquinas, *Summa Theologiae,* I–I, Q 90.
40 Ibid. I–II, Qs 94 and 100.
41 Ibid. I–II, Q 94, As 5–6 and Q 97, A 2.
42 Ibid. I–II, Q 94, As 1–2; Aristotle, *Nicomachean Ethics,* 1141a.
43 Saint Thomas, *Summa Theologiae,* I–II, Q 94, A 2; I–II, Qs 71–77; Thomas Aquinas, 'De veritate', in Thomas Aquinas, *Disputed Questions.* Transl. by James V McGlynn (Chicago: Henry Regnery, 1953), Q 16, A 1.
44 Saint Thomas, *Summa Theologiae,* I, Q 79, As 12–13; Saint Thomas, 'De veritate', Q 17, A 1.

even from the damned.[45] An action may be wrong, but *synderesis* may not. It reports on a moral order that exists independently of a person.

Man is inherently rational and knows the law of nature.[46] The lower intellect emanates from the higher, and the latter dominates the former.[47] The 'knowing' part of the soul that grasps the necessary truths *(scientificium animae)* is separated from the opinion-maker and the thinker with which contingent things are learnt. *Conscientia* is the application of knowledge to action.[48] If the intellect misjudges it, it does not come from God; it just seems to. Such a lack of the light of reason *(privatio luminis)* is the result of sin, because sin deprives it of the light of reason, of the Divine law. Sin is not a positive reality in the soul, but a deprivation, like a shadow is the lack of light, because an intervening object obscures it.[49] Original sin did not completely destroy human nature,[50] nor meaning. Sin does not prevent man from being meaningful to some extent, for if he were not so, he would no longer act meaningfully, and then his action would not be moral. Traces of propensity to virtue remains even in a condemned person, otherwise he would not feel the worm of conscience. However, the tendency to virtue – the intellect, does not work in him. Thomas Aquinas therefore mainly dealt with the forward-looking *(antecedents) conscientia,* the theory of action, rather than with the punishing conscience. Action is the inference of conscience, so conscience is a judgement-forming process. Conscience is an act *(actus),*[51] and not *potentia,* but it should also be a *habit,* not only an *actus,* because conscience is also present after and before the action (motive).[52] Saint Thomas disseminated a new meaning of conscience, the application of the knowledge contained in *synderesis* to the individual action.[53] *Conscientia* operates as a syllogism, the main thesis of which is *synderesis,* a supplement to practical knowledge.[54] The former always leads the doer to good.

Human action is the handling of contingent situations and probabilities. Contingencies make moral decisions possible and necessary: Everything could be different. Although it is easier to make a good law than to make a good decision, the law cannot specify every situation; one cannot imagine every situation and contingent in advance, so it is not possible to put everything into the laws. All laws must be interpreted in a specific situation. The law is therefore different from demonstrative truth, which is permanent and does not require application.

45 Saint Thomas, 'De veritate', Q 16, A 3.
46 Robert S Smith, *Conscience and Catholicism* (Lanham, MD: University Press of America, 1998).
47 Saint Thomas, *Summa Theologiae,* I, Q 79, A 9.
48 Ibid. I, Q 79, A 13.
49 Ibid. II, Q 86, A 1.
50 Ibid. I–II, Q 85, A2; Q 84, A 4.
51 Ibid. I, Q 79, A 13.
52 Ibid.
53 Saint Thomas, 'De veritate', Q 17, A 2; Saint Thomas, *Summa Theologiae,* Q 129, A 13.
54 Saint Thomas, *Summa Theologiae,* II–II, Q 83, A 1.

Conscientia concerns moral action, that is, voluntary and responsible action, which is not obligatory. Although *conscientia* judges whether something needs to be done, it does not stem from the deductive application of principles but is complex because it involves practical knowledge. The question, hence, was whether conscience could be wrong, and if so, why, and whether a false conscience was obligatory. *Synderesis* is never wrong, but *conscientia* is, which can have two sources, the wrong adjunct to practical syllogism (wrong practical knowledge, that is, misunderstanding of the situation) or wrong inference. *Conscientia* is the *actus* of judgement, therefore, it is related to practical knowledge. The central element of the scholastic conscience is, in addition to *synderesis*, practical knowledge; *phronesis* is translated into Latin as *prudentia*, reasoned judgement, foresight and prudence *(circumspectio).*[55]

The emphasis on circumstances is related to the notion of *prudence:* Conscience as it applies the law and *prudence* become relevant under changing circumstances. *Prudentia* contained the perception of the relevant elements of the circumstances (practical knowledge) and the ability to make the appropriate decision, the *consilium* and *iudicium*.[56] The Latin translation of *Summa Theologiae* introduced the term '*circumstantia*'. In addition to Aristotle, the emphasis on knowledge of circumstances in judging an action stemmed from rhetoric and the penal literature. Another source of practical knowledge was the rhetorical tradition, in which Cicero and Marcus Quintilianus emphasised the role of circumstances in persuasion, and each was given a role in *conscientia* when negotiating the appropriate (appropriate to the circumstances) action.[57] According to rhetoric, judgement is never independent of circumstances, judgement values probabilities and contingencies, because action is always contingent – 'it can be different', at least 'can be perceived in two ways', so it requires a decision.[58]

Such an interpretation of conscience and the incorporation of *prudence* was linked to a specific interpretation of the action. According to this, action is always contingent,[59] and free will always has a role to play in it *(liberum arbitrium);* that is, action is not necessarily obligatory, but the product of a practical conclusion, which conclusion is based on experiential reasoning, and many possible variants are decided by the actor. For each action, the judgement of reason is open to many possibilities, and is not fixed to one. That is why free will is important,[60] which is not forced by necessity.[61] A moral act is only that which is controlled by the practical intellect; only such an act can be either good or bad.

[55] Ibid. II–II, Q 49, A 9. Cicero did not use the phrase *'circumstantial'* (circumstance), Hermagoras used its Greek version *(peristasis).*

[56] Saint Thomas, *Summa Theologiae,* II–II, Q 48.

[57] Edward K Rand, *Cicero in the Courtroom of St Thomas Aquinas* (Milwaukee: Marquette University Press, 1968).

[58] Aristotle, *Rhetoric,* 1357a; Smith, *Conscience;* Josef Pieper, *Prudence* (New York: Pantheon, 1959).

[59] Saint Thomas, *Summa Theologiae,* I, Q 83, A 1.

[60] Ibid. I–II, Q 18, A 6.

[61] Ibid. I–II, Q 10, A 2.

Both the (Aristotelian and rhetorical) origins of *prudence* emphasised judgement-making because prudent judgement is not logical or theoretical.[62] Both practical knowledge, in *Nicomachean Ethics,* and rhetoric refer to situations that are contingent, contain alternative courses of action, can be judged from a variety of perspectives, all of which are plausible, but none can be proved and therefore require judgement.[63] 'And only what can be otherwise than as it is can thus be brought into being.'[64] Therefore, no matter how intellectualist the Thomistic conscience is, it is not rationalist, because the correct application of the principles[65] will never be as accurate as mathematics,[66] and it involves judgement. Unlike a logical conclusion, conscience (*prudence,* which is an adjunct to practical syllogism) is neither universally valid nor coercive. According to Saint Thomas, diversity and uncertainty accompany action.

> But still more uncertainty is found when we come down to the solution of particular cases. This study does not fall under either art or tradition because the causes of individual actions are infinitely diversified. Hence judgment of particular cases is left to the prudence of each one. He who acts prudently must attentively consider the things to be done at the present time after all the particular circumstances have been taken into consideration. In this way a doctor must act in bringing about a cure and a captain in steering a ship.[67]

One must judge; *conscientia* is judgement, part of which is *prudence,* proper perception and judgement.[68] Both Aristotle and Thomas Aquinas found it important to accept the uncertainty of practical judgement. Moral reasoning is therefore similar to disputation: Innumerable aspects arise in the beginning – there is no theoretical limit to which of them need to be taken into account. The specific situation is never systematic; it can never be fully known, so it always requires consideration and evaluation, which is not based on geometric rationality. In a specific situation, therefore, complete certainty is not possible; the decision to act is never demonstrative. *Prudence* is, at most, only moral certainty *(probabilis certitudo);*[69] it may reach a respectable opinion *(probabilitas, endoxos),* which may include errors.[70] Due to the limitations of the human intellect, one's moral life must cope with the contingent, on the basis of *probabilitas*. However, in the field of *prudentia* no one is completely self-sufficient.[71] *Conscientia* also helps, alongside grace, the knowledge generated

62 Aristotle, *Nicomachean Ethics,* 1141b–1142a.
63 Ibid. 1140a–b; Aristotle, *Rhetoric,* 1357.
64 Aristotle, *On the Soul,* Book III, part 10, 433a.
65 Saint Thomas, *Summa Theologiae,* I–II, Q 94, A 5.
66 Cf. Aristotle, *Nicomachean Ethics,* Book II.
67 Thomas Aquinas, *Commentary on the Nicomachean Ethics, I–II*. Transl. by CI Litzinger (Chicago: Henry Regnery, 1964), Lectio II, caput 2, 259.
68 Saint Thomas, 'De veritate', Q 17, A 5.
69 Saint Thomas, *Summa Theologiae,* II–II, Q 70, A 2.
70 Ibid. II–II, Q 70, A 2.
71 Ibid. II–II, Q 49, A 3.

from cohabitation[72] during interaction *(connaturalitatem).*[73] The principles of content (action) derive from experience, so conscience changes with experience.[74] Here, in this context, *homonoia* appears: Friendship refers to making common judgements.[75] *Prudentia* is not given by nature; in terms of *prudentia,* no one is sufficient on their own.[76] *Prudentia* is distributed knowledge. Judgement-making, man's natural ability, frees one from subjectivity, from self-confinement, and connects one to one's peers. Although the possible world is not completely discoverable, and judgements may be wrong, a probably good judgement, moral certainty, is possible. This is obviously different from Saint Augustine's morally absurd worldview, where bad intentions can also result in good. The Thomist was able to appreciate action, because he believed more in the discoverability of the moral world and in human intellect, and that the latter can be developed.

The elements of *prudentia* are memory, experience,[77] intuitive understanding[78] (this concerns the content of *synderesis*)[79] and teachability. Although *prudentia* contains many experiential and social elements, it is related not only to these but also to faith and grace.[80] Whether poetic or gracious, practical virtue cannot, however, arise *just* from an experiential, intersubjective world (the obvious causes of which, for Christians, are problems in the intellect caused by pervasive sin). It is not theoretical knowledge[81] but knowledge of general principles and the specific situation.[82] *Prudentia* relates to judgement and action.[83] Applying the principles always involves the problem of judgement, as judgement can be wrong. A good *deliberatio* is the work of *prudentia*.[84] Prudent practice stems not only from memory but also from the practice of making good and effective decisions.[85] This is because man is capable of non-algorithmically controlled action, that is, judgement-making. Often there is more than one possible good move; one has to choose. This decision requires knowledge of practice, as well as the imagining of new, as yet unexperienced possibilities. The meaning of the situation is diverse, and the decision must be made in the knowledge that there are other possible alternatives. There is always a gap between the situation and the

72 Ibid. I–II, Q 62, A 1. Grace is above reason (cf. the second letter to the Corinthians and the letter to the Galatians).
73 Ibid. II–II, Q 45, A 2; II–II, Q 28, A 2.
74 Ibid. II–II, Q 47.
75 Aristotle, *Nicomachean Ethics,* 1160a, 28–30; 1167a, 22–30; 1167b, 5–11.
76 Saint Thomas, *Summa Theologiae,* II–II, Q 49, A 3.
77 Ibid. II–II, Q 47, A 3.
78 Ibid. II–II, Q 49, A 2.
79 Ibid. II–II, Q 49, A 6.
80 Ibid. II–II, Q 47, A 14.
81 Ibid. II–II, Q 47, A 2.
82 Ibid. II–II, Q 47, A 3.
83 Ibid. I–II, Qs 48–49; Q 58, A 5.
84 Ibid. II–II, Q 47, A 6.
85 Ibid. II–II, Q 47, A 16.

judgement, a gap which is logically insurmountable. Therefore, judgement is a special ability, always personal, involving responsibility and commitment. Without *prudentia,* there can be no right choice (*prudentia acumen* – finding the right action)[86] or its implementation. The three elements of *prudentia* are not theoretical but, in addition to the judgement of individual cases *(synesis)* and judging emergencies *(gnome),* the ability to learn *(eubulia).*[87] Thomistic conscience, although of divine origin and internal, requires leadership, support and help. That is, the Thomistic conscience can and must be trained – this is what casuism served, and it is the duty of every human being to nurture, care for and inform his conscience.

The highly intellectualised image of Saint Thomas was closely related to the intellectualist image of the good order. Since the source of sin is a false conscience, which arises from a false logical conclusion or a false practical knowledge, the task is to nurture and correct the conscience. People's intellectual abilities are (also) unequal. Due to the intellectual disability of the majority, they must be dominated by those who are wiser than them, who correct their mistakes. This domination, however, is only partly a sanction, at least as important is teaching and intellectual leadership. The majority, seeing the limitations of their intellect, submit to the rule of the wise and accept the teaching of their practical knowledge, or at times set aside their conscience if they are wrongly judged. Just as the good order of the human soul is based on a hierarchy, and the world is hierarchical, so human relationships must necessarily be hierarchical in order to act well.

Subordination is in accordance with the law of nature; it is legitimate if the foreman does not use the subordinate for his own benefit, but for that of his subordinate. Laws are valid if they comply with the law of nature.[88] Of course, 'disobedience to the commands of a superior is a mortal sin, as being contrary to the love of God, according to Rom. 13:2. . . . [D]isobedience is born of vainglory'.[89] Because human intellect has been damaged since the time of the Fall, there must always be a compulsion to attain obedience. Fear is not troublesome but is benevolent as it deters sinners.[90] The virtuous should not be compelled, because they obey the law without it. The task of the law is therefore partly coercion and partly teaching for the common good.

> Laws framed by man are either just or unjust. If they be just, they have the power of binding in conscience, from the eternal law whence they are derived, according to Proverbs 8:15: *By Me kings reign, and lawgivers decree just things*. . . . [L]aws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because, as stated in Acts 5:29, *we ought to obey God rather than man*. . . . This argument is true of laws that are contrary to the commandments of God, which is beyond the scope of (human) power.

86 Ibid. I–II, Q 65, A 1.
87 Ibid. II–II, Q 51, A 4.
88 Ibid. I–II, Q 91, A 3.
89 Ibid. II–II, Q 105, A 1.
90 Ibid. II–II, Q 19.

> Wherefore in such matters human law should not be obeyed. This argument is true of a law that inflicts unjust hurt on its subjects. The power that man holds from God does not extend to this: wherefore neither in such matters is man bound to obey the law, provided he avoid giving scandal or inflicting a more grievous hurt.[91]

In contrast, '[a] tyrannical law, through not being according to reason, is not a law, absolutely speaking, but rather a perversion of law'.[92] But who will determine this, and can anyone turn against it? An unjust law does not bind the conscience.[93] Yet, it is still better to endure the tyrant than to rebel against him, because it can bring greater trouble: civil war or greater servitude.[94] However, even if not as a private individual, the public can replace or limit a tyrannical king.

Since not everyone receives grace, not everyone has become prudent, and so not everyone can participate in decision-making. Those who are unable to see the common good cannot. The hierarchy arising from natural law is distinguished from tyranny by the virtuousness of superiors, in addition to the laws serving the common good. In fact, their virtue is important; they have to be good people: 'Consequently the common good of the state cannot flourish, unless the citizens be virtuous, at least those whose business it is to govern. But it is enough for the good of the community, that the other citizens be so far virtuous that they obey the commands of their rulers.'[95] In the sinner, sin destroys the natural propensity for virtue, but in the good, 'besides the natural knowledge of good, there is the added knowledge of faith and wisdom; and again, besides the natural inclination to good, there is the added motive of grace and virtue. . . . [T]he good are perfectly subject to the eternal law, as always acting according to it.'[96] However, no man is able to rid himself of sin and become virtuous by his own efforts, nor is a human institution capable of doing so; only grace can achieve this.[97] Grace improves one's abilities, as does one's intellect. 'And thus there is a twofold grace: one whereby man himself is united to God, and this is called sanctifying grace; the other is that whereby one man cooperates with another in leading him to God, and this gift is called gratuitous grace. . . . But whereas it is bestowed on a man, not to justify him, but rather that he may cooperate in the justification of another, it is not called sanctifying grace.'[98] This grace is given to the priesthood, who must therefore obey. The priesthood, therefore, has teaching and disciplinary, punitive powers.

91 Ibid. I–II, Q 96, A 4.
92 Ibid. I–II, Q 92, A 1.
93 Ibid. I–II, Q 95, A 4.
94 Ptolemy of Lucca and Thomas Aquinas, *On the Government of Rulers. De regimine principum*. Transl. by James M Blythe (University Park, PA: University of Pennsylvania Press, 1997), 1.6.
95 Saint Thomas, *Summa Theologiae,* I–II, Q 92, A 1.
96 Ibid. I–II, Q 93, A 6.
97 Ibid. I–II, Q 109, A 5.
98 Ibid. I–II, Q 111, A 1.

The existence of the *forum internum* and *externum* includes the possibility of a collision between the two. Of course, the two cannot come into conflict if both are operated by divine law. In practice, however, not only can secular and ecclesiastical authorities clash, but the judgement of conscience can also clash with them. What can be done then, knowing that one's conscience may be wrong? The answer to the problem raised by false conscience – is one bound by one's conscience in all cases? – implies the potential for conflict between conscience and hierarchy. The possibility of a false conscience and the question of whether one is obliged to follow the conscience of the fallen raised the problem of the authority of conscience in scholasticism, from which the question of freedom of conscience arose. Acting against God and acting against conscience are both sins. What if someone acts against God in obedience to a false (but subjectively correct) conscience?

The authority of conscience was based on the letter to the Romans: What is not of faith is sin.[99] According to Saint Paul, the commandment of conscience always binds. Commentaries have typically interpreted the term 'faith' in the text as conscience, and later as a strong belief: Later interpretations suggest that it is sinful to act against one's belief, even if it may be wrong. However, a false conscience is binding differently than a correct one, because if it turns out to be wrong then it must be set aside and is no longer binding. Since one cannot know when one's conscience is wrong, one must always follow it, since one must strive for what one perceives to be good.

In patristic thinking, conscience has become the supreme authority in moral matters, yet for Saint Augustine it is sin that is contrary to eternal law,[100] and if conscience is contrary to a moral law completely independent of man, following the latter is not obligatory. According to the Sermons of Saint Augustine,[101] false conscience – the subjective peaceful and calm state of mind in sin – is thus not obligatory or justifiable, since man's judgement of himself is rebellion itself and unreliable. Therefore, a personal experience of good conscience is not a sufficient guide.[102] Saint Thomas solved the problem in such a way that he thought it was always sinful to act against one's conscience – this became the source of later freedom of conscience and of the duty of disobedience in the early modern age. To act against one's conscience is an act against God, so it is sinful.

> As stated in the First Part (Q_79, A 13), conscience is nothing else than the application of knowledge to some action. Now knowledge is in the reason. Therefore when the will is at variance with erring reason, it is against conscience. But every such will is evil; for it is written (Romans 14:23): *All that is not of faith* – i.e. all that is against conscience – *is sin*. Therefore the will is evil when it is at variance with erring reason.[103]

[99] Romans 14:23.

[100] Xavier G Colavechio, *Erroneous Conscience and Obligations* (Washington, DC: Catholic University Press, 1961).

[101] Saint Augustine, 'Sermon on the Mount'.

[102] Saint Augustine, 'Sermon XLIII, 13', in Saint Augustine, *Sermon on the Mount,* 849.

[103] Saint Thomas, *Summa Theologiae,* I–II, Q_19, A 5.

'Conscience, even if false, is obligatory' as the one who follows it sees it as God's command.[104] Man is obliged to do what he considers to be God's command just as he is obliged to strive to know what God's command is.

According to Saint Thomas, not following *conscientia* is a violation of the first command of *synderesis* (to do good and to avoid evil). In the *contra conscientiam agere peccatum* debate, two marked positions emerged, related to Saint Bonaventure and Saint Thomas. The former is considered voluntarist, and the latter as the main representative of the intellectualist interpretation by the literature on conscience. According to Saint Bonaventure, there is no conscience if we have good reason to doubt it. Saint Thomas criticised Saint Bonaventure because he thought a wrong *conscientia* is not binding.[105] Pierre Abélard was the most radical in this regard, insisting that obedience to conscience was an absolute command.[106] 'God considers not the action, but the spirit of the action. It is the intention, not the deed wherein the merit or praise of doer consists',[107] and 'when we do not violate our conscience, we have little fear of God holding us guilty of a fault'.[108] In the debate over the binding nature of false conscience, Thomist thinking internalised the concept of sin; that is, it reinterpreted as meaning that sin meant bad intentions and that someone, despite his or her own views – what he or she considers to be good or right – acts.

Saint Bonaventure was also interested in how one could do evil while knowing what good is. He found the answer, in part, in the concept of conscience. Instead of dividing conscience into two parts, *conscientia* and *synderesis,* as was widespread in the age, he divided it into three parts: knowledge of the law of nature, the possibility of becoming conscious and attitude. A person may understand what they need to do, but they may not want to do it, because knowledge does not necessarily motivate them to act. If knowledge indeed motivated action, there would be no will to commit sin either. But it exists. According to Saint Bonaventure, the propensity for sin is not an essential element of human nature, while *synderesis* is. Theorems of the law of nature *(synderesis)* are given directly through the natural light of the intellect; no experience is required to know them. Such an inner knowledge of principles is intuitive, which is an indisputable, direct experience, as opposed to *prudentia*. This intuitionist conscience is composed more of faith than knowledge, so there is no way to decide which conscience is right. It may follow that all action must be tolerated, which is the same as the conscience of the doer. The idea of intuition also means that it is pointless to try to convince or correct someone's conscience, because *ex hypothesi,* this belief is not open to persuasion. According to Saint Bonaventure, *synderesis* is in

104 Saint Thomas, 'De veritate', Q_17, A 4.
105 Saint Thomas, *Summa Theologiae,* I–II, Q_19, A 5.
106 Peter Godman, *Paradoxes of Conscience in the High Middle Ages: Abelard, Heloise and the Archpoet* (Cambridge: Cambridge University Press, 2009).
107 Abailard, *Ethics*. Transl. by J Ramsay McCallum (Merrick, NY: Richwood, 1976), 31.
108 Ibid. 48.

the will, and the will is self-determining and not subordinated to the intellect. The will is free ability, while the intellect is not; the will answers and the intellect accepts. Since the will has its significance in action, persuasion and teaching therefore have no significance, breaking the will and obedience being much more consequential.

Does one always have to follow the command of conscience? Is one obliged to act according to an unreliable judgement (conscience)? What is the *authority of conscience?* What should one do if *conscientia* – subjective certainty – commands action which is against the divine law? If conscience instructs you to commit sin, both action and non-action will be sinful. Man is definitely committing a sin. Saint Bonaventure's answer was that the strength of the command of conscience depends on the situation. The commandment of conscience can be of three kinds: equal to, indifferent to, or contrary to divine law. In the first case, conscience is always obligatory, as it is also in the second case. However, in the third case it is not obligatory; it must be set aside. One should not always follow the *conscientia,* although it is bad to act against it. Saint Bonaventure was interested in cases where someone had reason to suspect that the command of his conscience was wrong. For example, such would be the case if the command of *conscientia* were contrary to the command of the Church.

Conscientia sometimes tells us what is in accordance with the law of God, sometimes what is in addition to the law of God, and sometimes what is against the law of God – we are speaking here of what it tells us by way of prescription or proscription, not by way of advice or persuasion. In the first case, *conscientia* binds without qualification and generally, in that a man is bound to such things by divine law; and *conscientia,* which accords with it, manifests the bond. In the second case, *conscientia* binds so long as it persists, so that a man must either change his *conscientia* or must carry out what it tells him, for example if it tells him that it is necessary to salvation to pick up a stalk from the ground. In the third case *conscientia* does not bind us to act or not to act, but binds us to change it, because, since such a *conscientia* is mistaken and the mistake is incompatible with the divine law, so long as it persists it necessarily places a man outside the state of salvation. It is therefore necessary to change it, since whether a man does what it says or the opposite, he sins mortally. For if he does what his *conscientia* tells him, and that is against the law of God, and to act against the law of God is mortal sin, then without any doubt he sins mortally. But if he does the opposite of what his *conscientia* tells him, the latter persisting, he still sins mortally, not in virtue of the deed which he does but because he does it in an evil way. For he does it in despite of God, so long as he believes, his *conscientia* telling him so, that this displeases God, although (in fact) it pleases God. And this is what the commentary on Romans 14:23, 'Everything which does not issue from faith is sin', says: The apostle says that everything which is a matter of *conscience,* if done otherwise, is a sin. For although one may also do what is good, if one believes that it ought not to be done, it is a sin. The reason for this is that God does not merely take notice of what a man does but with what intention *(quo animo)* he does it, and the man who does what God commands, believing himself to be acting against

the will of God, does not do it with a good intention and therefore sins mortally. It is thus clear that *conscientia* always either binds us to do what it tells us, or binds us to change it. *Conscientia* does not, however, always bind us to do what it tells us, for example a *conscientia* which tells us that we are not obliged to do something to which a man would, otherwise, be bound. Such a *conscientia* is called 'mistaken'.[109]

Saint Bonaventure's concept of conscience is objectivist – obedience to false conscience is limited, and thus subjective certainty does not in itself bind and save the doer – and the command of conscience is binding in matters equal to or indifferent to divine law. The imperative of hierarchy in these indifferent matters does not override the command of conscience. The authority of conscience falls under the authority of the ecclesiastical hierarchy in matters of Divine law. Conscience cannot override other laws, nor have it depart from the precepts of God or the precepts of its superior, to which man commits himself. He may not be bound against the order of the superior. Therefore, the question of when conscience is binding and when it is not is not a real dilemma. (Later, Protestants, such as John Locke, denied freedom of conscience to Catholics on the grounds that they place obedience over the command of conscience.) No one has such a dilemma except for a short time, namely as long as he has an erring conscience, he has to reconsider his conscience. And if he cannot judge for himself because he does not know God's law, he needs to talk to people who know more. Saint Bonaventure connected objective morality and hierarchy. Consequently, the perplexus, which may be caused by a conflict between the command of conscience and the command of the hierarchy, must be set aside, since the order of the superior must take precedence over conscience in such a case. Due to the fall of conscience, acting according to conscience is not always right.

Saint Thomas came to a different conclusion from the hierarchy of laws. He argued that human law is not binding on conscience, because it is based on divine law, which is above human law. Therefore, conscience cannot be bound by human law. One also has to suffer for one's conscience,[110] because '[w]e must obey God rather than human beings'.[111] However, although the teaching of the Epistle to the Romans opposed this, it was necessary to obey the external tribunal, precisely for the sake of conscience.[112] The writings of Saint Thomas also direct that one's conscience must also be obeyed towards the Church: '[I]nferiors are not subject to their superiors in all things, but only in certain things and in a particular way, in respect of which the superior stands between God and his subjects, whereas in respect of other matters the subject is immediately under God, by Whom he

[109] See Saint Bonaventure, *Sententiarium*, Liber II, Dist. 39.1; Timothy C Potts (ed.), *Conscience in Medieval Philosophy* (Cambridge: Cambridge University Press, 1980), 114–115.

[110] 1 Peter 2:19.

[111] Acts 5:29.

[112] Romans 13:1.

is taught either by the natural or by the written law.'[113] Secular power must be obeyed in the affairs of the body, just as the affairs of faith cannot be entrusted to the decisions of anyone: '[P]rivate individuals . . . have no business to decide matters of faith.'[114]

As stated above (A 5), subjection whereby one man is bound to another regards the body; not the soul, which retains its liberty. Now, in this state of life we are freed by the grace of Christ from defects of the soul, but not from defects of the body, as the Apostle declares by saying of himself (Romans 7:23) that in his mind he served the law of God, but in his flesh the law of sin. Wherefore those that are made children of God by grace are free from the spiritual bondage of sin, but not from the bodily bondage, whereby they are held bound to earthly masters, as a gloss observes on 1 Timothy 6:1, *Whosoever are servants under the yoke,* etc. . . .

> [M]an is bound by divine law to obey his fellow-man. Man is bound to obey secular princes insofar as this is required by order of justice. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.[115]

The Dominicans were more accepting than the Franciscans of the conscience of subordinates.[116] Saint Thomas, in *Summa,* rejected the objectivist interpretation of conscience, but did not address the ecclesiological implications of subjectivist interpretation there. In *De veritate,* he dealt with the ecclesiological problem of conscience, but focused on actions which are indifferent to divine law, not usually judging actions. According to him, the relation of actions to divine laws cannot be established objectively; therefore, the Franciscan typification of actions (equal, opposite or indifferent to divine law) cannot be applied.[117] A good conscience cannot be set aside, so it is binding; therefore, a false conscience is more binding than the word of the superior. The widespread interpretation that it is always wrong to ignore one's conscience, does not mean that it is always right to follow it. There may be a situation where it is right to rethink the situation and one is obliged to obey and maintain, to shape one's conscience, as *prudentia* contains *consilium* and *iudicium,*[118] and only *probabilis certitudo* can be ascertained in moral decisions.[119] If conscience can be shaped, then efforts should be made to improve it. Thus, the dual purposes of Christian morality, that of doing good and of obeying one's conscience, are compatible.

113 Saint Thomas, *Summa Theologiae,* II–II, Q 104, A 5.
114 Ibid. II–II, Q 1, A 10.
115 Ibid. II–II, Q 104, A 6.
116 Eric D'Arcy, *Conscience and its Right to Freedom* (New York: Fordham University Press, 1971).
117 Saint Thomas, 'De veritate', Q 17, A 5.
118 Saint Thomas, *Summa Theologiae,* II–II, Q 48.
119 Ibid. II–II, Q 71, A 2.

Although the Franciscan William Ockham rejected the Thomistic intellectualising theology and anthropology that the intellect is capable of grasping divine truth, and considered that it was not the intellect which is the most basic spiritual power of man, but the will served by the intellect, conscience, and (ecclesiastical) authority, his response to possible conflicts was closer to that of Saint Thomas than to that of Saint Bonaventure. Unlike the Aristotelians, he did not hope that the law could coincide with freedom but saw the two as opposites. The emphasis on the will meant that will is an autonomous ability; it is not *prudentia* that regulates action – Ockham replaced *prudentia* with obedience to God – but external laws, coercion and obedience to them, and obedience to conscience.[120] He thought that a person cannot want what he does not think of, and that one wants what one thinks is good in action.[121] Consequently, even if a person is wrong, he must follow what he thinks is good, otherwise he will be subjectively doing wrong, that is, his conscience will be bad, which is a sign of damnation and an earthly reality. A person who disobeys the command of his conscience commits a sin. But what if the commandment of conscience and the teaching and commandment of the Church leader are contradictory?

Ockham radicalised Saint Thomas's *dictum* that acting against conscience is a sin. Citing Saint Thomas's explanation of false conscience, he demanded that the believer be able to resist a heretic pope. Contrary to earlier Franciscan teaching (in the Franciscan rule, conscience does not limit the monk's obedience, and if the command of conscience is in conflict with divine law, it must be set aside and false conscience is not obligatory), he believes that, in order to maintain the purity of conscience, a wrong conscience also binds its owner, and that church authority may be confronted, although he also placed an emphasis on humility. According to Ockham, the believer's strong convictions and cognitive certainty are sufficient proof to confront his superior, and even to declare the pope a heretic. By doing so, he essentially abolished the practice of the good advice of a neighbour: The Church cannot correct a false conscience. One cannot demand obedience and the setting aside of a false conscience. After all, if someone thinks they are thinking correctly, they can oppose good advice from their neighbours.[122] The ecclesiological consequences of the categorical nature of conscience and the tension between it and the virtue of obedience were clearly seen by contemporaries, although the problem did not appear *en masse* until centuries later.

120 Michael G Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* (Leiden: Brill, 1977); Douglas C Langston, *Conscience and Other Virtues: From Bonaventure to MacIntyre* (University Park, PA: Pennsylvania State University Press, 2001).

121 Sharon M Kaye, *William of Ockham's Theory of Conscience* [PhD dissertation] (Toronto: University of Toronto, 1997); Eleonore Stump, 'The Mechanism of Cognition', in Paul V Spade (ed.), *Cambridge Companion to Ockham* (Cambridge: Cambridge University Press, 2006).

122 Takashi Shogimen, *Ockham and Political Discourse in the Late Middle Ages* (Cambridge: Cambridge University Press, 2007), 22; David Burr, *The Spiritual Franciscans: From Protest to Persecution in the Century after Saint Francis* (University Park, PA: Pennsylvania State University Press, 2001).

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Searching for the Paradise Lost

A Post-Christian Crisis or a Christian Society?

Norbert Kis

'The weakness of the spirit. What power!'
(Béla Hamvas)

I Wandering around the faith of God…

If an extra-terrestrial visitor were to ask us humans what we have been doing here on Earth for tens of thousands of years, we might be able to answer briefly: we sought a lost Garden of Eden, we escaped suffering, we sought God, the logos, the spirit, eternity, in an unknown and brittle universe into which we were born. Then we created new ideals like science, human rights, or technology, but we did not find meaning in our lives there either.

The author is not a historian of religion, nor does he specialise in the history of ideas or philosophy. This paper is therefore more of a roaming; a string of free thoughts, an essay, rather than a scientific dissertation. The essay does not argue with the theorems of the sciences or the dogmas of religion; it respects them and even refers to them. This essay (1) recalls that humans had met the Christian faith *before* the teachings of the *Christian* religion, then (2) traces the reasons for Christianity's *weakening,* namely the renaissance of the 'God of nature' (deism) in philosophy and the arts. It argues that (3) *Christian freedom* was still a creative force in the age of the Enlightenment, but that (4) an *attempt at secularisation* against religion also began, and that for the last two centuries this process has broken down the organic fabric of Western culture. It notes that (5) meanwhile *science* has 'limped' along to a standstill, while still having no proof of the origin of life and no answer to the 'purpose' of human life. Finally, it poses two questions: (6) Is the instinctive need of the human community for transcendent answers extinct; in other words, is the Christian God really 'dead', and (7) has Western man burned out and matured to the point where he will again seek God's community-building faith and goals (post-Christian or Christian society)? Contemplating the spacious historical panorama, we find direction in the thoughts of the geniuses who shaped the *spirit of the age* (Béla Hamvas). The reference to 'lame science' above is based on Albert Einstein's *bon mot,* namely that science 'is lame without religion, religion without science is blind'. To paraphrase

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Einstein's saying, human rights, which have become the new ideals of non-religious modernity – in addition to or as part of science – also 'limp' without religion. Our essay will, inevitably, raise further questions: What awaits us at the end of the human adventure?[1] Will there be faith in God and will there still be a Christian community?

The overture to modernity was when late eighteenth-century Europe embarked on a path of scepticism about Christianity: Jesus maybe, but no to the church! The principle of God has become a pantheistic thought, that is, *deism,* which grew stronger by weakening *Christian theism*. Individual freedom, development and science are the new ideals that have crowded out Christianity from the spiritual mainstream. A society separated from the Christian religion, that is one which attempts secularisation, continues to this day. The hypothesis of *secularisation* is that a strong, neutral social community can be built *without* the Christian religion, even founded on *secular ideals*. The modern state is built on the *sovereignty* of *the people* rather than on the divine legitimacy of Christianity. In the relationship between the state and the individual, *human rights* and *constitutions* represent the new foundation. Following in the footsteps of Voltaire and Immanuel Kant, man's *inner moral command* represents the moral basis of community-building and state-building constructs of natural law. The historical roots go back to Christian theology, but the organic threads of community development are beginning to break.[2] Religion-based communities are starting to disintegrate, and the multi-generational family pattern is weakening. Compared to the small community, the individual becomes more important; *individual human rights* and *the free individual* will be the axioms of modernity.[3] Collective consciousness is disintegrating into individual consciousness, with cleverness replacing wisdom (Thomas S Eliot). The 'enlightened' individual embarks on a journey of two hundred years in search of a new community ethos, with a curiosity piqued by the doubts of science and under the spell of prosperity. By the twenty-first century, the Western world had entered the postmodern age, in which the political ideals and ideologies of a hundred years had failed and the freedom of the egocentric individual had become total. The society of the World Wide Web is virtual, that is *impersonal* – this is the postmodern vision.

Our roaming commences at the basics: *What* shall we understand under Christianity? Christianity is often used by the social sciences as a collective concept of values, rules and ethical norms. However, this study will examine Christianity as a religion and less as a concept of the history of ideas. While Christianity's historical role can easily be grasped in the formation of political institutions, philosophies and ethics are

[1] For a captivating theory of civilisation on human adventure, see Elemér Hankiss, *Az emberi kaland* (Budapest: Helikon, 2014).

[2] János Frivaldszky, *Természetjog* (Budapest: Szent István Társulat, 2001), 56–146, 300; Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

[3] Rémi Brague, *Curing Mad Truths: Medieval Wisdom for the Modern Age* (Notre Dame, IN: University of Notre Dame Press, 2019).

best captured in its *religious* form, otherwise ideology, philosophy, social mission and charity remain. The Christian religion sees God as a superhuman and supernatural intellect that has consciously designed and created the universe, and Man within it.[4] Human life has a divine origin, meaning and purpose. God comes into contact with man, and the Messiah brought salvation from the awareness of original sin (from suffering itself). He proclaims eternal truth, all this with love and the promise of eternal life. The Christian religion is the 'eternal prophecy'.[5] It gave mankind hope, which became *the strongest* community-building belief in Western culture.

Nowadays, a *traditional* outlook on life is intertwined with Christianity, so it is worth briefly covering the approach that looks on Christianity as a *tradition*.[6] Let us look at Christianity from the beginning, from its origin; that is, we will not examine religion as a historical and social (ethnographic) construct, but in its true depth. In Hamvas's poetic interpretation, the state of humanity before Christianity was:

> Fateless, aimless man, ataraxia, Tao's man, passivity, waiting neutrality; man cannot go beyond this degree from his own strength. Man has already been created, but the living word has not yet been inhaled. The moment will come when man receives the living word, worthlessness will gain its quality. Nothing becomes something, a nobody becomes someone. The goal is born, the complete and ready man.

According to Hamvas, Christianity as a tradition means the *recovery* of man's archaic temporal, primordial position. It seeks to turn man towards a normal, universal and absolute human existence, that is, to free him from a broken-down (corrupt) life. Christianity creates an *autonomous and communal human ideal*. Hamvas's Christianity as a tradition is related to the Hebrew, Greek, Chinese, Iranian and Hindu traditions. Religion may disappear (atheism), but tradition is indestructible; it cannot be lost in time. According to this, Christianity is equal to the tradition before Jesus and cannot disappear in the future. Tradition is always about the fullness of existence, for all of humanity. It is not European, nor Western, not religious but of universal validity. Tradition is *deist;* God is the creator of the universe, passive in the destiny of men. Tradition becomes theism *in religion,* that is, in the active God who shapes the cause of man.

Tradition is about man; religion is about a (loving) relationship and community. Over the past millennium, the Christian religion has proven to be the most effective force for community cohesion and retention. For free individuals, only commonly accepted ties and constraints could and can organise a community. In the last two hundred years, has it been possible to build a strong community without a Christian religion; that is, to organise a social order? Is there still a demand for real communities? What does the present show and what can the future bring for the

[4] Helmuth von Glasenapp, *Az öt világvallás* (Budapest: Akkord, 2012), 212–320.
[5] László Ravasz, *Pál Athénban* (Budapest: MTA, 1928).
[6] Béla Hamvas, *Scientia Sacra II* (Budapest: Medio, 2015).

Christian religion? The main question of the study is what the role of the Christian religion may be in future communities, after a secularised social experiment over the past two hundred years. First it is requisite to examine the roots and more important historical moments of Christianity in order to arrive at the causes of its ascension and weakening. The thread of the story is driven by the ideal of freedom. Christianity, and man within it, can only be understood from the point of view of freedom – the awakening to freedom.

II Man before the Christian religion

It is not known what conception of God human beings who lived and hunted in nature had. The use of symbols (cave paintings and some of the small sculptures, as well as burials from this period) suggests the existence of some kind of world of beliefs in the age of the Upper Palaeolithic in Europe 40–50 thousand years before Christ. Perhaps man considered himself a part of nature, subjecting his destiny to the spirits of nature, like trees and animals. His life was arranged by the shadows of the stars, earth, wind, rain, fire and the shadows of his dead peers. He also experienced freedom as part of nature, that is, as a natural thing. He probably had no special word or indication for freedom, because it was equal to the destiny of nature. Tradition and the tales of the elderly taught him what spirits had created the world and how. Perhaps he was preoccupied with the questions of why he was in the world and why he was going to die. However, the answers were given to him by a thorough knowledge of nature: Nature has an order, and he was a part of that order. Natural man received the experience of existence from nature, in which death was only a transition to another form of existence. We do not know in what spirits our predecessors, living in nature, believed, but he presumably knew that nature provides the source of life and cruelly takes life away. He saw animals as ancestors and creative forces and 'talked' to them; he was an animist, meaning that he believed in the world of souls. He also believed in the souls of animals. He fought for survival; not against nature but as part of nature. Civilised man looks back on the millennia spent in a covenant with nature as a primitive religion. Our *Homo sapiens* ancestors lived this way for 100 or maybe 150 thousand years. Their heritage lives on in our genes as the ancient image or archetype of nature's freedom.[7]

At the beginning of the Holocene era (12 thousand years ago) this world was ended, humans began working the land, having stepped out of the order of natural life. Over some 5–7 thousand years, farming became the basis of community life. Grain growing and animal husbandry provided better chances of survival, but it

[7] Lajos Szimonidesz, *Primitív és kultúrvallások, iszlám és buddhizmus* (Budapest: Dante, 1931); Charles Darwin, *The Descent of Man* (London: John Murray, 1871); Robin Dunbar, *The Human History* (London: Faber and Faber, 2005); Yuval N Harari, *Sapiens* (New York: Harper, 2015).

came at a heavy price. The loss of natural freedom, frequent struggles with nature, keeping the wild animals away from the farm, begging for rain and a good harvest. He needed *new gods* in order to dominate nature. However, new gods were also needed to maintain the *peace* of communities with increasing population density. With farming, a significant population arose and kinship-based traditions became less and less functional bringing the need for new ways of living in communities. Communities were organised into more complex hierarchies not based on family ties; moreover, hard farming work left *less and less* freedom for man. The lost 'Garden of Eden', the primordial image of Paradise, awakened man's guilt. The 'original sin', by which he denied natural freedom, and Mother Nature became part of the cultures.[8] The farmer who stepped out of nature had to reorganise his own world, struggle with nature and cope with the burden of a new form of freedom. In addition to the many good things, bad ones appeared; as the Tao says: 'All can know good as good only because there is evil.'[9] The history of the farmer which began then has continued up until the present day (the *Anthropocene*). Over 10 thousand years, man has increasingly harnessed the energies of nature for his own benefit, populated the earth and lived in increasingly secure material prosperity. Living in ever-larger communities, he had to find the right degree of freedom in the relationship between the individual and the community. However, this was rarely successful because it was easy to take freedom from a man of guilt using the promise of security, cruel gods or force. Communities became *oppressive systems of power*.

However, the phenomenon of freedom does appear at certain moments in written history. In these moments, one seeks the freedom of Paradise Lost, to escape the bondage of guilt and seek the right degree of freedom. Attempts to liberate the human spirit find the opening of freedom for good *in human reason*. Over the millennia the religions of *eternal world law* are created, which seek the way (back) to the order of nature and natural freedom. The Hindu, Sikh, Jain and Buddhist religions mark the metaphysical path of human freedom. The universists of Chinese civilisation, the philosophy of Confucianism and Taoism, also see the free man in the midst of the eternal laws of nature.

The awakening of 'Western man' began with the Hellenic world.[10] The basic feeling of the Greek geniuses was that behind things, as their soul, hides the *logos* that

[8] The book of Moses also spoke of this guilt: 'Cursed is the ground because of you; through painful toil you will eat food from it all the days of your life . . . and you will eat the plants of the field. By the sweat of your brow you will eat your food' (Genesis 3:17–19). Symbols reveal the way out of nature: The serpent, the creator of nature that has been sacred for millennia, becomes evil and is trampled by man. In guilt, man already denies freedom of choice. Adam says: 'The woman you put here with me – she gave me some fruit from the tree, and I ate it.' The woman said: 'The serpent deceived me, and I ate' (1Gen 3:12,13). Original sin is conceived in the denial of freedom. Yet, from this denial arises the idea of freedom, as man enters from Paradise into the world of good and evil, where he must decide using free will.

[9] Lao Tzu, *Tao-Teh-Ching* (Boston: Nomad, 1996), 6.

[10] This analysis is based on Will Durant, *The Story of Philosophy* (New York: Simon and Schuster, 1926).

gives life to the entire cosmos; one must live in harmony with it. From the empire of Alexander the Great to the Roman Empire, hundreds of religions intermingled, and the 'unknown gods' were also revered and had altars raised to them. The Greeks believed in the gods, but they sought freedom and truth in *human wisdom* and called it philosophy. Man becomes the centre of the world: 'gnothi seauton' (that is, know thyself), exhorted Socrates. The great step towards the awakening of human freedom was taken by Aristotle. He continued the path of his masters; that is, he created concepts. The concept of freedom was born centuries later thanks to Aristotle, as was the system of human thought, that is, the logic. The method of correct thinking, the Aristotelian *Organon,* was a thought so powerful that it laid the foundations (in part) for Christian theology centuries later.[11] Socratic philosophy and Aristotle provided a scholarly basis for later Christian thought. In the sixth to fourth centuries before Christ, the healing of Hippocrates, the Sun-centric cosmology of Pythagoras, the biology of Empedocles, and the diverse learning of Democritus, Anaximenes, Thales, Heraclitus, Anaximander and others awakened human wisdom. The god of philosophers does not interfere with man's business. Aristotle's god does nothing, has no will or purpose, but he is the cause and the ultimate goal, the form of forms. This sometimes *deistic*, sometimes *pantheistic* image of god is realised in the view of the Stoics and Epicureans: 'To look at everything with a calm mind', that is, to accept what is. There is little difference between the 'emptiness' *(satori)* of Buddhism and the Hellenic stoic aimless serenity *(ataraxia).* Man awakens; he is wise, and receives the spirit of nature. The man of the religions of world law and the aimless man of Hellenism is 'the passivity, the waiting neutrality'. 'Man has already been created, but the living word has not yet been inhaled.'[12]

The Jewish people remained indifferent to Greek influences; 'these people feel that they are the only one of the peoples of the earth to have made a direct covenant with the Infinite God, the Anonymous.'[13] The Jewish religion, unlike all earlier and contemporary religions, created a personal relationship between God and man: God makes revelations to man, gives commandments and forms plans. God promises man a Messiah and salvation. The guilt of the original sin, the loss of Paradise, is also a primordial experience for the Jewish people. For them, salvation (that is, the end of the world) is near. This is when Jesus arrives on the stage of world history.[14] Jesus probably did not study Greek philosophy or the religions of world

[11] Aristotle, 'Organon', in Aristotle, *Works* (Oxford: Clarendon, 1908).

[12] Hamvas, *Scientia Sacra II.*

[13] Sándor Márai, *Harminc ezüstpénz* (München: Újváry "Griff", 1983), 9.

[14] The moment of arrival in the vision of Sándor Márai: 'Arcadian landscape, yet Galilee is a restless land. Just as all lands are troubled at a time where Jews live. . . . [E]veryone was waiting for the end of the world here. It was natural for them, an everyday commonplace. . . . [T]he people, this Jewish people driven from exile into slavery, enduring in the land of their fathers, could not expect anything at this time but salvation, the natural condition of which is that the end of the world is here. . . . Jesus knows that his word sounds in the time, he knows that his word will one day be more than the word

laws, but the Mediterranean was steeped in Hellenic and Eastern wisdom. Jesus knew this without learning. From a small sect, Christianity became the only world religion that sees a man as the son of God. Jesus followed the Jewish teachings, but eventually his thoughts led to the liberation of man. Before it, for millennia, religions and philosophies were attempts to liberate man, seeking lost freedom and escape from the bondage of guilt. *Freedom* between man and community, the definition of the human baseline (as Hamvas put it) receives a benchmark with the teachings of Jesus. The moment came with Jesus when 'man receives the living word, the nothing becomes something, the nobody becomes someone. The goal is born. The complete and ready man'.[15]

III The birth of the Christian man

We may wonder how a small Judean sect could become the religion of the Roman world empire in just three centuries and then the world religion that conquered the whole world in one and a half thousand years. The answer, perhaps, is that the teaching of Jesus created the image of the 'ideal' religion, dormant in Western man, awakening the ancient image of God waiting in him. By proclaiming the divine origin, meaning, and purpose of life as eternal truth, He gave mankind the strongest community-building faith, mystery, and task – to wait for the end of the world, which gives salvation and eternal life. He gave man a saving thought. In the Old Testament, this freedom cannot be interpreted without God. The term *'nefes'* is used in several senses; it means free desire or longing, but it is also equates to the soul.[16] Man was given freedom by the soul, an integral part of his being. Habakkuk also gives direction to human freedom: 'The righteous will live for his faithfulness.'[17] Freedom must be used for the good life of serving God. Jesus knew that sin and guilt deprive man of freedom. The original sin that keeps man in sin, and gives him a sinful complex has been built by repressive systems of power. 'Everyone who sins is a slave to sin' (John 8:34). One must free oneself from the bondage of guilt and take responsibility for freedom. According to Jesus's teaching, there is no freedom without redemption from sin and guilt. 'So if the Son sets you free, you will be free indeed' (John 8:36). If there is no freedom, one cannot choose. The way of Jesus must be chosen by man, freely and by faith. Jesus awakens in man the search for purpose and reason. It gives a purpose to man: the path of love. 'I am the way, the truth and the life' (John 14:6).

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of the prophets before him. This is known to the simple Jew, who until the age of thirty was none other than the carpenter's son in Galilee.' Ibid.

15 Hamvas, *Scientia Sacra II,* 88.

16 Zoltán Tarjányi (ed.), *Erkölcsteológiai tanulmányok. A szabadság* (Budapest: Jel, 2008), 14.

17 Ibid. 18.

The path of love leads to the truth. Christian freedom and truth are interdependent concepts.[18] 'What is truth?', asked Pilates, and man has been repeating the question ever since, and inevitably confronting the narrow limits of human knowledge. The life of Jesus does not collide with the walls of knowledge, but ends in the divine spirit. This path must, however, be chosen. This is man's freedom, the responsibility of freedom. As Augustine of Hippo formulated it: 'The one who created you without you will not justify you without you.'[19] You can say no! The apostles of Jesus were free to choose; they were sometimes torn, but in the end they chose discipleship themselves. Jesus demonstrated the responsibility of individual freedom by likening it to entering a narrow or a wide gate (Matthew 7:13–14). He gave freedom to do good, but also to do evil. Why did we get freedom from God to do evil? Augustine's answer was that without it, freedom for good could not exist.[20] It makes sense to refrain from evil. We also received the ability to do evil from God. We often see the good, yet we choose the bad.

Two thousand years ago in Galilee, Jesus, as the prophet of a crumbling nation, conveyed a teaching to his own nation that, over time, provided every national community with a secure means of community organisation. The cult of the Roman emperor, an eternal divine sovereignty as the head of all strength and power, also gave a strong community in the empire. In contrast, Jesus brought to the surface the deepest and most oppressed human question – the *meaning and purpose* of human life. He gave an answer that highlights the human essence in his time and is timelessly valid anywhere and in any relationship between peoples and people. In the Hellenic world and the Roman Empire, in the midst of more than half a millennium of decadence and chaotic diversity, there was a longing in man for the certainty, revelation and redemption that the teaching of Jesus gave. He liberated man and gave him new and fresh strength and tools for community building. That is why a skinny Jewish man, Paul, was able to convert thousands in chaotic ports and markets.

The teaching of the Gospels has provided one of the strongest messages in history about the need to balance freedom in the relationship between the individual and the community. 'So in everything, do to others what you would have them do to you' (Matthew 7:12). The Bible tells us that both the community and the individual are important. All of this seems self-evident when viewed from today, but neither was like that in the first centuries of Christianity. The individual was graded by the community, according to different classes and castes, as something that was more important than the individual himself. The community was ruled by ruling elites. Neither the individual, nor the community, collectively or separately, were given responsibility for freedom and the right to

[18] Pope John Paul II, *Veritatis splendor,* 31–34.
[19] Saint Augustine, *Sermones,* 169, 11.13.
[20] Tarjányi, *Tanulmányok,* 55.

liberty. However, the power of this teaching began to weaken after the passage of one and a half thousand years.

IV The weakening of Christianity, the renaissance of deism

Was the natural image of God (deism) and the image of man in the Hellenic world a thesis of Western culture to which Christianity arrived as an antithesis? Or, conversely, did Christianity become a thesis and then the mediaeval renaissance and science came as its antithesis? We see intertwined ghosts and passions of the age rather than its main or secondary currents. But above all, we need to see the geniuses who shape the spirit of the age. In history, the change of the spirit of the age has been shaped by the thought systems of geniuses. It was not the spirit of the age that created the genius, but vice versa. The passion for the era was produced by the crowd (Hamvas). In the religions of natural and 'eternal world law' (Shinto, Hinduism, Sikhism, Buddhism and Chinese universalism) and in the systems of philosophy, in man's sense of natural freedom, attained through intellect and insight, he was looking for a way to *return* via discernment.

Deism was already a powerful force in the first centuries of the spread of Christianity – belief in a God, not the Christian one. The essence of deism is to believe in a divine supremacy that created the world along with its natural laws. God is present, but he does not dominate or influence the 'development' of the world, nor does he interfere in the affairs of man. The divine transcendent is nature itself, its revelation is nature itself. It can be observed in eternal forms of existence, perceived with meaning and the heart. The passive god of Hellenism and Aristotle and the deism of the Stoics lay dormant in the human consciousness, which *Medieval art* awakened (Renaissance) in a moment. Although the Christian faith offered answers to eternal truth, in addition to faith (the lost Paradise, that is), the attraction of nature, knowledge, the need to understand and curiosity were also at work in man. Thus, the scientific geniuses of the age were born.

The first of them was by Roger Bacon (thirteenth century), who taught the Franciscan orders science. In the *Opus Majus* he lashed out at blind faith in false authority, custom, prejudice and ignorance.[21] He placed science on an equal footing with theology, above all mathematics and optics. The surge of knowledge and learning was triggered by the discovery of printing, with millions of books printed in the second half of the fifteenth century. Another driving force of collective learning was the intoxication of exploring new worlds, starting with the American continent. Deism and the Renaissance began to sprout here and then blossomed with the experiments of Leonardo da Vinci, with the astronomical discoveries of Nicolaus Copernicus (sixteenth century), Galileo Galilei and Johannes Kepler

[21] Roger Bacon, *Opus Majus* (Freiburg: Herder, 2008).

(seventeenth century), and the biology, medicine and chemistry of William Harvey, Andreas Vesalius and Paracelsus – who rewrote the dogmas of a thousand years of Hippocrates and Galen. They were influenced by the scientific knowledge of the universe, a creative force reminiscent of the art of Hellenism, a romantic recollection of Greek philosophy, with a focus on the human. They were all believers, like everyone else at the time. The God of deism *exists,* but he *does not live,* and this took them further and further away from the image of the god of Christianity. All this went hand in hand with the rejection of Christian ecclesiastical authority, often starting from the ecclesiastical orders.[22]

The milestone was announced by Francis Bacon and Isaac Newton.[23] Bacon was religious, but his faith in God tended to deism.[24] It was philosophy which he expected primarily from the revolution of knowledge, and science only secondarily. He saw not only power in philosophical knowledge ('Knowledge is power') but a new foundation of human freedom. Contrary to the teachings of Thomas Aquinas, he considered intellect and the will to be one. According to Bacon, human reason must be freed from the bondage of a millennium of nebulae (idols), that is, the laws of nature must be found and obeyed. 'We cannot command nature except by obeying her'; that is, we must watch, experience and prove it. Two thousand years after Aristotle's *Organon,* he created the *New Organon* (1620), the second 'bible' of science. The pillars of this were raised only six decades later: Newton published his *Principles*,[25] and Baruch Spinoza published his *Ethics* (1677). The spirit of Paradise lost, Mother Nature, came to life; the law of nature and the will of God became *one*. According to Spinoza, God is the order of existence and man is only a form in the 'eternal relation of things' *(sub specie aeternitatis),* in the world of substances. 'All things are in God and move in God.'[26]

Science studies the order of nature, and in this order the freedom of man begins to turn into an *illusion*. As Spinoza put it: Man is as free as a discarded stone thinks

[22] The clergy became a repressive and ostentatious system of power. In Franco Zeffirelli's film classic (*Brother Sun, Sister Moon,* 1972) Saint Francis (Francesco) and his followers go to the Pope, who says: 'Once upon a time, I thought like you, but over time, my enthusiasm waned because the responsibility of governing the church took its place. . . . Power and wealth shall invade us, and ye shall be ashamed of your poverty. . . . Francesco, go in the name of our Lord Jesus Christ, proclaim the truth everywhere.'

[23] The analysis relies on Durant, *The Story of Philosophy*.

[24] 'I had rather believe all the fables in the Legend, and the Talmud and the Alcoran, than that this universal frame is without a mind. And therefore God never wrought miracle to convince atheism, because his ordinary works convince it. It is true, that a little philosophy inclineth man's mind to atheism, but depth in philosophy bringeth men's minds about to religion.' Francis Bacon, *Essays* (London: Samuel Mearne, Henry Herringman, 1680), 56.

[25] Isaac Newton, *Philosophiae Naturalis Principia Mathematica* (London, Royal Society, 1686).

[26] Benedict de Spinoza, 'Letter 21 (73)', in Benedict de Spinoza, *Chief Works*. Transl. by Robert HM Elwes (London: George Bell and Sons, 1901), vol 2, 211.

it controls its own trajectory.[27] Spinoza's God gives neither good nor bad direction to human action. Man can thus have an aspiration, 'the pursuit of understanding'. It is the first and only foundation of virtue that grants him freedom, 'the action of discernment'. To do so is to recognise and rid ourselves of the individualism of instincts, and at the same time to recognise the forms of eternity in our existence.[28] Spinoza laid the foundations of *scientific determinism,* that is, the determination of the will. This would become the *axiom of modernity,* and at the same time the basis of liberation for modern psychology by the 'awareness' of determinism.[29]

At the dawn of our era (eighteenth century) came the 'freest man' of Europe, the eternally exiled Voltaire. He preached with much greater impact than his predecessors on the liberation of the human spirit. '[D]estroy the insipid declamations, the miserable sophistries, the lying history, . . . the absurdities without number; do not let those who have sense be subjected to those who have none!'[30] Superstition and ignorance annoyed him: 'A fanaticism composed of superstition and ignorance has been the sickness of all the centuries.'[31] He idealised freedom: 'To be free is to be subject to nothing but the laws',[32] or 'By what right could a being created free force another to think like himself?'[33] He fought against church tyranny and hypocrisy, but saw God as a useful principle for explaining the world, in the same way as the laws of physics could. 'If it is very presumptuous to divine what He is, and why He has made everything that exists, so it seems to me very presumptuous to deny that He exists.'[34] He also considered religion necessary,[35] yet he replaced divine certainty with the basic position of doubt and the search for meaning. 'Doubt is not a very agreeable state, but certainty is a ridiculous one', he opined.[36]

The religious world, which sought to break out of religious wars, ecclesiastical arbitrariness and the mire of theology, sought a religion that could be built on reason (rationalism) and natural laws (pantheism). The deism of Jean Bodin and Bacon was a renaissance of the pre-Christian worship of nature. The existence of God, moral

[27] '[W]e are tossed about by external causes in many ways, and like waves driven by contrary winds, we waver and are unconscious of the issue and our fate.' Quoting Spinoza, Durant, *The Story of Philosophy*, 200.

[28] Ibid. 190–198.

[29] Recognition of determinism as a way of awakening to consciousness; two basic works, Arthur Koestler, *The Ghost in the Machine* (London: Hutchinson, 1967); Erich Fromm, Daisetz T Suzuki and Richard De Martino, *Zen Buddhism and Psychoanalysis* (New York: Harper, 1960).

[30] Quoting Voltaire, Durant, *The Story of Philosophy,* 259.

[31] Ibid.

[32] Ibid. 268.

[33] Ibid. 259.

[34] Ibid. 262.

[35] '[I]f there is a hamlet, to be good it must have a religion.' Ibid. 264. He was a theist; as he wrote, a man firmly persuaded of the existence of a supreme being as good as he is powerful, who has formed all things.' Ibid. 265.

[36] Ibid. 266.

responsibility, freedom and the soul as an eternal law remain, but God does not create a personal relationship with man, even though he is present in every element of existence. In deism, God *creates* but does *not act,* and theology is replaced by Stoic philosophy, which we see reborn in the thoughts of Voltaire, Denis Diderot, Jean-Jacques Rousseau, Auguste Comte, Kant, Gotthold E Lessing or Benjamin Franklin. While deism rejected theology and scholastic dogmas, it revered the moral teachings of Jesus. Jesus's teachings on freedom about the right degree of freedom between man and community, about the path of love and the divine intellect, were, at least, allowed to remain in the temples.

The omnipotence of human reason, the beauty of doubt and the power of science were cemented by the last genius of the eighteenth century. A tiny Prussian, a grey and boring professor from Königsberg who was misunderstood by almost everyone; that's why they named their dog Immanuel Kant after him. The philosophy and science of the nineteenth and twentieth centuries were based on the thinking of Kant. For him, Eastern philosophy touches on Western thinking.[37] According to his philosophy, God cannot be *proved* by reason, God is the *(a priori)* law living in us. The teachings of Jesus were also confirmed in Kant's theorems. The idea of Jesus's freedom concerns the moral law living in man, and Kant also idealised this community. Although the dogmas of theology and the ideals based on them are demolished in Kant's works, personal faith and religion were exalted. According to Heinrich Heine, Kant 'killed God'. In fact, Kant saved God, the true religion and the teachings of Jesus – although not for the church, but for philosophy.

Voltaire and Kant considered atheists re-liberated and regarded the teachings of Jesus profaned in their thought as an inner commandment. The 'new Christianity' of the era was deism, which laid the foundations for the further triumph of science and of the ideal of individual choice (the liberal paradigm). The deism and pantheism of the philosophers represented the basis of *human rights,* an idea which was born in the late eighteenth century. This philosophy of religion laid the foundations for the European revolutions, declarations of fundamental rights and the first constitutions,

[37] Absolute freedom was fulfilled by Kant. He said that what man and his great philosophers and scientists had thought and believed to be reality so far was merely the appearance of perception. The exalted human intellect is deceptive; that which we consider to be proved is mere assumption. Our intellect moves within the limits of sensual perception. This is true for freedom, for God, for good and evil alike. This scepticism is also true for science until we come to 'pure' reason. We do not know the absolute truth through our senses, only without sensual experience. We must reveal the immanent, *a priori* moral principles living in our inner self, born with us, which are categorical laws, imperatives like mathematics. Pure reason is also practical reason. Freedom is a categorical imperative that we cannot prove with theoretical reason, but in the moment of crisis we feel the unconditional command of freedom living within us. See Immanuel Kant, *Critique of Pure Reason* (Cambridge: Cambridge University Press, 1999); Immanuel Kant, *Critique of Practical Reason* (Cambridge: Cambridge University Press, 2015).

the fruits of the *Enlightenment*. The human spirit, the laws of nature, and the search for truth became components of the evolving moral philosophy of freedom. The social influence of the Christian religion weakened; *the cult of human dignity* and *perfection* was unstoppable.

V The phenomenon of Christian freedom

The freedom to be found in the teachings of Jesus is a hiding place that appears only fleetingly in history. In these teachings man found the lost paradisiacal freedom, escaped the bondage of guilt, and sought the right degree of freedom in relation to the individual and the community. This aspiration also appeared in the human rights declarations of the eighteenth and nineteenth century. The tragedy of the search for freedom was memorialised in the grand inquisitor scene in Fyodor Dostoevsky's *The Brothers Karamazov,* which is an eternal symbol of the fact that the preacher of freedom is always crucified.[38] Original sin is always repeated, from the expulsion from Paradise to the Crucifixion of the Saviour, right through to the burning at the stake of martyrs and scientists. What explains this? Do we not allow the promoter of freedom to do truth and good to 'deprive' us of our freedom to commit evil? Do we cling to our freedom out of sin and ignorance? Do we insist that we remain free to give up our freedom only to give it to the great inquisitors who promise security? Do we like to live in the bondage of our little addictions, to lock ourselves in the pockets of our ego, to live in ignorance and superficiality, to 'spin', that is, to have fun on the bars from here?

In the lair of freedom, the clear message of Jesus's teachings still sparkled, even in the nineteenth century with the exile of religion. Jesus also spoke when something 'ended' in the 'human landscape' and something new began (Sándor Márai). New worlds were built; the Constitution of the United States of America (1787) and the Declaration of Human and Civil Rights (1789) appeared. There were the revelations of the *ideal benchmark* of freedom between the sovereign national

[38] In Dostoevsky's novel, Jesus Christ arrives in sixteenth-century Seville, and is imprisoned as a heretic by the Grand Inquisitor. Beaten in handcuffs, the Saviour listens silently to the monologue of the Grand Inquisitor, the epitome of earthly power. 'Thou wouldst go into the world, and art going with empty hands, with some promise of freedom which men in their simplicity and their natural unruliness cannot even understand, which they fear and dread – for nothing has ever been more insupportable for a man and a human society than freedom. . . . So long as man remains free he strives for nothing so incessantly and so painfully as to find some one to worship. But man seeks to worship what is established beyond dispute, so that all men would agree at once to worship it. For these pitiful creatures are concerned not only to find what one or the other can worship, but to find something that all would believe in and worship; what is essential is that all may be together in it. This craving for community of worship is the chief misery of every man individually and of all humanity from the beginning of time.' Fyodor Dostoevsky, *The Brothers Karamazov*. Transl. by Constance Garnett (New York: Lowell), 278–279.

community and sovereign man. The *ideal of freedom* and a *new ideal of community* met in humanism. The tradition of humanism is often associated with the Christian religion.[39] According to this view, humanism and human rights are based on the idea of Christianity, which has given the human soul an inalienable dignity. From this arises the equal dignity and freedom of man – the secular doctrine of equality. Within Christianity, the Reformation initiated a turn towards humanism with a critique of the authority of the institutions of ecclesiastical and temporal power.

The individualism awakened by the Renaissance and science received a decisive impetus in the Reformation, and a personal faith gave dignity to the individual: It was able to resist tyranny.[40] In my opinion, Christianity is no more humanistic than the history of philosophy from Socrates to Kant, the art of the Renaissance, the philosophy of science of Francis Bacon or the life of Voltaire. The eighteenth and nineteenth century ideal of freedom is built on the preceding three hundred years of *deist, pantheist and rationalist philosophy* just as much as it is *on Christianity*. Since it confronted Christian ecclesiastical authority, the new ideal of freedom emerged on a *secular,* that is, on a non-religious basis. The change of era means that European culture, after the era of the divine age and the heroic rebellion, arrived at the era of *people-centredness* (Arnold Toynbee).[41] On the new foundation of modernity and human rights, the long nineteenth century saw the rise of the great paradigm of *liberalism* and the ideal of *natural law,* while the short twentieth century spawned the *positivism* of public law and international law. The new ideals solidified *into a totem* and moved on towards their self-destructive destiny.[42] The scepticism of science, meanwhile, subtly mocked the eternal truths of the Christian religion. The revolution of industry and money sought new community organising *idols,* which became a fatal and devastating *passion for age* over time. The Christian religion fell into decline. The concealed sanctuary of Christian freedom disappeared under the new superstructures.

The European corpus of Christianity began to disintegrate, starting from the Reformation, with the formation of *national languages* and *national cultures* and the aspiration of 'national freedom' as a new ideal. Migration begins in Europe as a result of industrialisation (*Gemeinschaft* turns into *Gesellschaft*). A migrant worker separated from his small community must find a common identity and language in

[39] Oskar Halecki, *The Millennium of Europe* (Notre Dame, IN: University of Notre Dame Press, 1963).

[40] István Bibó analyses why it would not have been possible to limit the exercise of political power to moral limits without the theology of Saint Augustine and Saint Thomas. The Christian ideal is given a pattern, the tyrannus may be judged; this inspires the movement of group freedoms *(libertas)* as privileges and rights, from which individual rights develop. István Bibó, *Az államhatalmak elválasztása* (Budapest: Argumentum, 2011), 311–313.

[41] János Gyurgyák, *Európa alkonya?* (Budapest: Osiris, 2018), 94–102, referenced by Arnold Toynbee, *A Study of History* (Oxford: Oxford University Press, 1934–1961).

[42] András Zs Varga, *Eszményből bálvány?* (Budapest: Századvég, 2015).

the cities, and this will be the driving force of the national culture.[43] While Europe is being fragmented by national forces and revolutions, Christianity continues to pass down the idea of *universality* into legal systems ('all men are created equal'). The exclusionary instinct, entwined with *national identity,* however, had already undermined the idea of the *universality of human rights* at its birth. By the end of the twentieth century, the development of human rights had become detached from the Christian ideal of community. The social organising and value-preserving potential of Christianity also continued to weaken. The nineteenth and the twentieth centuries were an era of great social and political attempts at secularisation.

VI An attempt at secularisation

From the nineteenth century onwards, the Christian religion weakened in Europe and North America, and later in large areas of South America, to varying degrees, as a *community-building force;* religion became a private matter. The new ideals were the rational and moral laws and the human freedoms based on them, with freedom of speech at their forefront;[44] they formed the new ethos of community building. Without the Christian God and religion, for one and a half thousand years no one had built a strong community *(societas perfecta)* in Europe. Exiting the common belief system, the individual became agnostic and sceptical, became stoic, and eventually bargained away his freedom to Dostoevsky's grand inquisitor in exchange for security. Can you find better answers than Christianity to the purpose and meaning of the life of the human community? Science raised doubts. This marked the beginning of the attempt at secularisation in the nineteenth century.

While the community sought new common ideals, politics offered new legitimising ideas. The spells of *money, wealth* and *political ideologies* also tried to crowd the Christian mystery out of the lives of the community and the individual. *New philosophies and human rights* became the basis of the new secularised morality. The national constitutions, the social contract, popular sovereignty, the will of the people and the choice of the individual and the political rights based on it became the new community-building and legitimising institutions. The free choice of the individual created political power (liberalism), a way of life (individualism) and an economy (capitalism). This *secular ideological trilogy,* based on *individual freedom,* replaced the *Holy Trinity*. The peoples of Europe fall under the spell of the carnival of dogmatic worldviews and the Magic Mountain (Thomas Mann). In previous centuries, the search for lasting bonds of common culture, and for harmony steered communities toward Christianity. In contrast, new ideologies seek the political and economic fulfilment of individual freedom. Science and its philosophies have awakened the

[43] Francis Fukuyama, *Identity* (New York: Picador, Farrar, Straus and Giroux, 2018), 59–74.
[44] András Koltay, *Tíz tanulmány a szólásszabadságról* (Budapest: Wolters Kluwer, 2018), 9–14.

'Faustian' spirit of Western culture: An eternally seeking, doubting, power-minded, purposeful, intolerant and hedonistic spirit.[45]

The alliance of both capitalism and science seeks the secret of development in the *material,* and explains human life by material phenomena. *Materialism* persecutes the transcendent and spiritual responses of religion. The origin of moral norms is sought in man, in his *a priori* imperatives (Kant). The process of disunion begins: Philosophy and law *humanise*, seeking the meaning in life, while science *dehumanises*, that is, *naturalises*. The quest for meaning of life is conquered by *determinism*, a science that questions free will. The naturalism of biology (biochemistry) and psychology, and then psychoanalysis, mechanise (rationalise) man and life, or to use another word, demystify them.[46] By the end of the nineteenth century, Charles Darwin's theory of *evolution* had also embarked on its journey of conquest (1859).[47] According to this hypothesis, human life has no purpose and meaning. We are the products of natural selection, adaptive mutations; there are strange living things on our family trees, and we are related to eukaryotes and even prokaryotes. There is no creation and we are not the crowning achievement of creation. It would render us mere groups of living beings, struggling to survive and reproduce, sometimes battling with microorganisms and viruses. The science of anthropology forms the superstructure. Man becomes subject to 'naked' instinct; Sigmund Freud claimed to be motivated by sexuality, Friedrich Nietzsche by a will to power. The world is the will of the individual (Arthur Schopenhauer), that is, ultimately Nothing.[48] A propensity for Romantic *pessimism* (spleen) and *nihilism* begins to dominate the thinking of the Western world. Science continues to build up the Newtonian system, and everything can be explained by mathematics and the laws of the four forces (gravity, electromagnetism, strong and weak bonding). However, one is increasingly missing from the theory of *universality:* God.

The centuries-old scaffolding of Christianity is strained but still stands. Thoughts of philosophy continue to revolve around God: Streams of deism, pantheism, agnosticism, relativism and atheism collide and extinguish each other. New ideological forces are emerging: atheistic socialism, Marxism and communism.

[45] The Faustian spirit of the West, the Faustian man and the symbolism of autumn are the basic ideas of Oswald Spengler's work, *The Decline of the West* (New York: Alfred A Knopf, 1926).

[46] According to Christian thought, 'it is not possible to understand the spirit from nature, but nature can be understood from the spirit. . . . The self-sustaining tendency of man as a natural being does not coincide with the line of development of man as a spiritual being. . . . [T]he nature is contrary to the requirements of superiority to it.' László Ravasz, *Kicsoda az ember?* (Budapest: BRKIE, 1918), 39–44.

[47] Charles Darwin, *On the Origin of Species* (London: John Murray, 1859).

[48] The last sentence of the first volume: '[F]or those in whom the will has turned and negated itself, this world of ours which is so very real with all its suns and galaxies is – nothing.' Arthur Schopenhauer, *The World as Will and Representation*. Ed. and transl. by Judith Norman, Alistair Welchman and Christopher Janaway (Cambridge: Cambridge University Press, 2010), 439.

New socialist elites are conquering new social ideas, national socialism, fascism and Soviet collectivism. Science reinforces the doubts besieging man with new theories. According to quantum physics, the physical laws of our world do not work in the world of atoms; that is, there is no absolute status. The theory of relativity is born, according to which we ripple in the infinite fabric of space–time. The darkness around man is deepening and billions of galaxies are discovered besides our own (1923, discovery of Edwin Hubble).

Barely a hundred years after the beginning of the attempt at secularisation, by the twentieth century, the literature of the *decline of the West* emerges: declinism, the ideology of the world crisis, the art of decadence.[49]At the end of the Great War, Oswald Spengler announced the Decline of the West (1918), and the post-World War II era is shaped by the work of Eliot on the decline of *culture*.[50] Science, which had become increasingly ideologically charged *(scientificism),* still could not give meaning to human life and human freedom, only deepening the doubts. Agnostic and atheist Europe sought ideals in both Eastern cultures and Islam. This corrupt atheist world is punished by Mikhail Bulgakov in his novel *The Master and Margarita*; Woland is the antihero of the Christian world. The archetype and communal ethos of the Christian religion had become a subconscious image, an archetype re-mystified. World War II pushed Western culture into moral misery. The experience suggests that after the extermination or weakening of the Christian tradition, the 'moral' dictatorship of a power elite always builds a community myth. In the end, these ideologies always crippled the community and failed. In Europe, worldviews and ideas are, in fact, a history of delusions (Hamvas). The ideologies summoned up by secularisation are the Faustian antitheses of Christianity. According to Hegelian dialectics, history combines thesis and antithesis in synthesis. However, the synthesis became an increasingly distant prospect: World War II is followed by half a century of the Cold War of two ideologies.

Entering the twenty-first century, the man of Western culture is beginning to turn away from failed ideological experiments. *Liberalism* and *individualism* have also turned into a rigid ideology, a totem, and strike one as less and less credible as a social ideal, becoming instead a servant of consumer and political culture. The fallen paradigms make the spirituality of the *national community* seem to be a suspicious, bad-faith ideology. However, communities are beginning to rediscover their *national culture,* based on national language and traditions, and

[49] Arthur Hermann, *The Idea of Decline in Western History* (New York: Free Press, 1997); Béla Hamvas, *A világválság* (Budapest: Magvető, 1983).

[50] Thomas S Eliot, *Notes Towards the Definition of Culture*. Ed. by Jewel Spears Brooker (Cambridge: Cambridge University Press, 2004). Culture is something that 'makes life worth living', and that has an unbroken bond with religion. Culture is self-limiting in the community, just as religion sets common boundaries.

national identity as a community-building force. The historical trap of nationalism represents a real danger if the collective instincts of national arrogance, exclusion or ethnic hostility awaken. The ancient basic feeling is still the fear that, along with disillusionment, flows into the internet's ocean of communication and gives birth to the postmodern age. The postmodern type of man is a man of the crowd, indifferent to social ideologies, politics and worldviews, an egocentric individual. In contrast to the postmodern thesis, (national) traditionality is an antithesis that seeks 'natural' community roots, including the Christian religion. Christian denominations in former communist countries and Orthodox Christianity in Russia are gaining strength. In the United States, secularisation, which separates religion and political life, is increasingly a mere constitutional-public law theorem. In the United States, the Christian religiosity (of the vast majority) of society is strong, and for two hundred years, Christianity has been, and still is, the most important idea and ideal for the diverse immigrant community that makes up the United States.[51]

As the foundations of secularisation are weakening, so the institution of human rights has also rusted. Even the theory of human rights, rooted in natural law, expresses a theorem that has not changed in the last two hundred years: Legal norms and their dogmatics are in fact 'legal forms', the content of which is determined by the culture (nature) of a particular people or country. Europe and North America at the end of the eighteenth century were still influenced by a culture based on the Christian religion in a relatively uniform order. If a European or international court had existed at the time, a uniform conception of law between countries and peoples, resting on the cultural foundations of the Christian religion would have been accepted relatively easily. Since then, secularisation has driven national cultures apart through a kind of centrifugal force. *Culturally dependent diversity* and the derogation of human rights are increasing. This does not necessarily imply cultural differences between countries in Europe, but rather the *difference* between a Christian or non-Christian approach.

Will the experiment of a secularised society fail in the coming decades? Are neutral societies losing their viability? What could the twenty-first century 'synthesis' look like, that follows the thesis of Christianity and the antithesis of secularisation? What are the signs that the communities of Western culture, guided in part by a group survival instinct, are finding a modern or postmodern form of the Christian religion? Nearly five hundred years ago, secularisation began with a conflict between 'lame' science, opposing religion, and 'blind' Christianity, attacking science. The answer is perhaps in Einstein's metaphor; that is, we need to assess the status of science.

[51] Richard Dawkins, *The God Delusion* (New York: Bantam, 2006), 43–46. He evaluates how difficult it is to cope in American society as an atheist.

VII How far has 'lame' science come?

The scholars who initiated secularisation (from the thirteenth to the nineteenth centuries), although Christian, held deist or pantheistic ideas of God. Darwin,[52] Lord Kelvin (William Thomson), Michael Faraday and James Clerk Maxwell were religious, but from Voltaire through Einstein to Stephen Hawking, God is present at the end of the scientific theories, though it is more a form of poetic naturalism (the creator of the laws of nature) and not a belief in a supernatural intelligence or the afterlife of the soul. The God of Spinoza is synonymous with the laws governing the operation of Nature or the Universe; in the words of Einstein: 'I do not believe in a personal God. . . . If something is in me which can be called religious then it is the unbounded admiration for the structure of the world so far as our science can reveal it.'[53]

Some describe God as a 'mathematician', some as a 'biologist'.[54] In their deism, God is the source of the natural, mathematical, and even moral laws that govern the universe. The greats of science, then, usually arrived at a belief in a higher intelligence that created the world. Many scientists 'believe in faith', and quantum physics is looking for the 'divine particle'. However, scientific deism could not weaken the power of science, especially the agnosticism (the expression of Thomas Huxley) and atheism of neo-Darwinian views.[55] Science, to paraphrase Einstein, has always remained somewhat lame. The basis of secularisation is the hope that science can provide human communities with answers to the origin, meaning and purpose of life that *will be better* than the teachings of the Christian religion. It was a hope that the answers of science would furnish us with new truths, on which social communities would be strong, moral and prosperous. The road was a sceptical, agnostic or atheistic search for truth that shook off religious authority and its dogmas. In response, religion has also created its own anti-evolutionary 'science of creation' – the teachings of *creationism and intelligent design*.[56] Science must, then, also undertake, according to Richard Dawkins, to make a statement about the likelihood of a hypothesis of God: Science *cannot be agnostic,* only *atheist:* 'The presence or absence of a creative super-intelligence is unequivocally a scientific question.'[57]

Science, then, is sometimes lame, it sometimes limps, and sometimes its practitioners recognise its limitations and turn to God. The laws of entropy, evolution

[52] In the last years of his life, Darwin wrote to John Fordyce in a letter (1879): 'In my most extreme fluctuations I have never been an atheist in the sense of denying the existence of a God. I think that generally (and more and more so as I grow older) but not always, that an agnostic would be the most correct description of my state of mind.' Charles Darwin, *To John Fordyce* (7 May 1879).

[53] Dawkins, *The God Delusion,* 15.

[54] Francis S Collins, *The Language of God* (New York: Free Press, 2006). Collins was the leader of the Human Genome project in the USA.

[55] James Haught, *2000 Years of Disbelief: Famous People with the Courage to Doubt* (Amherst, MA: Prometheus, 1996).

[56] Richard Dawkins, *The Blind Watchmaker* (New York: Norton, 1986).

[57] Dawkins, *The God Delusion,* 58–59.

and information became the three pillars of scientific doubt that destroy tradition. Science has come a long way, on the issues of the human genome, the map of the universe, particle physics, the physics of black holes and many other questions in nature. Nevertheless, science is not able to reproduce the origin of life biologically, and it sees life only as a 'consequence of a peculiarity and structure of matter'.[58] Science derives biological evolution from chemical evolution, examining only life phenomena, but has no answer to *the meaning of life* and *its purpose*. Science has also become guilty of mass destruction, of wars, overpopulation, mass production, destroying nature and bioethical risks.

The centuries-old tragedy of the struggle between science and religion is beginning to be recognised by both camps. Science recognises that cognition is constrained; it cannot provide reassuring answers to the eternal questions of the human soul and uncertainty. Man cannot build a lasting and strong community without a common religion; that is, it takes faith to provide the answers to the dangers around him and to the tormenting questions of life (Why do I live?). Faith that gives transcendent answers must shine in the dim corners of human knowledge and the soul. *Religion* recognises the power of knowledge and the importance of seeking the truth of the intellect, in addition to faith. In the 1950s, Pope Pius XII called evolution an explainable scientific approach to human development, and this was repeated by Pope Saint John Paul II in 1996. In 2011, Pope Benedict XVI affirmed that scientific theories that explain the origins and development of people and the world are not at odds with religion, but leave many questions unanswered. At a meeting of the Pontifical Academy of Sciences maintained by the Holy See in 2014, Pope Francis stated that scientific explanations for the origin of the world did not preclude God's role in creation. The differences between the scientific conception based on the theory of evolution and the Christian religion seem less and less related to the conflict between reason and irrational faith: Both are equally ranked, faith or hypothesis (in the language of science). Evolutionary theory is also ultimately based on faith, as it has no explanation for either the beginning of biological life or the purpose of biological complexity. Scientists like Francis Collins or even brain researcher Tamás Freund argue for Faith, when reaching the limits of complexity and cognition.[59] Ultimately, science also becomes a matter of *faith*. This leads to the realisation that man needs religion and science alike. The desire to believe and the desire to know are not mutually exclusive. The lame (science) and the blind (religion) can heal their afflictions together.

The lesson of the last two hundred years is also that, just as secularised ideals of freedom or political ideologies were not able to, neither can science become a *community building* and *community retention force*. Religious tradition as a community-building force and the primordial image of the community cannot be replaced forever. Transcendent divine truths, whether combined with pantheistic or universal

[58] Albert Szent-Györgyi, *Az őrült majom* (Budapest: MKLK, 2014), 23.
[59] Collins, *The Language of God,* 18.

philosophy, offer man a refuge of community, of common faith, in the solitude of individual freedom, in the indifference of society and in the savagery of nature. After two hundred years of desperate searching for a road, can the rebirth of the Christian religion be the way out of the crisis of Western man? Perhaps, but from what crisis? And what kind of Christianity?

VIII The decline of the post-Christian West, or Christian society?

The crisis philosophy and crisis literature of the last century are products of the 'emptiness' and moral misery experienced in the place of Christian religious communities.[60] World wars and genocides are demonstrations of the failure of fallen political ideologies (fascism, nationalism and communism). Nor can science help the human soul and the ethos of community in existential and ontological darkness, burdening it instead with additional doubts. Nature is deaf, the cosmos is brittle and empty, we are just developed animals, and there is no eternal life waiting for us. This is what human science has been able to come up with. 'God is dead. . . . And we have killed him'[61] – Nietzsche put it this way that ideologies built in place of deism lead to a world of nothingness, without any value. Nietzsche also held Christianity responsible for the death of deism, but saw the teachings of Jesus as a guide. However, the natural god of deism, although not 'dead', was hardly a suitable ideal for giving man a community-building value and strength.

According to the philosophy of history of Spengler, the emblematic harbinger of the crisis, the decline and fate of Western culture is inevitable. Thriving s are religious, while declining civilisations are non-religious. The agony of the Faustian spirit of Western culture was brought about by the will to power, the constant longing, the pursuit for new businesses and the constant 'struggle'.[62] The decline began with the secularisation of the nineteenth century, with the triumph of the unreligious man of the crowd, the rule of money and the cult of unlimited freedom. The West is being led to its doom by the philosophies of political ideologies, materialism, the relativism of science, scepticism and pessimism. According to Spengler's vision, by the twenty-first century, the nations of Western culture will begin to disintegrate and become shapeless cosmopolitan masses, in response to which politics will become despotic. Giambattista Vico, one of Spengler's sources of inspiration, distinguished three stages in the history of nations and cultures, the divine (Christianity), the heroic (revolution, ideologies, and science) and finally the human stage.[63]

[60] Hamvas, *A világválság;* Steven Pinker, *Enlightenment Now* (New York: Viking, 2018), pt I, ch. 3.
[61] Friedrich Nietzsche, *A Gay Science*. Ed. by Bernard Williams (Cambridge: Cambridge University Press, 2001), 120.
[62] Gyurgyák analyses Spengler's philosophy, see Gyurgyák, *Európa alkonya?*, 71–80.
[63] Giambattista Vico, *The New Science* (New Haven, CT: Yale University Press, 2020).

According to the philosophies of the crisis, in the postmodern Western world, the great community-forming worldviews will ultimately fail. The total diversity of individuals, with their neutral, virtual communities will become an ideal. Transcendent religion (Christianity) is no longer able to recreate true communities. In the post-Christian world, the influx of Islamic and atheist migration will also devour the remnants of Western tradition. Virtual communities on the World Wide Web do not need common ideals. Moreover, the common questions of existence do not preoccupy a person floating in the intoxication of endless strings of relationships and an infinite world of information. Postmodernity is also destroying the last forces of religion. Science does not provide ideals either; it escapes the life phenomena of the microworld and the universe. The last effort of politics is to rebuild communities with a *conservative turn* – the ideology of national identity, the revival of national traditions.

The big question is, can there be a real reversal of the decline; that is, is there still a mass demand for the answers of transcendent religion? By shaping Vico's civilisation life cycles into circular form, can it happen that after the divine, heroic and human phase, the circle continues with another cycle of divine civilisation? What can happen at the gridlock of today's civilisation? Hellenism, the peoples of the Roman Empire, and the Jewish people two thousand years ago were at a similarly critical historical moment. Jesus was born in the age of decadence and of the wait for the end of the world. With Christianity, the divine phase of pre-modern Western culture, the liberation of man, the gospel of freedom, began. Is there still an opportunity in human freedom today to avoid doom, according to the Spenglerian logic of history? Toynbee believes that we are in a cycle of decline, but that the historical power of higher religion should not be underestimated. However, he saw the source of the turnaround not in the renaissance of the Christian religion but in a new world civilisation.[64]

To begin to answer these questions, it is important to note that, in the European Union, 71.6 per cent of the population profess to belong to a Christian denomination (2015), this figure was 69.6 per cent in 2018 (Eurobarometer), 72 per cent in the United States of America (Gallup, 2017), 67.3 per cent in Canada, and nearly 75 per cent in Russia (World Atlas). In Hungary, 74.6 per cent (2015, Eurobarometer) claim to belong to a Christian denomination. According to some of the historians quoted above (for example, Oskar Halecki, Toynbee or Spengler), the foundation of a civilisation has always been fundamentally religious. The religious tradition of the West is Christianity and Hellenism, the Renaissance and, in part, the pantheistic deism pursued by science. For one and a half thousand years, the *Corpus Christianum* was the binding force of the peoples of Europe, and even an indispensable part of Western culture.[65] If the transcendent beliefs of Christian teaching do not serve to organise the community then Western culture may indeed disappear. Could it be that two centuries of secularisation and science were merely a detour from the spiritual mainstream of the Christian religion?

[64] See Gyurgyák, *Európa alkonya?*, 97.
[65] Fernand Braudel, *A History of Civilisations* (London: Penguin, 1995).

In replying to this, *scientific hypotheses* can also help. At the individual level, the natural selection laws of evolution hardly work in solidarity or in social societies. However, the group-level evolutionary struggle, that is, the struggle for survival between communities, ethnicities and nations (group selection), is fierce. This is shown today by the political war and urge for national defence sparked by mass migration. Throughout history, in the group selection struggle, the survival of a people has largely depended on the communal power of religion. Will these national and community instincts be revived? Do they consider the Christian religion a viable strategy for community building and self-defence? From politics to small communities, many countries are already following this path. In these countries, the community-building ideologies of the secularised social experiment are turning to dust.

The secular foundations of the Enlightenment, such as human rights, the rule of law, liberalism and even liberal democracy, are slowly coming into conflict with the values of Christianity and national tradition. The secular products of liberalism find no breeding ground in policies based on national identity and tradition, in Christianity, or in the postmodern culture of diversity. Similarly, the capitalism of money and global capital is clashing with the movements of local value communities. Political ideologies and even social diversity are being devalued. The crisis of the EU's *ever-closer integration* idea is explained in part by its continued search for community-building power in human rights, money and other secularised ideals. In contrast, Christianity, which is the only common spiritual root of Western communities, is rejected. As secularised ideas weaken, so will the EU.[66]

After two hundred years, the thesis of secularisation is again confronted with the thesis of Christianity. On the one hand, the evolutionary instinct of community survival has been awakened by the secular global society, and on the other hand, the instinct of community self-protection is coming to life, from Europe to the USA in self-defence against other religions, such as Islam. The confrontations that underlie secularisation, the opposition of Reason and Faith and the conflict between science and religion, have smoothed out over two hundred years. The chances for Christianity have strengthened; the search for a transcendent ideal, in place of the doubts of life, the wish for certainty of existence and the instinct of belonging to the community also direct the postmodern man towards the ideals of religion. However, the Christian tradition cannot revive on its own. There is no doubt that two thousand years ago, without the exceptional conversion work of Paul the Apostle, and then without the effective institutional system of the Church, Christianity would not have become the world religion that formed the basis of Western culture. However, the postmodern man lives in virtual dimensions that neither apostles nor the church can reach. He builds a community on the World Wide Web, seeks validation in virtual exhibitionism, and searches for a flood of

[66] Gyurgyák, *Európa alkonya?*, 141–197.

information in which the truth is like a needle in a haystack. In his life, dependent on artificial intelligence and robots, he is unable to cope with the destruction of nature, and he also flees from the ancient questions of existence. He is a post-Christian man who is already beyond the community-building attempts of church and politics. He lives in a tense space between the attractions of the global world and national identity, and is sceptical of political ideologies. Instead, he believes in the exciting vision of science and technology, dissolving into the colourful virtuality of the World Wide Web. The magic of machine algorithms gives man the experience of transcendence, drifting with excitement towards the world of transhumanity.[67] Science and technology present man on the World Wide Web with a picture of a fictional-fantastic future, so man is blinded by the *hybris* of his own omnipotence.[68]

The picture and vision we can draw of the future today, although different from country to country, is moving towards unity. In the two hundred years since the secular founding in the USA, during social secularisation, and sometimes even against it, the Christian religious foundation has evolved, and politics and the judiciary have at times openly or covertly based their value judgements on Christian theism. Recent developments in the USA, Poland, Russia or Hungary, show that local communities are discovering the success and power of community-building that follows the national Christian ideal. Since the Reformation, Christianity has had to adapt to the peculiarities of national culture, national language and identity. In addition, it must be open to the hypotheses and deism of science, as well as to the hyperactive 'society' of the World Wide Web.

Eliot dreamed of a modern Christian society seven decades ago.[69] In his long poem *Waste Land,* seeing the moral misery of the twentieth century, he wondered how the norms of transcendent origin could be enforced more effectively in modern society. According to Eliot, for the individual, worldly prosperity has become the main, and even the only accepted goal. He sees this as a fundamentally emptied, 'negative' culture that is transformed into a pagan culture. In Christian society, the natural goal of man – virtue and prosperity in the community – is accepted by all, and the supernatural goal, salvation, would be the goal of those who have an eye for it'.[70] The 'Christianity' of the state is only a reflection of the Christianity of the society it governs. The 'Christian community' constitutes the basic moral rules derived from religion for society as a whole, that is, a 'unified code of religious conduct'.

[67] Ray Kurzweil, *The Singularity is Near* (New York: Viking, 2005).

[68] Yuval N Harari, *Homo Deus* (New York: Harper, 2017).

[69] Thomas S Eliot, *The Idea of a Christian Society and Other Writings* (London: Faber and Faber, 1982). His philosophy of society was primarily built on the work of the famous Catholic French philosopher Jacques Maritain, *True Humanism* (New York: Praeger, 1970). See also Gergely Egedy, 'Vallás és kultúra TS Eliot társadalomfilozófiájában, 1–2', *Magyar Szemle* 13, nos 9–10 and 11–12 (2006).

[70] Eliot, *The Idea of a Christian Society,* 62

At this point, Eliot's vision of a 'religious elite' may evoke disturbing historical and literary memories in many. However, the Nobel Price-winning poet himself rejected the uniformed man and culture. He saw a way out in National Christianity, warning that if it moved in a 'nationalist' direction, it would inevitably become a mere mouthpiece for the 'prejudices, passions and interests' of a nation.[71] Eliot's Christian culture is one in which each local culture is a variation, and common faith is the force that unites nations in a kind of utopian world culture.[72] Today, the strengthening of conservative politics, including national politics and national religious politics, may also be interpreted as part of this historical flow.[73] Conservatism recognises that the teachings of Jesus and the Christian principle of God can re-awaken faith in 'eternal truths', the search for a lost Paradise, and become a great communal force again with messages for the twenty-first century.

[71] Ibid. 76.

[72] Ibid. 88, 93.

[73] Ferenc Horkay Hörcher, *A Political Philosophy of Conservatism: Prudence, Moderation and Tradition* (London: Bloomsbury, 2020). According to Hörcher, conservatism can be the starting point for restoring the balance between society and nature, rethinking economic and social systems, and can be the dominant paradigm of the twenty-first century; András Lánczi, *Konzervatív kiáltvány* (Gödöllő: Attraktor, 2002).

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The Protection of Creation and Human Rights

Gyula Bándi

I Baseline

The starting point of the history of Christianity is the description of Creation in the Bible, as well as the subsequent tasks and messages for humanity. All of these are embodied in a Christian traditional order, some elements of which have been explained differently at different times – the change in perception of man's dominion over the created world, which is addressed below, is a good example of this. A Christian-spirited ecumenical European environmental organisation (European Christian Environmental Network) provides a clear summary of all this in its 2005 report:

> The Christian tradition is rich in its description of the human role and responsibility in relation to creation. We are called creatures, stewards, servants, prophets, kings, co-workers. We recognise the damage done by some notions of human dominion and domination in the past. We acknowledge God has given all human beings, created in the image and likeness of God (Genesis 1:28) . . . In the process of handling natural resources and turning them into human goods and services, we are taking of God's gifts in creation and accepting our responsibility for their transformation.[1]

In the Judeo–Christian tradition, the special relationship of humanity with the created world recurs as a fundamental issue.[2]

Christopher Weeramantry, then Vice-President of the International Court of Justice, raised a good example of environmental traditions appearing generally in religious beliefs in his dissenting opinion to the Gabčíkovo–Nagymaros Project judgment,[3] by comparing one of the fundamental principles of contemporary international environmental law with the ideas of another world religion, Buddhism:

> The notion of not causing harm to others and hence *sic utere tuo ut alienum non luedus* was a central notion of Buddhism. It translated well into environmental attitudes. *'Alienum'*

[1] European Christian Environmental Network, *The Churches' Contribution to a Sustainable Europe,* 2005.

[2] For example, a summary of this in the Jewish religion by Josie Lacey, *Environmental Ethics in Judaism,* 2006.

[3] Judgment of the International Court of Justice of 25 September 1997, dispute between Hungary and Slovakia, www.icj-cij.org/en/case/92/judgments.

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> in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.[4]

After listing several examples, it concludes: 'Traditional wisdom which inspired these ancient legal systems was able to handle such problems.'[5] The emphasis, unfortunately, is on the word 'was', because today this is far from true: Today the traditional philosophy to which the judge refers seems to be lacking within humanity.

Before embarking on a detailed discussion of the subject, let us highlight one more part of Weeramantry's dissenting opinion, this time referring to an outstandingly important element of the legal order and the practical functioning of society – *traditions:*

> There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific and Australia – in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.[6]

The most accessible such resource are our own roots of this kind, and it is no wonder that the International Court of Justice itself emphasised in this case: 'Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature.'[7]

Religious or other expectations and traditions have been decisive in this way throughout human history and have, for the most part, developed a harmonious relationship with nature and the environment – until recently. Although humanity has indeed intervened in the order of nature, its consequences have mostly been experienced locally; they did not affect the overall picture.

II Creation and the Bible

Taking Creation and the Bible as the starting point, arguments can then be built on these. Further details, in addition to the brief summary below, can be found

4 Ibid. Separate opinion of Vice-President Christopher Weeramantry.
5 Ibid.
6 Ibid.
7 Ibid.

in an article by Dinah Shelton, a renowned American professor of human rights; the following quote summarises this well: 'The overall message conveyed by the Bible is that nature is to be respected as part of God's creation, which man has no right to destroy.' [8]

The beginning, for Christians, is undoubtedly the Genesis,[9] which is well-known, and mostly a part of it relating to prehistory, with a description of the days of Creation. Without delving into the details of this, the order of creation deserves attention: (1) Day and night; (2) sky; (3) waters and land, plants; (4) the two lights (sun and moon); (5) living creatures, birds separately; (6) beasts, pets and man, in the image of God. '(1.28) And God blessed them. And God said to them, "Be fruitful and multiply and fill the earth and subdue it, and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth."' Several issues deserve special attention, namely the order of creation and the place of man, and thus the specific duality of man: He is dependent on the previous and parallel elements of Creation, but he has also been given dominion over them. The latter issue has become a stumbling block for many who do not understand the essence of it: For some readers, misunderstanding the word 'domination', the message is that nature must be subjugated and exploited, rather than respected and protected.

Returning to Creation, continuing now with Paradise, it is worth highlighting an important biblical message in response to the above misunderstanding: 'The Lord God took the man and put him in the garden of Eden to work it and keep it' (Genesis 2:15). This is a somewhat more precise reference to the proper meaning of the above concept of domination. Neither working nor taking care can be associated with exploitation or subjugation; on the contrary, it feels like a responsibility, to which papal messages have drawn attention in recent decades. Thus, there can no longer be any doubt that the reference in the Book of Genesis 1:28 to the dominion of man over nature means responsible custody, caring for those entrusted to him.

This was made clear by Pope Saint John Paul II in 1979, speaking at the same time about the wasteful management by man: 'Yet it was the Creator's will that man should communicate with nature as an intelligent and noble "master" and "guardian", and not as a heedless "exploiter" and "destroyer".' [10] Nor is there any doubt in the Book of Genesis, and elsewhere in the Old Testament, that the responsible guardian in question is all mankind, along with all generations and clans. The Lord said to Abraham: 'And all peoples on earth will be blessed through you' (Genenis 12:3).

[8] Dinah L Shelton, 'Nature in the Bible', *GWU Law School Public Law Research Paper* no 371 (2007), 15.

[9] In the present study, I quote the Holy Scripture based on the following source: https://tinyurl.com/da7skp5f.

[10] Pope John Paul II, *Redemptor hominis,* 1979, para 15.

A line from the Old Testament echoes this: 'Now choose life, so that you and your children may live' (Deuteronomy 30:19). These messages and quite a few other references make it clear that the creation of man – in fact, the creation of mankind – means the continuity of human generations. *Gaudium et spes* had left no room for doubt about this a decade and a half earlier:

> God intended the earth, with everything contained in it, for the use of all human beings and peoples. Thus, under the leadership of justice and in the company of charity, created goods should be in abundance for all in like manner. . . . In using them, therefore, man should regard the external things that he legitimately possesses not only as his own but also as common in the sense that they should be able to benefit not only him but also others.[11]

Pope Saint John Paul II, commenting in his centenary encyclical re-reading of the *Rerum novarum,*[12] put it even more clearly: 'God gave the earth to the whole human race for the sustenance of all its members, without excluding or favouring anyone. This is the foundation of the universal destination of the earth's goods.'[13]

Turning back to the Book of Genesis, the story of Noah may be taken as further substantiation, because from this it will also be understood that, unlike the arrogant supremacy of man today, no creature was considered superfluous or unnecessary:

> (7:1) The Lord then said to Noah: 'Go into the ark, you and your whole family, because I have found you righteous in this generation. (2) Take with you seven pairs of every kind of clean animal, a male and its mate, and one pair of every kind of unclean animal, a male and its mate, (3) and also seven pairs of every kind of bird, male and female, to keep their various kinds alive throughout the earth.'

Moreover, the Bible in general also gives a number of other important pointers, in connection with the Book of Genesis's message of cultivation and preservation. An example in Deuteronomy conveys this respect and reasonable protection of nature: '(22:6) If you come across a bird's nest beside the road, either in a tree or on the ground, and the mother is sitting on the young or on the eggs, do not take the mother with the young. (7) You may take the young, but be sure to let the mother go, so that it may go well with you and you may have a long life.' Another regarding farming, is from the book of Exodus:

> (23:10) For six years you are to sow your fields and harvest the crops, (11) but during the seventh year let the land lie unploughed and unused. Then the poor among your people may get food from it, and the wild animals may eat what is left. Do the same with your vineyard and your olive grove. (12) Six days do your work, but on the seventh day do not work, so that your ox and your donkey may rest, and so that the slave born in your household and the foreigner living among you may be refreshed.

11 Second Vatican Council, *Gaudium et spes,* 1965, para 69.
12 Pope Leo XIII, *Rerum novarum,* 1891.
13 Pope John Paul II, *Centesimus annus,* 1991, para 31.

The work by Shelton cited above drew my attention to a biblical story that shows how close the created world and its living creatures are to the Creator, occasionally closer than man. This extract is from the story of the donkey of Balaam from the Book of Numbers:

> (22:31) Then the Lord opened Balaam's eyes, and he saw the angel of the Lord standing in the road with his sword drawn. So he bowed low and fell face down. (32) The angel of the Lord asked him, 'Why have you beaten your donkey these three times? I have come here to oppose you because your path is a reckless one before me. (33) The donkey saw me and turned away from me these three times. If it had not turned away, I would certainly have killed you by now, but I would have spared it.'

In a final example from the Book of Job, the Lord tries to reprimand the arrogant man, with these words among many others:

> (38:4) Where were you when I laid the earth's foundation? Tell me, if you understand. . . .
> (33) Do you know the laws of the heavens? Can you set up God's dominion over the earth?
> (34) Can you raise your voice to the clouds and cover yourself with a flood of water? . . .
> (39:26) Does the hawk take flight by your wisdom and spread its wings toward the south?
> (27) Does the eagle soar at your command and build its nest on high?

The Bible, the fundamental guide for Christianity, does not, therefore, give man (humanity) a direct creative role in Creation, but expects us subsequently to take care of the created world, with requirements aimed at preserving the whole of creation, expecting behaviour of Man that is not only for individual gain but for the benefit of humanity as a whole, as a condition for the survival of humanity.

III The message of the Catholic Church on the protection of the environment

The *Rerum novarum* mentioned above, which is now 130 years old, in fact first confronted the church with social problems in a comprehensive manner, bringing it closer to everyday life. It addressed issues such as human nature and rights, the common good and the purpose of goods, solidarity and love, the family, human work, morality and the economy, and the role and responsibilities of political and social communities at all levels; the similarly growing weight on the international community and even the essential issues of peace are also involved. One hundred years later, in the anniversary *Centesimus annus,* Pope Saint John Paul II reminded us that one of the basic values of the original encyclical is that it can be renewed from time to time: '(3) I now wish to propose a "re-reading" of Pope Leo's Encyclical. . . . But this is also an invitation to look around at the "new things".' This exhortation also encourages me to believe we should explore the basics of today's environmental issues in the *Rerum novarum,* since the outstanding significance of the encyclical is

that it seeks to set the church in motion in terms of the issues of society, in particular social issues, property, the economy and work.

New questions and new things are themselves renewed, because this encyclical marked the beginning of something new, and nature, the common good and the common sense intended to govern all this, also the responsible behaviour of man already appeared in it:

> (5) It is the mind, or reason, which is the predominant element in us who are human creatures; it is this which renders a human being human, and distinguishes him essentially from the brute. And on this very account – that man alone among the animal creation is endowed with reason – it must be within his right to possess things not merely for temporary and momentary use, as other living things do, but to have and to hold them in stable and permanent possession; he must have not only things that perish in the use, but those also which, though they have been reduced into use, continue for further use in after time. . . . (21) [T]he blessings of nature and the gifts of grace belong to the whole human race in common.

Obviously, the wording is somewhat different from the ecclesiastical revelations of recent decades, but the point is perceptible: natural goods cannot be expropriated, they are entrusted to the *universal responsibility of man*.

Forty years after the original encyclical, the *Quadragesimo anno*[14] added new elements to the original ideas in it. The best known of these is the *principle of subsidiarity (principium subsidiaritatis),* specifically in the interest of the *common good*. It was this principle that first appeared in the environmental regulation of the European integration, namely in the Single European Act in the title on the environment, in 1987.[15] Point 104 of the encyclical enjoins paying attention to what is good for all mankind, so the idea of the common good is highlighted. After 1931, however, the church became increasingly concerned with other historical issues, and further elaboration on the question of the common good had to wait.

After the end of the war, life began to return to normal, and at the same time, from the 1960s onwards, the worsening environmental burden caused by man had become increasingly perceptible. Although the papal encyclical of the early 1960s was fundamentally about peace, it was also a major first step in the emergence of human rights *(Pacem in terris).*[16] Environmental aspects are just beginning to emerge:

> (2) That a marvellous order predominates in the world of living beings and in the forces of nature, is the plain lesson which the progress of modern research and the discoveries of technology teach us. . . . (55) Among the essential elements of the common good one must certainly include the various characteristics distinctive of each individual people But these by no means constitute the whole of it.

[14] Pope Pius XI, *Quadragesimo anno,* 1931.

[15] Under Article of 130R(4) of the Single European Act: 'The Community shall take action relating to the environment to the extent to which the objectives referred to in Paragraph 1 can be attained better at Community level than at the level of the individual Member States.'

[16] Pope John XXIII, *Pacem in terris,* 1963.

It was not long before the foundations of environmental protection were further strengthened: Two years later, the next pope laid down the basis of the Church's approach in *Gaudium et spes:* '(36) For by the very circumstance of their having been created, all things are endowed with their own stability, truth, goodness, proper laws and order. Man must respect these as he isolates them by the appropriate methods of the individual sciences or arts. . . . When God is forgotten, however, the creature itself grows unintelligible.' Next, the second part of paragraph 69, cited above in connection with the interpretation of the Bible, is reiterated: 'In using them, therefore, man should regard the external things that he legitimately possesses not only as his own but also as common in the sense that they should be able to benefit not only him but also others.'

Man's responsibility for the created world – which can in fact be identified with what we call environmental considerations and even sustainable development today – had become increasingly pronounced. The *Populorum progressio* of 1967[17] saw the further development of the idea that appeared in *Rerum novarum,* in the way that it highlights the limitations and responsibilities of economic development in general. This encyclical presents ideas that can be paralleled with what had already been clearly articulated at the United Nations (UN) Conference on the Human Environment in Stockholm, or at the EEC Summit in Paris, both held in 1972. Among other things, *Populorum progressio* addresses the real meaning of development: '(14) The development we speak of here cannot be restricted to economic growth alone. To be authentic, it must be well rounded; it must foster the development of each man and of the whole man.'[18] According to the Encyclical, '(76) [W]e are not just promoting human well-being; we are also furthering man's spiritual and moral development, and hence we are benefiting the whole human race.' Of course, there is a place for solidarity and peace, so instead of 'prosperity' I prefer the term 'well being'.

Shortly after the above encyclical was issued, a UN conference was held in parallel with the Paris Summit, the Stockholm Conference on the Human Environment, which adopted the Stockholm Declaration. Point 4 of it recognises the special responsibility that man must bear in order to protect the natural environment. And, just for the sake of parallelism, the Hungarian Act II of 1975 on the Protection of the Human Environment, which was directly influenced by the former, deserves to be mentioned. After a short break, the journey that started then was continued

[17] Pope John Paul VI, *Populorum progressio,* 1967.

[18] The Summit of the Heads of State and Government of the Member States, held in Paris in October 1972, states similarly: '(3) Economic expansion is not an end in itself. Its first aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that progress may really be put at the service of mankind' [European Union, 'Statement from the Paris Summit (19 to 21 October 1972), 2].

by Pope Saint John Paul II, in the encyclical *Redemptor hominis,* referring to the dangers of the modern age much more clearly and directly than his predecessors. The fifteenth section entitled 'What modern man is afraid of' considers the relationship between nature and man:

> We seem to be increasingly aware of the fact that the exploitation of the earth, the planet on which we are living, demands rational and honest planning. . . . Man often seems to see no other meaning in his natural environment than what serves for immediate use and consumption. . . . Yet it was the Creator's will that man should communicate with nature as an intelligent and noble 'master' and 'guardian', and not as a heedless 'exploiter' and 'destroyer'.

The key here again is *human dignity,* which is closely related to the recognition of the true value of the environment, the real meaning of development. Man's responsibility is emphasised, which refers back to the apparent contradiction that lies between the messages of biblical domination and guarding, according to some exaggerated interpretations.

The Encyclical *Sollicitudo rei socialis* also provides a definite answer to the real values and content of progress:

> (34) Nor can the moral character of development exclude respect for the beings which constitute the natural world, which the ancient Greeks – alluding precisely to the order which distinguishes it – called the 'cosmos'. . . . The dominion granted to man by the Creator is not an absolute power, nor is it a freedom to 'use and misuse', or to dispose of things as one pleases. The limitation is imposed from the beginning by the Creator himself and expressed symbolically by the prohibition not to 'eat of the fruit of the tree' (cf. Gen 2:16–17).[19]

In 1990, Pope Saint John Paul II launched a series that also conveys an ever deeper environmental content in messages issued on the occasion of the World Day of Peace:[20]

> (7) The most profound and serious indication of the moral implications underlying the ecological problem is the lack of respect for life evident in many of the patterns of environmental pollution. . . . Respect for life, and above all for the dignity of the human person, is the ultimate guiding norm for any sound economic, industrial or scientific progress. . . . (13) Modern society will find no solution to the ecological problem unless it takes a serious look at its life style.

The central question of *Centesimus annus,* mentioned above, is the common good, and environmental values form an undeniable part of this:

> (37) Equally worrying is the ecological question which accompanies the problem of consumerism and which is closely connected to it. . . . Instead of carrying out his role as

[19] Pope John Paul II, *Sollicitudo rei socialis,* 1987.

[20] Pope John Paul II, *Peace with God the Creator, Peace with all of creation,* 1990.

> a co-operator with God in the work of creation, man sets himself up in place of God and thus ends up provoking a rebellion on the part of nature, which is more tyrannized than governed by him. . . . In this regard, humanity today must be conscious of its duties and obligations towards future generations.

The market, clearly, is not sufficient for managing this task. In the meantime, the UN began efforts to reconcile the aspects of the environment and development, which was the resounding point of the 1992 Conference on Environment and Development which recommended pursuing sustainable development.[21] Although the following encyclical *(Evangelium vitae)*[22] was less concerned with the environment, still we should mention it: '(42) As one called to till and look after the garden of the world (cf. Gen 2:15), man has a specific responsibility towards the environment in which he lives, towards the creation.' The Venice Declaration[23] – in the spirit of ecumenism – was a summary of Pope Saint John Paul II's thoughts to date: 'Respect for creation stems from respect for human life and dignity. . . . The problem is not simply economic and technological; it is moral and spiritual. . . . We have not been entrusted with unlimited power over creation, we are only stewards of the common heritage.' This call for moral renewal also appeared in a later message on the occasion of the World Day of Peace: '(6) As the gift of peace is closely linked to the development of peoples, it is essential to take into account the moral consequences of using the goods of the earth.'[24]

So far, I have presented biblical and Vatican sources according to my own points of view and way of thinking. Obviously, there is a much more authentic and beautifully structured source than mine, which is the Compendium of the social doctrine of the Church,[25] especially the tenth chapter, which deals with environmental protection. The Compendium reviews the attitude of Christianity from the fundamentals upwards, and therefore seeks to strike the right balance in all of this: '(463) A correct understanding of the environment prevents the utilitarian reduction of nature to a mere object to be manipulated and exploited. At the same time, it must not absolutise nature and place it above the dignity of the human person himself.' Furthermore: '(465) The Magisterium underscores human responsibility for the preservation of a sound and healthy environment for all.' '(466) Care for the environment represents a challenge for all of humanity. It is a matter of a common and universal duty, that of respecting a common good.' It also highlights a number of other important elements, emphasising that more than one message is important to us by mentioning 'biodiversity, which must

[21] United Nations, *Rio Declaration on Environment and Development,* 1992.

[22] Pope John Paul II, *Evangelium vitae,* 1995.

[23] Pope John Paul II and His Holiness Ecumenical Patriarch Bartholomew I, *Common Declaration on Environmental Ethics,* 2002.

[24] Pope John Paul II, *Do not be Overcome by Evil but Overcome Evil with Good,* 2005.

[25] Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church,* 2004.

be handled with a sense of responsibility and adequately protected, because it constitutes an extraordinary richness for all of humanity'. It also emphasises the responsibility for future generations: '(467) Responsibility for the environment, the common heritage of mankind, extends not only to present needs but also to those of the future.'

Before continuing to cite papal messages, it is definitely worth noting a circular of the Hungarian Episcopal Faculty.[26] This is also the next source in chronological order, and it carries an important message for the Hungarian Church, giving a comprehensive and meaningful summary of what has been said so far:

> (22) Since economic, financial logic dictates political decisions and often our social value judgments, we tend to ignore the indirect costs of economic growth that occur in other areas, in the natural environment, or in the social sector in the long run. . . . (169) Protecting the environment is more than ensuring the dignified living conditions of present and future generations, as man's relationship with God, people, and the created world forms a unity. The protection of the natural environment is nothing more than the public good, that is, the protection and promotion of human dignity.

Pope Benedict XVI was following the long established path when he recalled *Populorum progressio* in his encyclical *Caritas in veritate*:[27]

> (7) [T]he common good. It is the good of 'all of us', made up of individuals, families and intermediate groups who together constitute society. . . . (23) Yet it should be stressed that progress of a merely economic and technological kind is insufficient. . . . (48) Today the subject of development is also closely related to the duties arising from our relationship to the natural environment. . . . (50) At the same time we must recognise our grave duty to hand the earth on to future generations in such a condition that they too can worthily inhabit it and continue to cultivate it.

Perhaps the most important warning is a kind of summary of the above: '(51) The way humanity treats the environment influences the way it treats itself, and vice versa. . . . [T]he decisive issue is the overall moral tenor of society.' Consequently, environmental protection cannot be separated from other problems of humanity; they can only be tackled together.

The World Day of Peace messages continued to return to environmental themes, and even the title of the one from ten years ago is eloquent: 'If you want to cultivate peace, protect creation'[28] whose message is clear:

> (1) Respect for creation is of immense consequence, not least because 'creation is the beginning and the foundation of all God's works', and its preservation has now become essential for the pacific coexistence of mankind. . . . (5) Prudence would thus dictate a profound, long-term review of our model of development, one which would take into consideration the meaning of the economy and its goals with an eye to correcting its malfunctions and

[26] Hungarian Catholic Bishops' Conference, *Our Responsibility for the Created World,* 2008.
[27] Pope Benedict XVI, *Caritas in veritate,* 2009.
[28] Pope Benedict XVI, *If you Want to Cultivate Peace, Protect Creation,* 2010.

> misapplications. . . . (7) The goods of creation belong to humanity as a whole. . . . [T]here is a need to act in accordance with clearly-defined rules, also from the juridical and economic standpoint, while at the same time taking into due account the solidarity we owe to those living in the poorer areas of our world and to future generations.

Suggesting a solution is also not unfamiliar: '(11) It is becoming more and more evident that the issue of environmental degradation challenges us to examine our life-style and the prevailing models of consumption and production, which are often unsustainable from a social, environmental and even economic point of view. . . . We are all responsible for the protection and care of the environment.'

Pope Francis' ecological encyclical *Laudato si'* was five years old last year.[29] The fact that this is the first voluminous encyclical devoted by the Pope to ecology and sustainability as a whole makes it stand out from the preceding Vatican documents. This encyclical borrows its title from the prayer of Francis of Assisi: *'Laudato si', mi' Signore' ('Be blessed, Lord!').* Pope Francis, of course, builds on the thoughts of his predecessors, taking forward their ideas, with some reflection also on the UN Sustainable Development Goals (SDG) document adopted in the same year.[30] The introduction to the Hungarian translation of SDG indicates the commonalities of the two messages: 'This work, this "systemic change", is also increasingly urged by the Christian social teaching of recent decades, most recently in Pope Francis' encyclical beginning with '*Laudato si'*.'

The most important question posed in the encyclical is: '(160) What kind of world do we want to leave to those who come after us, to children who are now growing up?' In response, Pope Francis re-reads the narratives of the Bible and then provides a complex overview based on the Judeo–Christian tradition and, in particular, explains that man has a 'supreme responsibility' to the created world, which is the intimate connection between all creatures; and explains the fact that: '(95) The natural environment is a collective good, the patrimony of all humanity and the responsibility of everyone.' At the heart of the encyclical there is a proposal on a comprehensive ecology as a new paradigm of justice: '(139) Nature cannot be regarded as something separate from ourselves or as a mere setting in which we live. . . . We are faced not with two separate crises, one environmental and the other social, but rather with one complex crisis which is both social and environmental.' The Pope calls for *ecological conversion,* where the starting point is 'Towards a new lifestyle' (203–208).

A remarkable parallel unfolds in this regard in the practice of the Constitutional Court of Hungary, which develops the idea of responsibility for present and future generations and responsible custody, in line with the teachings of the Bible, in its most recent resolution on the Forest Act.[31]

[29] Pope Francis, *Laudato si',* 2015.
[30] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development,* 2015.
[31] Resolution 14/2020. (VII. 6.) AB.

> [21]1. According to Article P(1) of the Fundamental Law '[N]atural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.' . . . [22] Article P(1) of the Fundamental Law is based on the constitutional law wording of the concept of *public trust* relating to environmental and natural values, the essence of which is that the state treats the natural and cultural treasures entrusted to it as a kind of trustee for future generations, and allows present generations to use and utilise these treasures to the extent as long as it does not jeopardise the long-term survival of natural and cultural assets as assets to be protected as such. The state must take into account the interests of present and future generations when managing and regulating these treasures. The rule of preservation of natural and cultural resources for future generations in the Hungarian Fundamental Law can thus be considered a part of the newly formed and consolidated universal customary law, and expresses the constitutional commitment to the importance and preservation of environmental, natural and cultural values.

On the occasion of the fifth anniversary of the encyclical, Pope Francis spoke again in his message for the World Day of Peace on 1 January 2020, on the necessity of *ecological conversion:* 'Indeed, natural resources, the many forms of life and the earth itself have been entrusted to us 'to till and keep', also for future generations, through the responsible and active participation of everyone. . . . Ecological conversion . . . must be understood in an integral way.'[32] Thus, the papal encyclicals have been paying increasing attention to the environment since the 1960s, which, after numerous excerpts from documents, World Day of Peace messages, and other minor statements, was completed by 2015 in a self-contained encyclical devoted to ecological content. It goes without saying that all statements have a similar, albeit ever clearer and sharper, content, because their essence is the responsibility of man or humanity, the role of co-heir and guardian, respect for all forms of life, and identification of the common good for the benefit of all, including the environment, as part of the created world, not forgetting human dignity, which cannot be complete without the created world.

It is also becoming increasingly clear that current economic interests and the interests associated with them are misleading humanity. The whole system – we must name it: the so-called consumer society – needs to be changed, as we are in a social and environmental crisis, behind which lies an ethical crisis fomented by the falseness of values and the deformation of our lifestyle. The responsibility is shared by all, but the responsibility of the rich countries and the developed world is greater and encompasses also the basic idea of solidarity. Protecting the created world is by no means a requirement just because of man – although man is obviously the centre of it – but also because regardless of man, reverence for creation appears, which of course has a direct reflexive effect on us. The lifestyle review and change required must be radical, which is what is meant by calling for ecological conversion.

[32] Pope Francis, *Peace as a Journey of Hope,* 2020.

IV The Catholic Church and human rights, especially the right to the environment

This entire book has been devoted to the subject of Christianity and human rights, so it is hardly necessary to present the history of ecclesiastical revelations in this regard, which largely coincided with the emergence of interest in environmental issues. However, we must not forget that the basis of social teaching is certainly the *Rerum novarum,* the outstanding message of which is care for the common good: The state's controllers must work generally and uniformly on a complete system of laws and institutions that results in the well-being of the community and individuals automatically from the system and management of the state itself. This is stated even more clearly later: 'The state has a legitimate duty to promote the common good', and '(29) [T]he state must sacredly protect the rights of all people, be they anyone.' This is a clear recognition of human rights, more than half a century before the international community expressed a similar recognition in the Universal Declaration of Human Rights. In the same encyclical, the protection of creation in the present sense was not articulated so markedly. The reason for this is the central role of man in Creation: '(6) Man is older than the state, so by its very nature it should have had the right to sustain its life before any state formation was formed.' The source of all this is that: '(7) God gave the earth to the whole human race to use and enjoy its fruits.' Thus, the central role of man also requires the protection of rights, since man's rights predate the state and can indeed be traced back to the Creation. One of the fundamental bases in this field is *Pacem in terris:*

> (28) The natural rights of which We have so far been speaking are inextricably bound up with as many duties, all applying to one and the same person. These rights and duties derive their origin, their sustenance, and their indestructibility from the natural law, which in conferring the one imposes the other. . . . (75) There is every indication at the present time that these aims and ideals are giving rise to various demands concerning the juridical organisation of States. The first is this: that a clear and precisely worded charter of fundamental human rights be formulated and incorporated into the State's general constitutions.

In terms of the real values and content of development, the encyclical *Sollicitudo rei socialis* also deserves attention:

> (33) The intrinsic connection between authentic development and respect for human rights once again reveals the moral character of development: the true elevation of man, in conformity with the natural and historical vocation of each individual, is not attained only by exploiting the abundance of goods and services, or by having available perfect infrastructures.

The next point here, as mentioned earlier, is respect for creation (creatures). As promised, we will not delve too far into the details of the relationship between the Vatican and human rights; it is sufficient and necessary for a complete picture to refer to the first encyclical of Pope Saint John Paul II, *Redemptor hominis,* more precisely to one of its subheadings:

> (17) Human rights: 'letter' or 'spirit'
> The Declaration of Human Rights linked with the setting up of the United Nations Organisation certainly had as its aim not only to depart from the horrible experiences of the last world war but also to create the basis for continual revision of programmes, systems and regimes precisely from this single fundamental point of view, namely the welfare of man-or, let us say, of the person in the community-which must, as a fundamental factor in the common good, constitute the essential criterion for all programmes, systems and regimes. . . .
> The Church has always taught the duty to act for the common good and, in so doing, has likewise educated good citizens for each State. Furthermore, she has always taught that the fundamental duty of power is solicitude for the common good of society; this is what gives power its fundamental rights. Precisely in the name of these premises of the objective ethical order, the rights of power can only be understood on the basis of respect for the objective and inviolable rights of man. The common good that authority in the State serves is brought to full realization only when all the citizens are sure of their rights.

Thus, the *common good* is, on the one hand, what links the issue of the protection of creation and human rights in general and, within that, links it to the role of the state, which in both cases is the postulate. The common good must be implemented primarily by the state, whichever aspect of it is being considered. The other basic connection is *human dignity,* the content of which is expanding and evolving, with some issues already established while others are still emerging – with the environment probably falling within the latter group. Awareness of this relationship thirty years ago necessarily led to the conclusion that was formulated by Pope Saint John Paul II, first in a World Day of Peace message (1990), one of the conclusions of which is quite clear: '(7) Respect for life, and above all for the dignity of the human person, is the ultimate guiding norm for any sound economic, industrial or scientific progress. . . . (9) The right to a safe environment is ever more insistently presented today as a right that must be included in an updated Charter of Human Rights.'

Almost a decade after this message, in 1999, Pope Saint John Paul II devoted *an entire* World Day of Peace message to human rights,[33] taking human dignity as a starting point, continuing with the universality and indivisibility of human rights, and then focusing on some of the human rights that have become increasingly important. These included new components of the right to life, including action against all forms of violence, such as 'mindless damage to the natural environment', as an act of violence, combined with human dignity (point 4). Freedom of religion is, of course, seen as a central issue by the Pope, who then moves on to rights of participation, which, although specifically mentioned here because of their democratic nature, also constitute a fundamental component of environmental protection. In addition to the prohibition of all forms of discrimination, the right to self-fulfilment, solidarity and peace, Paragraph 10 concerns *responsibility for the environment:*

[33] Pope John Paul II, *Respect for Human Rights: The Secret of True Peace,* 1999.

> (10) The promotion of human dignity is linked to the right to a healthy environment, since this right highlights the dynamics of the relationship between the individual and society. A body of international, regional and national norms on the environment is gradually giving legal form to this right. But legislative measures are not sufficient by themselves. . . . The world's present and future depend on the safeguarding of creation, because of the endless interdependence between human beings and their environment. Placing human well-being at the centre of concern for the environment is actually the surest way of safeguarding creation; this in fact stimulates the responsibility of the individual with regard to natural resources and their judicious use.

The last sentence, quoted from the first message, or the conclusions or rather expectations of the separate specific message become particularly important in light of the fact that neither the Universal Declaration nor the European Convention on Human Rights (both of which recently turned seventy years old), made any direct reference to the right to a healthy environment. Despite the many efforts, conferences, working groups and special rapporteurs to date,[34] no substantive progress has been made on international recognition in this connection, although credit should be given to the dissenting opinion of Weeramantry, already referred to:[35]

> Protecting the environment is also an essential part of the current doctrine of human rights, as it is a prerequisite for many human rights, such as the right to health and life. It is hardly necessary to explain this in more detail since damage to the environment may prejudice or undermine all human rights mentioned in the Universal Declaration and other human rights instruments.

Centesimus annus clearly states that '(11) the State has the duty of watching over the common good, and of ensuring that every sector of social life, not excluding the economic one, contributes to achieving that good, while respecting the rightful autonomy of each sector'. Protecting the environment is given a prominent role among the tasks of the state, as this obligation cannot be replaced by anything else:

> (40) It is the task of the State to provide for the defence and preservation of common goods *such as* the natural and human environments, which cannot be safeguarded simply by market forces. . . . [A]ll of society have the duty of defending those collective goods which, among others, constitute the essential framework for the legitimate pursuit of personal goals on the part of each individual.
> Here we find a new limit on the market: there are collective and qualitative needs which cannot be satisfied by market mechanisms. There are important human needs which escape its logic. There are goods which by their very nature cannot and must not be bought or sold.

This text refers to the terrain of the classic role of the state, when the care of a protected interest would not bring any or enough economic benefit, certainly not to a degree that the market would react to it without intervention. However, the task must be performed in order to protect society – in this case, this coincides with

[34] For example, United Nations, *Special Rapporteur on human rights and the environment,* 2020.
[35] Weeramantry in judgment of the International Court of Justice of 25 September 1997 (n 3).

the protection of the environment. The papal assessment is completely correct, as every step of environmental interest, at least in the beginning, seems to be costly, so it is not profitable for the economy. Thus, another solution is required, because the task cannot be postponed.

The third, perhaps least successful, UN Environment Summit and Conference was held in Johannesburg in 2002. The Vatican also spoke up,[36] not forgetting to mention human rights or the right to a clean environment. In this regard, the Rio Declaration ten years earlier[37] provides the appropriate starting point, more precisely its first principle ('[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'), thus emphasising the central role of man. Knowing the ecclesiastical revelations so far, the extended interpretation of human dignity can certainly be best linked to this. 'The promotion of human dignity is linked to the right to development and to the right to a healthy environment, since these rights highlight the dynamics of the relationship between the individual and society; this stimulates the responsibility of the individual towards self, towards others, towards creation, and ultimately towards God.'

The Compendium of the Social Doctrine of the Church may not dispense with discussing the issue of human rights as a priority. This takes place in Part IV of Chapter III, according to the premise of which: '(152) The movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity.' Although it is beyond the mandate of this article to discuss the Church and human rights in general, one more thought must be highlighted before moving on to its environmental aspects, and this is the importance of *a unified approach to human rights:* '(154) Human rights are to be defended not only individually but also as a whole: protecting them only partially would imply a kind of failure to recognise them.' An accompanying idea also strongly determines the general attitude towards environmental issues: '(156) Inextricably connected to the topic of rights is the issue of the duties falling to men and women, which is given appropriate emphasis in the interventions of the Magisterium.'

In the Compendium's chapter on the environment, the emphasis on the importance of legal regulation in general, while naturally far from being exclusive, primarily deserves special attention: '(468) Responsibility for the environment should also find adequate expression on a juridical level.' The Compendium introduces human rights conclusions in this way and outlines a process that has unfortunately not yet been completed:

[36] Intervention by the Holy See at the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August – 4 September), Address of HE Msgr Renato R Martino, 2 September 2002.

[37] United Nations, *Rio Declaration on Environment and Development,* 1992.

> (468) The juridical content of *'the right to a safe and healthy natural environment'* is gradually taking form, stimulated by the concern shown by public opinion to disciplining the use of created goods according to the demands of the common good and a common desire to punish those who pollute. But juridical measures by themselves are not sufficient. They must be accompanied by a growing sense of responsibility as well as an effective change of mentality and lifestyle.

So papal statements – certainly before the Compendium, and we can safely say that even after its adoption – are markedly prevalent. It is worth mentioning the wording itself, in the way it is determined, because in this the encyclicals and messages do not take a position so clearly in each and every case. A safe environment refers to an obvious connection with peace, while a healthy one is a generally accepted quality.

In the context of the above-mentioned references in *Caritas in veritate* to the protection of the environment and the protection of future generations, and the warning of the Compendium, Pope Benedict XVI's most important message in the same encyclical is not surprising: '(43) An overemphasis on rights leads to a disregard for duties. Duties set a limit on rights because they point to the anthropological and ethical framework of which rights are a part, in this way ensuring that they do not become licence.' According to a continuation of the message not yet quoted here, '(48) [c]onsequently, projects for integral human development [need to be open to] *solidarity and inter-generational justice,* while taking into account a variety of contexts: ecological, juridical, economic, political and cultural'. It hardly needs to be spelled out that a right only makes sense if it is accompanied by the obligations of others, and of these the obligations of the international community and the state will be paramount. Of course, this does not mean that the state alone has obligations, as the earlier quotations in the encyclical clearly show the formula – the way that we treat the environment is a sign of how we treat others – that it is everyone's duty. Therefore, first *the obligations and requirements* must be established in the field of environmental values, as we do not have time to wait for them to appear on their own.

The obligor's side is also emphasised in the encyclical *Laudato si':* '(67) We are not God. The earth was here before us and it has been given to us. . . . This implies a relationship of mutual responsibility between human beings and nature. Each community can take from the bounty of the earth whatever it needs for subsistence, but it also has the duty to protect the earth and to ensure its fruitfulness for coming generations.' The starting point here is *the common good:* '(159) The notion of the common good also extends to future generations' from which, and from the basic requirements for its protection, we can also deduce human rights: '(157) Underlying the principle of the common good is respect for the human person as such, endowed with basic and inalienable rights ordered to his or her integral development. . . . Society as a whole, and the state in particular, are obliged to defend and promote the common good.' There is therefore a direct reference to fundamental rights in general and to their broad relationship matrix.

Closely related to all this is the importance of the completeness of human life and an interpretation of development that is not exclusively economic in scope but which focuses on the quality of life (politics and economy in dialogue for human fulfilment).

Finally, I would like to draw attention to two more Vatican statements, both of which are linked to the seventieth anniversary of the Universal Declaration of Human Rights. In chronological order, the first is Pope Francis's New Year's greeting to diplomats accredited to the Holy See.[38] On the occasion of this anniversary, the Pope states, primarily representing the general opinion of the Holy See on human rights, that human rights are essential to the reality of man's central role, to the image of God and his likeness. Then he notes the *changes* in the human rights catalogue, the appearance of *'new rights',* including the right to health, or the relationship between the right to life and peace. The speech then turns to the duty to care for our land, of which our obligations when interacting with nature are a part. On the topic of climate change, it then focuses on the rights of future generations.

The other statement, also on an anniversary, comes from the Secretary of State for Relations with the Vatican,[39] and in this he sees *responsibility for the environment* as an integral part of peace, with the support of the poorest nations, as 'an essential part of the promotion and protection of human rights'. The phrase 'Everything is connected', is cited from Pope Francis's encyclical *Laudato si',* so responsibility for the environment is also linked to the exercise of rights. *Integrative ecology* appears in the same place as an obvious consequence of this correlation, which, although somewhat different from the traditional system of human rights as understood in the strict sense, is closely linked to the promotion of all human rights. These two speeches do not represent exactly the same concept; the first suggests a little more strongly that the catalogue of human rights is in need of expansion, and that environmental rights will necessarily be included in this, while the second emphasises the role of environmental protection. It is noteworthy that this parallel approach is also applied by the Fundamental Law of Hungary, in which Article XX considers the protection of the environment as a means of achieving physical and mental health, while Article XXI gives a more comprehensive, clear wording of the right to a healthy environment.

It should also be remembered that, as in all cases when discussing the right to the environment, *sub-areas* might appear, which demand an independent role, and rightly so.[40] Among these, *the right to water* plays a prominent role, because its

[38] Pope Francis, *Address of His Holiness Pope Francis to the Members of the Diplomatic Corps Accredited to the Holy See for the Traditional Exchange of New Year Greetings,* 2018.

[39] Intervention of the Secretary for Relations with States at the Council of Europe for the celebration of the 70th anniversary of the Universal Declaration of the Rights of Man, 2018.

[40] We can read about this in many places, for example, Linda Hajjar Leib, *Human Rights and the Environment: Philosophical, Theoretical and Legal Perspectives* (The Hague: Martinus Nijhoff, 2011).

direct connection to human life is beyond dispute. Regarding other topics, such as biodiversity, their role in human life may be less obvious to many, but the necessity of water cannot be questioned. As such, it is no wonder – especially bearing in mind the ecclesiastical approach that particularly supports disadvantaged people in developing countries or even financially disadvantaged people and groups of people – that access to an adequate, quality water supply is also given a central place in this thinking.

Two examples of the right to water of many may suffice to illustrate this, without going into details. One of them is the intervention from the Pontifical Council for Truth and Peace at the 2003 World Water Forum.[41] Of particular note is the assertion that: 'Water has a central place in the practices and beliefs of many religions of the world' (Section I). With regard to ethical considerations surrounding water, there can be no doubt that '[t]his principle of the universal destination of the goods of creation confirms that people and countries, including future generations, have the right to fundamental access to those goods which are necessary for their development. Water is such a common good of humankind' (Section II). This is further developed later: 'Sufficient and safe drinking water is a precondition for the realisation of other human rights' (Section VI). This leads to the idea that the truth of this seems so natural to everyone in general that it is liable to be overlooked as a right – even though access to water is clearly not at all self-evident in the lives of many millions of people. 'There is a growing movement to formally adopt a human right to water.' This is also indispensable because of *human dignity,* since '[w]ater is an essential commodity for life. . . . Therefore the right to water is thus an inalienable right'. In 2007, on the World Day of Water, Pope Benedict XVI also spoke in connection with the right to water.[42] He affirmed that '[a]ccess to water is in fact one of the inalienable rights of every human being, because it is a prerequisite for the realisation of the majority of the other human rights, such as the rights to life, to food and to health'. With this and the rest, he is in fact repeating what has been said before, making clear the continuity of the Vatican's position.

V Summary and conclusions

Recognition of the central role of man, and thus indisputably his rights, is at the root of Christian teachings. It is no wonder, then, that an emphasis on the prominent role of human rights appeared much earlier in church statements than in international politics. The protection of the environment and nature, inherent

[41] Note Prepared by the Pontifical Council for Justice and Peace, *A Contribution of the Delegation of the Holy See on the Occasion of the Third World Water Forum (Kyoto, 16–23 March 2003).*

[42] Pope Benedict XVI, *Message of the Holy Father Benedict XVI, signed by Cardinal Tarcisio Bertone to the Director General of FAO on the occasion of the celebration of World Water Day 2007.*

in which is the protection of Creation, is in any case an integral part of the basic teachings of Christianity, and throughout the scriptures and beyond, starting from the Book of Genesis onward. In today's concepts of the Catholic Church, it is one component of the social teaching of the Church. Although we have drawn almost entirely on the teachings of the Catholic Church above, as conveyed most fully, in a unified system, and clearly by the popes and the Vatican, and consequently available for study, we can safely say that the conclusions of all Christian religions as a whole are fundamentally consistent. Man, then, is a co-heir in Creation, but has increasingly forgotten the responsibilities that come with it, and as an oppressor ('rogue possessor') rather than a careful master of the environment around him, destroys and ravages, damages and even consumes it during use. At the same time, there can be no doubt that rights can only be invoked by those who respect the rights of others and thus live up to their obligations.

Such a general view of Christianity *as a basis of natural law* appears even in the reference list of the Hungarian Constitutional Court, since the need for the interpretation of the right to the environment to be based on general ethical grounds cannot be disputed by anyone. This is best related to the resolution related to the amendment of the Water Act (better known as the 'well drilling case'), where these moral considerations also serve as a direct argument.

> [36] Pope Francis discussed the natural law foundations of biodiversity conservation in his encyclical beginning with *Laudato si'*: 'Each year sees the disappearance of thousands of plant and animal species which we will never know, which our children will never see, because they have been lost for ever. The great majority become extinct for reasons related to human activity.' The encyclical categorically states: 'We have no such right.' The protection of life on earth for our descendants is not only a natural obligation but also a 'fundamental issue of justice' and is most closely linked to the issue of human dignity and the purpose of human life itself (Pope Francis: Encyclical *Laudato si'*). Patriarch Bartholomew speaks directly of 'a crime against nature' in connection with human acts that destroy 'the biological diversity of God's created world' (ecological vision and initiatives of Ecumenical Patriarch Bartholomew).[43]

The Catholic Church – and Christianity in general – is trying to get humanity back on track in parallel with the proliferation of environmental crisis phenomena, which must involve a fundamental change in the current way of life, economic order, consumer society, especially ethical renewal. It is undeniable that neither the economy nor technology is enough to solve the environmental crisis. This ethical renewal may be called either an ecological renewal or an ecological conversion.

What is undoubtedly the basis of the connection with human rights is the common good and human dignity. The common good, which is good for all people and societies and not just a few, is hardly achievable without the values of Creation, without respect for and mercy of created goods and living beings, as the common good is far from material (it is enough to recall the difference between achieving

[43] Resolution 28/2017 (X.25.) AB.

well-being or welfare) but presupposes a much more complete set of values. Human dignity also includes respect and the protection of the environment and nature from the outset, all the more so because the recognition of the content components of human dignity and their relative importance and internal proportions change over time, but there has never been any doubt that it encompasses all the conditions necessary for the completeness of human life.

The completeness of human dignity is also reflected in human rights, and human rights cannot be enforced without the protection of environmental values – for instance, water as a fundamental condition of life in connection with the right to water. Enforcement of the right to a healthy environment is the basis of other human rights. From here, it is a short step to extend human rights in this direction, which often appear with 'healthy' as an adjective. It is vital to highlight the obligor's side of the rights equation in this field, since, as explained in detail in Article P of the Fundamental Law of Hungary and the recent case law of the Hungarian Constitutional Court, ensuring the proper quality of life for present and future generations is the duty of the state and of all citizens. Within this, the state – and, of course, above all the international community, which is a community of states – is subject to a special responsibility. As Benedict XVI put it: 'She must above all protect mankind from self-destruction.'[44]

For Christianity, and thus for the Catholic Church, the recognition of the right to the environment as a human right, based on the protection of creation and the central role of man as part of the common good and human dignity and as an indispensable condition for both, reminds man or humanity of his own responsibility in this area. In closing, I refer again to the idea of *Caritas in veritate:* '(51) The way humanity treats the environment influences the way it treats itself, and vice versa.'

[44] *Caritas in veritate,* para 51.

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Legal Personality and the Right to Life and Dignity in Contemporary Catholic Natural Law Philosophy

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I The problem of the need to establish human rights: The lessons of the Universal Declaration of Human Rights

The recognition of human rights as legally binding was the result of a process of historical-moral awareness. However, the discovery and recognition of this binding nature of human rights are not only evidence of the gradual accumulation of knowledge of the natural law on which human rights are based, which is its epistemological side, but also of man's life as a historical-socio-cultural being; in other words one leading a cultural existence rather than an abstract metaphysical essence that can be defined *a priori,* the criteria of which – and thus the human rights deriving deductively from them – could be fully defined once and for all. These insights left a deep impression on humanity's thinking about human rights during the period of the adoption of the Universal Declaration of Human Rights. So much so that public thinking has almost gone to the other extreme, because it is almost inappropriate to discuss human nature, its essence and the human rights arising from it, using deductive thinking in this post-modern age, which may also be called anti-essentialist.

In recent years, efforts have been made to imbue some of the fundamental rights and fundamental institutions enshrined in that Declaration with a meaning contrary to their original meaning in that Declaration, for ideological and political reasons, such as to argue for 'the right to abortion' and the right of gay couples to marry, framing these as human rights and beyond this, fighting for sexual and reproductive rights as human rights. I believe that to counter these efforts, the only suitable argumentation may be made also with reference to rights (contrary to the right to abortion, by deductively grounding the right to life and to be the subject of law) and institutions (grounding marriage as an institutionalised relationship between a man and a woman) arising from the natural human essence by logical necessity.[1] The scope

[1] The rights contained in the Declaration signed by the parties were either considered to be philosophically or religiously substantiated according to their own system of views, or were considered not to be justifiable in this way but generally valid legal claims. Jacques Maritain held that the signatories shared a common system of metaphysical views of which they were unaware. The mere fact of their agreement also shows that the law of nature is written in the hearts of all men, and there it works. It

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of this argument is very narrow, as it derives from certain basic human rights and institutions, the essential criteria of human nature with rigour arising from *logical necessity,* although the importance of the content of these human rights is even greater.[2]

This study will focus on addressing the human right to life and dignity, pointing out that these can only be defended effectively if the natural, theoretically graspable essence of man is defined as *his spiritual soul* – which gives the unconditional and absolute dignity of every human being – and which is present from his conception to his death; that is, as long as a human person lives and exists in his completely unique body.[3] I believe that this line of thought and vision of reality is most consistently enforced by the basic position of the Christian approach. The Christian attitude may have been different at a time when the above-mentioned libertarian 'legal claims' based on ideology did not yet exist, but the Declaration wished to declare human rights based on true human nature, since their existence – in a very general way – was shared by everyone. Nowadays, however, mainstream Libertarian rhetoric, which can be regarded as denying the true, real meaning and content of some of the major human rights enshrined in the Declaration, while on the other hand demanding the recognition of so-called 'rights' which run contrary to human nature, has prevailed in human rights arguments and legislative and judicial practices.

The correct (Catholic) starting point for reasoning, then, can only be the essential nature of the human person, which provides the substantive basis for the validity of his dignity and the most basic human rights, and that essence, as we have written, is the spiritual soul in every person, which is metaphysical, thus transcendent, and therefore it is a sacred reality that can only be interpreted in a religious way. The soul thus provides the basis, reason and existence of human dignity, which is also *metaphysical* and *transcendent* for the same reason, thus is a religiously charged reality or, as Robert Spaemann puts it, a sign of holiness.[4] Today it is no longer enough to follow the path that Jacques Maritain could still take in the wording of the Declaration, therefore it is necessary to enclose in parentheses the theoretical philosophical foundation of human rights, stating their basis, simply because there is no broad consensus on it.

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is another matter that in a secular liberal system of ideas, which has been professed by many, these rights could not be justified by coherent rational theoretical reasoning. Elinor Gardner, 'Nature and Rights: The Meaning of a Universal Agreement on Human Rights', in Giuseppe Butera (ed.), *Reading the Cosmos: Nature, Science, and Wisdom* (Washington, DC: American Maritain Association, 2012), 215–228, 221–222.

2 Cf. János Frivaldszky, *Természetjog és emberi jogok* (Budapest: Pázmány Press, 2010).

3 Regarding the relationship between body and spirit in man, see, for example, James Capehart, 'Incarnate Spirit: Proper Thomistic Definition of the Human Being or Merely Description of the Human Soul?', in John J Conley (ed.), *Redeeming Philosophy: From Metaphysics to Aesthetics* (Washington, DC: American Maritain Association, 2014), 83–98.

4 Robert Spaemann, *Tre lezioni sulla dignità della vita umana* (Torino: Lindau, 2018), 45.

It has now been proved that it is not possible just to declare human rights, as their abstraction from human nature has led to the consequences mentioned above. I believe that the proclamation that man has a spiritual soul from the time of his conception onwards, which prevails to the fullest extent in Christian thinking, and which is indeed the Catholic position, and is thus the most defensible, can also be arrived at by intuition and experience, and thus thinkers who do not believe in God and the average person may also adopt it. Moreover, in addition to believing that the soul is the most essential component of the human person, it is also possible to effectively argue for it, even in a dialogue with contemporary brain research.[5] The key task is to prove this proposition as thoroughly as possible and in several ways in our science-positivist age, which is nevertheless favoured by the fact that, more recently, turning to some kind of spiritual dimension has proven to be an inner emotional and intellectual need in broad segments of society.

When the Declaration was formulated, many worldviews came together in favour of the expression and enforcement of human rights, and although the secular religion of transhumanism was already present in its germ,[6] perhaps the most striking trend was progressive liberal humanism, while the presence of Christian personalism was also felt, among other things, of course, under the influence of Maritain. After the Second Vatican Council, for Catholic thinkers, natural law thinking was essentially synonymous with the doctrine of human rights in a positive sense, the development of which was the result of a number of ecclesiastical documents. The doctrine of Catholic human rights has since evolved to such an extent that the arguments in the 1990s already called into question whether the Catholic Church still needs the theoretical tools of natural law thinking as a foundation for human rights, or

[5] See, for example, Juan J Sanguineti, 'Soul and Person: Commentary on *Your Soul is a Distributed Property of the Brains of Yourself and Others* by Michael A Arbib', *Reti, saperi, linguaggi – Italian Journal of Cognitive Sciences* 3, no 2 (2016), 243–252.

[6] At the time of its creation, transhumanism was an evolutionary, unrevealed (that is a worldly) secular religion, a new faith, as Julian Huxley put it. Julian S Huxley, *Religion Without Revelation* (New York: Harper and Brothers, 1927); Julian S Huxley, *New Bottles for New Wine* (London: Chatto and Windus, 1959), 17. When Maritain was Chairman of the Committee invited by UNESCO to draft the preamble to the Declaration, he deliberately focused on the protection of human rights, rather than on their theoretical basis, as there was so much variety in worldviews about the basis of rights that there was no realistic possibility not only of consensus but even of thinking in one direction. It should also be pointed out that, during the second session of its General Assembly in Mexico City, Huxley happened to be the first Director-General of UNESCO, while Maritain led the French delegation. In this atmosphere of UNESCO leadership, Maritain was presumably unable to enforce his own Thomasian theory of human rights, standing as the validity basis of human rights, learning about the natural law in the context of historical development, but rather focused on the search for unity in February 1948 and also later on. The Declaration was finally adopted by the United Nations General Assembly on 10 December 1948; for the Drafting Committee and the documents, see http://research.un.org/en/undhr/draftingcommittee.

whether the doctrine of human rights is so firmly entrenched, that it has sucked it in implicitly.[7]

In human rights, one of the ways in which human nature marked by dignity became meaningful, as far as the masses are concerned, was by declaring crimes *against humanity*. Furthermore, humanity that is fundamental to childhood has, over time, been perceived and thus expressed on a human rights level; its innocence and beauty, kindness, charm and its real but at the same time extremely vulnerable *humanity,* present in a 'condensed' and *clean* way, which may have inspired the wording of the Declaration of the Rights of the Child. However, in the wake of contemporary libertarian and utilitarian theories of bioethics, morality and philosophy of law, children's rights, taken seriously as fundamental human rights, have unfortunately stalled.[8] The scandalous phenomenon of child euthanasia in itself shows the way that many men of our time, adults, judge the meaningfulness of a child's life, that is, its perceived 'nonsense', from the point of view of their own incorrect values. It is a comforting development, however, more and more people consider that for a human person living in a shattered, ugly body, the experience of death, the transcendent nature of the *spiritual soul,* manifested in a peculiar way before death and in man's focus on it, is a *holy* thing, fulfilling personal human dignity and the meaning of (eternal) *life* (that starts in this world).[9]

As a result, however, proponents of euthanasia and assisted suicide have achieved significant results in developing new forms of euphemistic language ('merciful release', 'mercy killing'), and deploying a language policy toolkit (assisted suicide cannot legally be called by that name in some US States)[10] in order to make it sound humane to the general public. In contrast, in the human embryo, because it does not yet look human-like and charming, many do not yet perceive this spiritual dimension, and thus it cannot automatically evoke empathy in everyone. There is a particular need for theoretical proof and consistency of thought so that the soul is not involved in rational-moral (external) activity or in considerations of its *future skills*. This is all the more difficult since *personalism,* including the Christian version of it, puts emphasis on the *fulfilling* spiritual moral realisation of the human person, *perfecting interpersonal relations,* including, first and foremost, in his relationship with the transcendent, that is,

[7] Francesco D'Agostino, 'A természetjog kérdése az egyház társadalmi tanításában', in János Frivaldszky (ed.), *Természetjog. Szöveggyűjtemény* (Budapest: Szent István Társulat, 2006), 257–271, 261–262.

[8] János Frivaldszky, *A jogfilozófia alapvető kérdései és elemei* (Budapest: Szent István Társulat, 2019), 102–109.

[9] Marie de Hennezel and Jean-Yves Leloup, *A halál művészete. Hogyan nézzünk szembe a halállal? Vallási hagyományok és humanista spiritualitás napjainkban* (Budapest: Európa, 1999), 90–92, 112, 116, 120–121, 126, 132, 152, 163 and 166.

[10] Katalin Hegedűs, *Létezik-e jó halál?* (Budapest: Oriold és Társai, 2017), 94.

with God, in which natural moral law encourages and obliges him to *become what* he is in essence.[11]

From this perspective, the emphasis here is on moral personality development and the social development of man, which is condensed into the human person's *right to self-development*.[12] In contrast, the soul obviously does not form an absolute value either in the dying person, or in the human embryo, who may not even be borne alive, or might perish months after his birth, due to its *future potential* being realised in moral and rational actions. The human soul in itself forms the basis of man's unconditional dignity, without the need for any externally perceptible act, deed, or ability, from conception to death. This is the Christian, and hence Catholic teaching. The basic state of thought of personalism, as described just previously, can hardly be applied to conceptually grasping the essence (the soul) of the human embryo, which is also present in that state of life as its unconditional human personal value arises from his spiritual soul.

The lawyer has basically sound intuitions, such as in deducing the need for respect for a former human person (right to respect for the deceased), but sometimes he seems to be as blind as a bat and does not realise that a foetus is not a thing but a human being, while at other times he is the prisoner of his rigid logical constructions in his form-conservatism, such as when thinking in terms of the German pandectist concept of legal capacity, even if it clearly obscures man's legal subjectivity and personality at the foetal stage. These blind spots could have long been corrected by a healthier constitutional mindset which regarded the life of the foetus more realistically – in the age of 4D ultrasounds and the latest genetic research. In the logic of the latter, the right to life and to be the subject of law, which belongs to everyone 'since birth', can mean nothing more than the fact that everyone is, by nature, a human person and a subject of law from the moment he lives and exists as a unique human being; that is, from his conception. Due to the fact that a human being resembling a tadpole or salamander may not be captivating emotionally or empathetically,[13] it still needs to be theoretically realised that he is a human person the same as everyone else; that is, 'one of us', a member of humanity as a human being with unconditional dignity. Thus, simple intuition or primary experience is sometimes not sufficient to reach a correct legal position, and the rigid use of the category of legal capacity to grasp the notions of the subjectivity of the human embryo is particularly inappropriate, because it falsifies reality itself,

[11] For a brief but substantive history of the concept of the person and philosophical personalism, see Giovanni Lauriola, 'La persona: storia di un concetto', in Giovanni Lauriola (ed.), *Diritti umani e libertà in Duns Scoto* (Alberobello: AGA, 2000), 125–150. It should be noted that representatives of philosophical personalism were also largely critical of the contemporary line of natural law theory. Giuseppe Mazzocato, 'L'indirizzo personalista ed i suoi problemi', in Giuseppe Angelini (ed.), *La legge naturale. I principi dell'umano e la molteplicità delle culture* (Milano: Glossa, 2007), 151.

[12] Cf., for example, Domenico Coccopalmerio, *Fortitudo iuris. Persona e diritto* (Trieste: Lint, 1989).

[13] Michael Slote, *The Ethics of Care and Empathy* (Abingdon: Routledge, 2008), 18.

with very serious consequences. In order to establish reality against the often ideologically-based or interest-driven misconceptions that often become dominant, the lawyer must rely on his sense that identifies in man, in all men,[14] the most human and most particular dimension that is the spiritual soul, which grants man absolute value and dignity.

II Consensus on the specific content of human rights, but not on their basis

In the age when the Declaration of Human Rights was being drafted, a common *practical* agreement was shown on the specific normative content of the human rights that had been formulated. However, in the absence of a true consensus, *theoretically-rationally* formulated philosophical anthropology was missing, which would have established these human rights in terms of *the basis of their validity*. There was thus a lack of consensus on the source, purpose, and thus the nature of human nature. Everyone agreed on the declared human rights, but not on the *why* of their validity, because if they had been asked it would have resulted in a debate.[15] Thus, articulated human rights can be considered to be 'natural' rights only to the extent that, in more than one case, the term 'innate' is included in the terminology before those rights. However, this 'only' means that positive law is not the source of their validity.

However, the Declaration does not articulate the nature of the source inherent in human nature, such as the source of human dignity, which would contain and prescribe these human rights and institutions in a manner consistent with natural law, based on specific human nature. Due to this shortcoming, the declared human rights somehow lose their specific, substantive natural law basis, as the latter would presuppose the universal recognition of universal human nature.[16] In this way, the parties involved in drafting the Declaration proved only to themselves – by a theoretical justification valid for themselves as individuals but different from the other drafting parties – the basis of validity of human rights; hence, there was only an effective consensus on the need for practical action, namely the practical conclusion for the protection of human rights.[17] In the end, in line with the pragmatic attitude

[14] The practical *ars* of exercising law, as understood by Roman lawyers, is to be able to perceive the human person and his legal subjectivity in the foetus, beyond the formal and abstract category of legal capacity. Cf. Pierangelo Catalano, 'L'inizio della "persona umana" secondo il diritto umano', in Andrea Trisciuoglio (ed.), *Valori e principii del diritto romano* (Napoli: Scientifiche Italiane, 2009), 31–36, 33–34, 36.

[15] Jacques Maritain, *Man and the State* (Washington, DC: Catholic University of America Press, 1998), 77; Norberto Bobbio, 'Sul fondamento dei diritti dell'uomo', *Rivista internazionale di filosofia del diritto* 42 (1965), 302–309.

[16] Reginaldo Pizzorni, *Diritto naturale e diritto positivo in S. Tommaso d'Aquino* (Bologna: Studio Domenicano, 1999), 221.

[17] Cf. Maritain, *Man and the State,* 78.

current at that time, it was in practice not particularly important for the adopters of the Declaration to formulate for themselves the final basis for the validity of these rights; from a political-practical point of view, the important thing was to ensure the effective protection for them; the declaration sought to contribute to this through its indirect and symbolic means.

This was also the case at the level of a political pragmatism with a noble goal, on the basis of which it was possible to agree on the rights to be protected by *consensus,* after a period of mass injustice.[18] The compromise in the consensus underlying the Declaration was therefore that the reference to human nature and its source was enclosed in parentheses, and thereby the statement of the natural law basis for human rights was also ultimately omitted. In this way, however, according to my thesis, human rights were not given either natural law protection or content definition under natural law, which also had an impact on the future enforcement of human rights and the manner of their enforcement. The reality of the consciously undertaken *absolute*[19] philosophical unfoundedness of human rights turned into a theoretically undertaken philosophical unfoundedness (it was declared that 'human rights cannot be philosophically founded'), then, over time, it turned into *effective pressure,* performed via the enforcement of 'human rights' by libertarian political ideologies, in the medium of *value relativism* taken in a *normative* way, or sometimes in the philosophical context of *nihilism*. Following Maritain's thoughts, however, in a well-interpreted positive approach, it may be asserted that a kind of pragmatic political consensus could have been arrived at thanks to the shared seeds of truth experienced by the drafters and because the 'cognition by natural inclination'[20] of natural law still operated in the moral consciousness of mankind, which in turn was a pre-scientific and pre-philosophical *primary* mode of cognition, and thus it does not require and immediately presuppose a theoretical foundation or *reflective scientific-philosophical* knowledge.[21]

III Maritain: 'Practical truth' and the natural law basis of human rights – the problem of a compromise

Maritain, who was involved in the preparation of the preamble to that declaration, approached human rights and their origin, validity and content on a Christian natural

[18] Leonardo Messinese, 'La concezione della legge naturale in Jacques Maritain', in Renzo Gerardi (ed.), *La legge morale naturale, problemi e prospettive* (Roma: Pontificia Università Lateranense, 2007), 424.

[19] Norberto Bobbio, *L'età dei diritti* (Torino: Einaudi, 1997), 16.

[20] For the concept see Marco D'Avenia, *La conoscenza per connaturalità in S Tommaso D'Aquino* (Bologna: Studio Domenicano, 1992).

[21] Messinese, 'La concezione', 426.

law basis.[22] When he began to discuss the possibility of examining human rights and explaining their contents on the basis of natural law, he was following in the footsteps of Saint Thomas Aquinas, and arguing on the basis of Christian philosophy.[23] On the one hand, discussing the substantive validity of human rights, he emphasised their origin from God, since the dignity of the human person derives from man's creation in the image of God and, on the other hand, he argued that the most general requirements of natural law can be known by all men on the basis of their 'natural inclination', that is the functioning of the natural law in man, in a natural way.

According to Saint Thomas Aquinas, the law of nature is the participation of the eternal law in the human mind. Man is thus able to know this law by his natural rationality, which merely reflects the purposes of his natural inclinations. Maritain, who, as can be seen, founded human rights in his writings on a Christian basis, in a natural way, was able to explore these foundations and demonstrate their knowledge by accepting these rights ontologically and epistemologically, even without a person necessarily accepting their ultimate source (eternal law). A prominent role was played in this by the idea that natural law is *primarily* known based on a 'natural propensity', which doctrine was originally formulated by Saint Thomas Aquinas.[24] That is, behind the political consensus of the Declaration on practical conclusions alone, Maritain was able to provide solid evidence of human rights to an authoritative audience, which they were able to accept because of his epistemological, cognitive-oriented approach to knowledge, that is, one based on natural inclination. Meanwhile, Maritain explained the ontological scientific-philosophical validity behind the epistemology of natural law in a Thomist way, which considered the dignity of the human person and the rights arising from it to be based on natural laws in the Christian sense.

The divine foundation of human dignity as the source of human rights and the corresponding moral theological theoretical reasoning could not come into question in drafting the Declaration, as acceptance of this theoretical-theological basis belongs to the world of (Christian) religious faith, while the authors of the

[22] When discussing human rights, he starts from the transcendent dignity of the human person in the Christian sense, adding that this transcendence 'most obviously exists in the perspective of faith and redemption', and then goes on to say that 'but since then the consciousness of this dignity has gradually gained ground also in the natural order, penetrating and renewing our knowledge of the law of nature and natural law'. Jacques Maritain, 'A személy jogai, a politikai humanizmus', in Frivaldszky János (ed.), *Természetjog. Szöveggyűjtemény* (Budapest: Szent István Társulat, 2006), 90–92. However, the basic ideas were already in place in 1942, as he published in May of that year in New York his work entitled *Les droits de l'homme et la loi naturelle*.

[23] On the question of whether Christian natural law thinking exists, or just whether this theological-based reasoning can be used for a Christian philosopher and philosopher of law, cf. Giovanni Ambrosetti, *Diritto naturale cristiano, profili di metodo, di storia e di teoria* (Roma: Studium, 1970). Today, it has been re-emphasised that human rights need to be explicitly based on divine law-based natural law.

[24] D'Avenia, *La conoscenza*.

Declaration held various religions and ideological beliefs.[25] It was not possible to determine the basis of validity of natural law in the sphere of religious truth, that is to explain and reach a consensus on the content of the eternal law – these methods of justification would have been mutually rejected as dogmatic, thus giving rise to endless debates, so it was not possible to determine the legislative source of the natural law in the first place. At the same time, it became possible to emphasise the epistemological contents of natural law, that appears and is being increasingly fully known at the individual and collective civilisational levels, that is, highlighting the role of the cognitive subject (man, humanity) in cognition and in the way of cognition (by inclination, connaturality), together with the human rights content received, that is, the one known to be mandatory. It was thus possible to define the conclusion-like content of human rights in an epistemologically certain way, and consequently to express them politically by arriving at a consensus.[26] However, it must also be said that, without a well-defined source of validity and a theoretically formulated, commonly shared ontological order, these rights have inadvertently become unproven axioms that lack a metaphysically fixed basis in natural law. In fact, in the absence of a source of validity, and thus in the absence of an understood binding force: (1) they ultimately remained vulnerable; (2) in terms of their legal content[27] and interpretation, they lost their direction; furthermore (3) without the underlying human nature, individual rights can be isolated from others;[28] what is more, they could even confront or be played off against each other.

The binding force of human rights, independent of the positive source of law, namely political power, was supposed to be expressed by the fact that the Declaration includes the adjective 'innate' before certain human rights. However, as the Declaration does not have a positive law binding force, and by omitting the definition of the essential nature of human nature as a source, the foundation of natural law is actually enclosed in brackets (reduced only to the 'innate' adjective), thus calling into question the nature of human rights' mandatory content, taken in a broader legal

[25] See Dag Hammarskjöld Library, Drafting Committee – Members, https://research.un.org/en/undhr/draftingcommittee.

[26] Maritain, *Man and the State,* 76–80.

[27] The Declaration is not binding in a positive law sense, but it has greatly influenced the development of human rights thinking.

[28] Certain rights are exaggeratedly taken out of their human rights context by certain human rights aspirations, and this is contrary to the spirit of the Declaration. Vittorio Possenti, *Il principio-persona* (Roma: Armando, 2006), 108. For the concept of the world of rights, that is for the natural law (practical philosophical) discussion of the nature of human rights as a coherent system, see Francesco Viola, 'I diritti umani: una nuova forma di diritto naturale?', in Giuseppe Angelini (ed.), *La legge naturale, I principi dell'umano e la molteplicità delle culture* (Milano: Glossa, 2007), 137–149. In my view, some fundamental human rights are absolute in their correct (!) sense, such as the right to be the subject of law, life and human dignity, which are fundamental rights that arise from human nature in an absolute, unrestricted way. However, these rights also acquire meaning and content in relation to the essence of the human person, since they are 'human' and they belong to the 'person'.

philosophical sense. In the meantime, a number of human rights instruments have been adopted with positive law binding force, including the International Covenant on Civil and Political Rights, but the problems arising from the lack of a valid basis for human rights have not been resolved, or even seem to have been exacerbated. As these documents contain a number of political elements since they contain an international vindication of rights, they have also spread a culture of the political assertion of rights. In the postmodern age, this created a whole political culture of demanding 'rights of claim', considered in a kind of libertarian view, which in many respects are in clear conflict with the human rights enshrined in the Declaration and with the institutions based on human nature (marriage, family).[29] As a result, renowned contemporary Catholic legal philosophers, based on metaphysical reality and continuing classical traditions, have turned against the contemporary culture of human rights, seeing that it was increasingly driven by the relativism and nihilism of libertarian political voluntarism being unverifiable by rational arguments, in philosophical and legal terms.[30] Michel Villey's basic position, which rejected the whole modern tradition of subjective and human rights for philosophical reasons, also fits into this trend.[31]

However, I believe that, instead, the doctrine of true fundamental human rights needs to be strengthened in defence of human natural truths, while the theoretical and political-ideological abuses of human rights must be rejected because they are against human nature and therefore against human fulfilment. Namely, from the point of view of natural law, there is a huge difference between the situation when universally divided, natural law-based natural rights are declared (recognised and admitted) and enforced, and the situation prevailing at present – as just referred to – when claims without natural law justification, or claims directly confronting the requirements of natural law are made using political means and transformed into

[29] In recent decades, gender feminists have campaigned for a complete revolution in and elimination of thinking on gender roles, including at the 1995 UN World Conference on Women in Beijing. Oscar Alzamora Revoredo, 'A genderideológia: veszélyek és lehetőségek', *Embertárs* no 1 (2008), 11–23.

[30] Danilo Castellano, *Razionalismo e diritti umani. Dell's anti-philosophy politico-giuridica dell 'modernità'* (Torino: Giappichelli, 2003), 91.

[31] Michel Villey, *Il diritto e i diritti dell'uomo* (Siena: Cantagalli, 2009). Danilo Castellano, moreover, disagrees with the French philosopher of law that rights cannot be derived from (individual) human nature. Castellano, *Razionalismo,* notes 2, 3 and 5. Villey has been widely criticised – it suffices to refer to Ambrosetti in this regard – for overly tilting to the other side in his criticism of the individualistic human image of modern abstract rationalist natural law, which approaches natural law and the nature on which it is based as the nature of political groups in a too pragmatic, and thus anti-theoretical, anti-philosophical way. Ambrosetti, *Diritto naturale cristiano,* 38–39. From the nature of the empirically, almost sociologically described groups, it is exactly the normative nature that disappears. It is also doubtful, as Ambrosetti writes, that the natural law of the Romans would have been nothing more than an open, continuous practical search for the 'just'. When Villey places a strong emphasis on interpersonal mutual justice in his conception of law, at the same time he underestimates and incorrectly assesses the role of subjective rights and human rights in the world of law.

positive law; that is, rights are enforced for political or ideological reasons. These claims and demands which are contrary to natural law, ostensibly of a 'human rights' nature, do not have legal validity and binding force in the sense of natural law, even if they take a positive legal form. All these contemporary problems, therefore, stem from the fact that the rights declared in the Declaration do not have an explicit, collectively declared natural law basis.

Thus, Maritain traces the origins of rights back to eternal law through natural law, while expressing the cognition of natural law in such a way that many religious or ideologically convinced people can agree with it if they share the human rights enshrined in the Declaration and are led by the secular 'faith' in them. In Maritain's presentation, man is emphatically a historical being, a 'cultural being'[32] and as such the explanation of natural law takes place in a theoretical framework of cultural philosophy, in which humanity is the privileged subject of the cognition of this law. The historical cognition of natural law in the experience and conscience of mankind – the *gnoseological* element of natural law in the historical civilisational-cultural sense – therefore plays an extremely prominent role in Maritain's theory.[33] Mankind thus recognises certain human rights *as binding,* at an important point in its development of conscience and consciousness as a result of historical experience, and the authors of these declaration(s) were in consensus about this recognition, and arrived at it almost spontaneously.

Maritain's merit is that, by drawing attention to the cognition of natural law (in a primary manner, that is, by *inclination* or connaturality, and not to its ontological side that can be theoretically articulated), he contributed to reaching a general consensus on human rights based on that law.[34] Thus, a universal (general) consensus on the results of the epistemological side of natural law prescribing human rights was possible, while the ontological dimension underlying them, which Maritain not only professed but also developed through thorough and powerful work, remained in the background.[35] It seems clear that the gnoseological element elaborated in

[32] Jacques Maritain, *Nove lezioni sulla legge natural* (Milano: Jaca Book, 1985), 124. Compare with the introduction by Francesco Viola, ibid. 30–31, 34. These nine presentations were given in 1950. It was published earlier in Italian than in the original language, see Viola, ibid. 12. The fact that Maritain's important work was published in Italian before the original language (French) is always mentioned in the Italian literature. See Messinese, 'La concezione', 409. The Italian edition greatly shaped Italian legal philosophical thinking, especially that of natural lawyers. It is noteworthy that, for example, a recent Brazilian monograph published by the Brazilian Jacques Maritain Institute discusses Maritain's oeuvre, which fertilises legal thinking and its legal and constitutional implications, without basing it at all on these nine lectures; however, in my opinion, neither Maritain's concept of natural law nor his understanding of human rights is possible without them. Lafayette Pozzoli, *Maritain e o Direito* (São Paulo: Loyola, 2001).

[33] Viola in Maritain, *Nove lezioni,* 33.

[34] Messinese, 'La concezione', 424.

[35] Ibid. It is important to note that Maritain considered the theoretical foundation of human rights to be fundamentally important. Nevertheless, it seems that he considered it important for *theological,*

Maritain's doctrine of natural law was in line with humanity's ground-breaking historical experience of the content of natural law. However, this optimistic mood in the year of the Declaration, 1948,[36] and, we could add, its underlying cultural philosophical foundation, has long since disappeared. This development requires a redefinition of the relationship between natural law and human rights – perhaps through an even closer return to the relevant thoughts of Saint Thomas Aquinas.

The issue raised by the Declaration for our time is the extent to which the practical justification of the content of human rights, detached from the *demonstration* of validity bases, is able to support the argument that seeks to resolve human rights conflicts in the right direction when it comes to human rights based directly on the essence of human nature. The human rights enshrined in the *Declaration,* as practical conclusions, are fundamentally in line with the Thomasian sacred content of the law of nature. This is not the case, however, with the further (misguided) interpretations which have subsequently been proposed, deriving from ideological-political interests and subjective views. These have emerged from the separation of the declared rights and the basic human institutions founded on human nature (marriage, family) from the content elements of human nature (and it is certain that they did not receive such a substantive foundation at the time of their declaration), and their ontology, thus highlighting some rights, detaching them from others, so they began to be interpreted in a way which is not in accordance with the essence and structured goals of human nature. As a result, the human rights initially declared in 1948 have since more than once taken on a distorted meaning on their own;[37] which is to say that, in the framework of human rights reasoning and justification, they acquired anti-natural, that is, non-legal content.

Hence, it can be concluded that the justification or attempt to justify the content of human rights at the time of their application does not, at the same time, mean the *foundation* of their *validity*. This raises the question of the moral and legal philosophical relevance of a theoretical knowledge of human nature. However, in view of the above misinterpretation of human rights – in the Thomasian, natural law sense – the question already arises: Can the content of human rights be justified

Christian reasons. See Jacques Maritain, 'Il significato dei diritti umani', in Jacques Maritain, *I diritti dell'uomo e la legge naturale* (Milano: Vita e pensiero, 1993), 121–149, 126, 132, 134–138 and 140. However, I also consider the theoretical, conceptual-deductive foundation to be essential from the point of view of legal philosophy. Evidently, Maritain also considered this to be essential (although he wrote more about moral-philosophical justification), but he did not choose this path, and this is remarkable. Nor did he regard this method of justification as his duty when the Declaration had already been adopted, and the pragmatic compulsion to build a consensus was no longer so burning. However, it is also clear that a conceptual-deductive justification is only possible and necessary for the most basic rights and institutions.

36 Pizzorni, *Diritto naturale,* 224.

37 Commissione Teologica Internazionale, *Alla ricerca di un'etica universale: nuovo sguardo sulla legge naturale* (Città del Vaticano: Libreria Editrice Vaticana, 2009), 7–8.

without revealing the source of their ultimate validity? In addition, can they be justified if they are not considered in their ontological dimension and content? In my view, based on the doctrine of natural law explained by Saint Thomas, not only can no new human rights be derived if the goals of human nature and the essence of human nature are ignored, but also the correct content of the human rights articulated in the Declaration cannot be established without the application of natural law reasoning and philosophical substantiation in a Thomasian, Neo-Scholastic ontological sense. It follows that, for the correct interpretation of human rights, human nature may be and must be formulated theoretically on the *reflective* and normative level of *philosophy of law* in a legal manner. Even if a declaration of human rights ignores this philosophical anthropology, the science of philosophy of law, with its specific vocation in mind, can no longer do so.

Knowledge of this theoretically formulated normative essence of human nature, as the basis of reasoning, is necessary because without it the most important human rights and natural human institutions (marriage, family) cannot be derived, and established, and it will not be possible to reject the latest aspirations that may be considered contrary to natural law, called 'human rights', invalid. An objective and orderly knowledge of the 'human good' contained in the finality of human nature is necessary in order to formulate the right to achieve and ensure it as a mandatory general requirement. The question now is what these human goods consist of and how can they be articulated. In recent years, ontological thinking, and all sorts of essentialist reasoning in general, has been rejected by many thinkers; this includes any mode of justification that starts from human nature as a source of legal validity. On the one hand, this has come from the 'neoclassical' natural law trend of neo-Kantian and at the same time analytical practical philosophical thinking,[38] – following Saint Thomas in a reformulated way of thinking – on the other hand, pragmatist tendencies bearing certain features of postmodernism have rejected the derivation of legal norms and human rights arising from a theoretically pre-formulated universal human nature.[39] However, I consider the inclusion of this theoretically formulated human nature in the legal argument concerning fundamental human rights indispensable, as mentioned above.[40] The concrete content definition of the *most fundamental* human rights, that is, the substantiation of their validity, the derivation of their essential normative content,

[38] Tommaso Scandroglio, *La teoria neoclassica sulla legge naturale di Germain Grisez e John Finnis* (Torino: Giappichelli, 2012).

[39] János Frivaldszky, 'Law as Practical Knowledge: Deconstruction, Pragmatism, and the Promise of Classical Practical Philosophy', in Alberto Martinengo (ed.), *Beyond Deconstruction: From Hermeneutics to Reconstruction* (Berlin: De Gruyter, 2012), 255–275.

[40] János Frivaldszky, 'Quale legge naturale per l'Europa dopo la scuola neoclassica del diritto naturale?', in Marcello M Fracanzani and Stefania Baroncelli (eds), *Quale religione per l'Europa?* (Napoli: Scientifiche Italiane, 2014), 51–72; János Frivaldszky, 'Diritti umani e natura umana', in Giulio Maspero and M Pérez de Laborda (eds), *Fede e ragione: l'incontro e il cammino. In occasione del decimo anniversario dell'enciclica Fides et Ratio* (Siena: Cantagalli, 2011), 149–158; János Frivaldszky,

and their justification in this way cannot ignore the *a priori* theoretical knowledge of human nature, capturing its essential elements in *concepts* and *normative* statements, or those relations of logic. The latter, on the other hand, is preceded in terms of cognition by the basic moral intuitions and experiences of man, or of all people who think and act correctly, and who intuitively explore and understand human nature. However, the foundation of the validity and content of other human rights that are further away from the basic normative contents of essential human nature – which are otherwise mostly context-dependent in their validity and form of expression – and the resolution of their conflicts *also* requires a dialectical prudential practical knowledge of the classical jurisprudence, which, in turn, increasingly constitutes the world of practical philosophy and reasoning.[41]

This line of thought also raises further issues and topics. It is therefore also possible to ask what the nature of the different truth needs and ways of proving the manifestations of practical philosophy are, and how they are related to each other. In other words, what is the relationship between the 'practical truth' of consensus-oriented *political* pragmatism, exercised perceptively with a view to enforcing human rights, that is, the 'overlapping consensus' of contents concerning human rights, and the need for justice of controversial-dialectical prudential *legal* reasoning, as well as the statements of moral and political philosophy (as we see it) formulated mostly as analytical justification-oriented practical philosophy by the contemporary academic community of legal theory argumentation? In any case, the primary question is whether any consensus of political or legal thinking that emerges is of any relevance, to the validity of human rights at the theoretical level, (or if such relevance is only wished for) and if so, within what framework.

Our impromptu answer is that the content of fundamental human rights can only be validly discussed in relation to instances of human nature. Since human rights are based, for Maritain, on a law of nature and natural law basis, the question arises as to what the role of human nature and natural law in the formulation of human rights is, and how they can be discerned. To answer this question, it is important to distinguish between the primary, that is on an individual level, and on those of the humanity, and reflective (that is secondary) philosophical scientific ways of revealing the law of nature. Cognition, at the level of mankind, needs to be analysed specifically because of Maritain's concept of the law of nature. As will become apparent, the question itself was somewhat different in the era of Maritain, in the optimistic atmosphere of the formulation of human rights, than it is in our times,

'Diritto naturale senza natura umana?', in Antonio Malo (ed.), *Natura, cultura, libertà: storia e complessità di un rapporto* (Roma: Edusc, 2010), 113–123.

41 Cf. Frivaldszky, *Természetjog*, 144–146; János Frivaldszky, 'Legal Discourse: The Promise of Classical Practical Philosophy', in Maurizio Manzin, Federico Puppo and Serena Tomasi (eds), *Studies on Argumentation and Legal Philosophy: Further Steps Towards a Pluralistic Approach* (Trento: Università degli Studi di Trento, 2015), 129–142.

which are burdened with different issues, and when certain fundamental rights have often become empty, meaningless formulas, which various ideological and political trends seek to fill with content to fit their beliefs and further their interests.

Just as the natural mind of the uncorrupted ordinary person, reflecting on natural human inclinations, is able to understand the aims of human existence and the human goods and norms associated with it, so taking account of the results of reflective scholarly knowledge of natural law or philosophy of law on the basis of individual and community moral experiences – as a secondary cognition of natural law – is capable even nowadays of formulating the essence of human nature, along with its most basic content elements and the norms, institutions, rights and duties arising from them by exploring the concepts and the relations between them. At this level of reflection, the nature of human nature may and must be articulated in such a way that the greatest possible number of the more fundamental human rights, duties and natural law institutions might be established and deduced from it. It must be formulated because, in the course of individual natural moral cognition, some basic provisions of natural law can be taken as evidence; that is (in the case of 'ordinary cognition'), on the basis of natural inclination, a scientific foundation of which would enable legal-philosophical reflection to derive a number of natural law principles, rights, institutions and rules in their necessity, by detailing the syllogistic logical relations between them. This, however, requires the establishment of valid premises of syllogism, some of which certainly would be founded upon human nature.

Human rights have been articulated and proclaimed throughout the history of mankind, if not in a fully-developed form, but in fact on the basis of natural law validity, defined as 'innate'. (This paper often does not make a conceptual distinction between the concepts of law of nature and natural law, often using them as synonyms, although it is clear that the law of nature, in its broad sense, underpins natural law.)[42] Human rights thus need to be substantiated by natural law, or, as it were, 'justified' by it in terms of both their legal validity and their proper application. There was some intuition of this in the formulation of the Declaration, but, as already noted, in the absence of an agreement on the nature and purpose of human nature and the source of human dignity, the express basis of natural law was not formulated in a philosophical-theoretical way. Maritain's response, written during the preparation of the Declaration (preamble) in June 1947, stated that if God does not exist, then 'the end justifies the means' principle is the only reasonable one, and if it were applied in a society in which everyone would finally exercise their full rights, then any right of any person for that purpose could be infringed if it were the necessary means to achieve the aim pursued.[43] Theoretically, therefore, it is very

[42] Viola in Maritain, *Nove lezioni,* 137.

[43] See the quote from Jean-Yves Calvez, 'I diritti dell'uomo secondo Maritain', in Vincent Aucante and Roberta Papini (eds), *Jacques Maritain: la politica della saggezza* (Soveria Mannelli: Rubbettino, 2005), 108.

conceivable for a false policy to fight for the 'full' enjoyment of human rights, which violates real human rights, and thus human dignity and human nature, because human rights, in their entirety, are not derived from a well-understood notion of human nature, which might otherwise determine their content.

In the footsteps of Maritain, we can conclude that this situation of violation may arise, for example, in such a way that the political system, starting from a misconceived, reduced anthropology, absolutises material equality on a materialistic and collectivist basis,[44] while trampling on liberties, as has been the case with communist dictatorships, but also in such a way that the political regime radicalises the most widely understood and unrestricted individual liberties as the only possible rights, without regard to the fundamental truths of human nature. In my view, it is not necessary to believe in God to avoid these, but it is absolutely necessary to accept the dignity of an unconditional, spiritual human soul. Spaemann, for example, argues that the right to dignity is not a human right, the enforcement of which one is entitled to, but rather a fundamental *metaphysical rationale,* from which human beings derive rights and duties in any case.[45] Nevertheless, Maritain disregards such a 'final' philosophical foundation of human rights in concrete political action, more specifically in his contribution to the preparatory material for the Declaration, as he believed that the effective protection of human rights could be ensured even if the authors of the Declaration did not agree on the philosophical (cultural, religious, ideological or political) values underpinning them.[46] In the introduction to the UNESCO's contribution to the Universal Declaration, which Maritain was commissioned to draft, the French philosopher stated that people could agree on the text of the Declaration without expressing the same views on the finalist ultimate *theoretical* foundation:

> I am absolutely convinced that the only way to prove my belief in human rights and the idea of freedom, equality and fraternity is the only one to be firmly based on truth. This does not prevent me from agreeing on these practical beliefs with those who are convinced that their justification, which is completely different from mine and contrary to mine in terms of theoretical dynamism, is similarly based on truth alone.[47]

Thus, he maintained that, in the field of practical beliefs, people who are equally convinced that, in terms of human rights, only their justification is based on the truth may come to an agreement even though their beliefs and ultimate justifications

[44] Jacques Maritain, *Az igazi humanizmus* (Budapest: Szent István Társulat, 1996), 44–66. Cf. Zoltán Turgonyi, 'A marxizmus tomista szemmel', in Zoltán Frenyó and Zoltán Turgonyi, *Jacques Maritain* (Budapest: L'Harmattan, 2006), 55–97.

[45] Spaemann, *Tre lezioni,* 33.

[46] This practical situation existed, as representatives of the international community from several nations, cultural traditions and religions were present among the drafters of the Declaration.

[47] Jacques Maritain, 'Introduction aux text réunis par l'UNESCO. Autour de la nouvelle déclaration universelle des droits de l'homme', in Jacques Maritain and Raïssa Maritain, *Œuvres complètes* (Fribourg–Paris: Éditions Universitaires – Saint-Paul, 1988), vol IX, 1206.

are different from or contradict each other. Some were horrified by Maritain's standpoint on this, while others believed that it was not a matter of simple pragmatism, but of the right attitude in the spirit of practical wisdom.

The authors of the Declaration did not, however, consider that the consensus behind the Declaration itself created the basis for the validity of the rights in it, as they are declared to exist, that is valid, 'innate', or it appears from the wording that the Declaration proclaims the foundations of human coexistence by treating these principles and contents as moral facts. Maritain's attitude is a pragmatic political approach to a fundamental human rights declaration based on politically practiced truth; that is to say, practical truth – not grounded in sheer unprincipled pragmatism – that prioritises the declaration and enforcement of rights as its goal.[48] Yet the question remains as to whether this goal has been achieved, or whether mere faith in human rights could have been achieved at all,[49] when the same rights no longer mean the same content for everyone. In my opinion, the answer is negative. There are not only political reasons for this, namely that, in many respects, the declared rights have not been enforced, but I also mean by this 'no' that, in their theoretical unfoundedness, they could not prevail in the long run, because human rights without an articulated notion of 'human nature' are indeed not human or rights in the strict sense of the words. At the *primary* level of cognition of the natural law, on the basis of 'natural inclination', the rights declared in the Declaration empirically coincide with the norms based on natural law – in the sense of Saint Thomas – but *deformations* may occur during further cognition, explanation and interpretation (also in line with Saint Thomas's teachings) that can be explained by negative cultural-societal processes, which is only confirmed by the lack of theoretical, *secondary* cognition of the law of nature; that is, the foundation and explanation of it and the rights that flow from it.

IV The right to life of the foetus arising from its human essence and dignity – the need to transcend the pandectist heritage

Although this paper began with a discussion of an international human rights document of fundamental importance, the lawyers of legal systems with cultural features of the German pandectist mindset remained prisoners of a much older legal way of thinking regarding the human foetus's right to life. The existence of

[48] Calvez, 'I diritti dell'uomo', 108–109.

[49] Although these human rights have lost their rational foundation, they have not yet lost their religious character and have even become the religion of humanity. If we want to save the universality of human rights, they must have a kind of foundation by faith; they must be transformed into a secular faith in the sanctity of human dignity, writes Viola. Francesco Viola, *Diritti dell'uomo, diritto naturale, etica contemporanea* (Torino: G Giappichelli, 1989), 80.

the foetus, and thus its right to life, has also been discussed in this context in civil law thinking, and even on several occasions in the constitutional approach, as in the case of Constitutional Court judges who brought these civil rights mindsets into the constitutional discourse and in their Constitutional Court decisions. First it is worth examining what this approach is, that has been able to overwrite the legal human image of even universal human rights declarations and constitutions corresponding to them in everyday life, even in a novel way, that in the event of the interpretation or amendment of constitutions, or exceptionally with the adoption of a new constitution, the traditional *pandectist civil law* approach determines the constitutional content with regard to the basic legal status and subjectivity of the foetus. The theoretical task, more precisely, is to leave the notion of pandectist legal capacity permanently behind in the analysis of the subjectivity, human person-identity, and right to life of the foetus, as it is completely inadequate for grasping it in conceptual terms.

In pandectism, the problem of what makes a subject capable of being a person in a legal sense is resolved by the fact that a person is the subject of law; that is, he is a person in the civil law sense, who can be the addressee of rights (and duties). The ability to be the addressee of rights and obligations is called civil law capacity *(bürgerliche Rechtsfähigkeit).* The prerequisite for this is a kind of *status naturalis* that becomes real when one is born alive and has a human (facial) appearance.[50] The human being is therefore a subject of law if and to the extent that it is recognised by the state. According to pandectists, legal capacity makes a man a subject of law *(Rechtsperson),* who has a personality (in the legal sense). This can also be seen in the logical structure of the statement that 'every human being has legal capacity and therefore qualifies as a person' *(Alle Menschen sind rechtfähig, sie sind damit Personen),* or in another wording, 'Any person holding legal capacity is a man in the legal sense' *(Person im rechtlichen Sinne ist der Mensch, der rechtsfähig ist).*

Personality in the legal sense *(Rechtspersönlichkeit)* comes from legal capacity, so the latter is the personality itself. Being the subject of law and legal capacity thus coincide. However, this ability is only legal (and will become legal capacity, and indeed existing) if it is granted by the law that also determines its content. While in the enlightened modern conception of natural law, man is inherently and by nature entitled to certain innate natural rights – which have historically identifiable Christian roots – that is, man is the addressee of these rights by nature, that is *ab origine,* in pandectism, man exercises his rights in such a way that the state has previously attributed legal capacity to him, so the rights he can exercise in this way depend on legal capacity. While, in enlightened natural law, man's dignity is based on his innate rights, in pandectism this dignity is based on legal subjectivity granted by the state, the validity of which is independent of the individual rights actually enjoyed, as the latter depend on an additional statutory allocation, dependent on the

[50] Alberto Donati, *Giusnaturalismo e diritto europeo, human rights e Grundrechte* (Milano: Giuffrè, 2002), 177–178.

state's will.[51] Consequently, it is not the rights that play the decisive role in terms of legal capacity but their allocation by the state, which makes the latter a decisive legal quality in man's relation to the state.

As a person does not have legal status prior to its allocation by the state, so a man does not have a natural subjective right that may be enforced against the state, to be the subject of law, or to have his personality in the legal sense and legal capacity recognised. In pandectism, legal capacity thus exists insofar as it is granted by laws, which also specify its content. Under pandectism, legal capacity is a fragment of state sovereignty, by the granting of which the state exercises self-restraint in the exercise of its sovereignty. In this way, the basic concept of civil law, legal capacity, is a category of public law. However, if legal capacity is a precondition for the acquisition and exercise of any further individual rights, its *public law* nature permeates the whole of civil law (that is, *private* law).

From that perspective, therefore, the precondition for granting a subjective right is the existence of legal capacity; that is to say, the fact that the human person has become the subject of law. In pandectism, legal capacity, that is, legal subjectivity, is not a general subjective right but merely means an ability or a *capability* to be the addressee of rights.[52] Something that is an integral part of all rights cannot be a right in itself. Contractual, testamentary and marital capacity are not the consequences of legal capacity or the general concept of the human person but attributions and allocations by the state. The natural person is thus *bound* to the *formal* concept of legal capacity and, through this, *to the state*.[53] The state grants individual rights on the basis of previously recognised legal capacity and legal subjectivity. Legal capacity is *not a right* but a *mere status*. Legal capacity, as explained above, is based on the positive; that is, on politically stated law, and is thus granted by the state.[54] It follows that it does not have its own ontological status. It follows from this that it is also possible for the state to choose not to confer legal capacity on a particular group of people, and hence they would not have rights.

[51] Ibid. 181–182.

[52] Ibid. 183.

[53] Francesco D Busnelli, 'Rilevanza giuridica della vita prenatale, categorie civilistiche, principi costituzionali', in Donato Carusi and Silvana Castignone (eds), *In vita, in vitro, in potenza: lo sguardo del diritto sull'embrione* (Torino: Giappichelli, 2011), 27.

[54] For the extreme representative of legal norm positivism, Hans Kelsen, the subject of law is not an entity with a centre, that is, a dignity that stands itself in front of the system of norms in the first person singular, but one to whom norms give a personalised, fictitious and virtual existence, as they perceive and create him as a unified point of defined normative imputations. While Immanuel Kant's conception of law and pandectism presupposed the existence of the subject, and the question arises as to when it will become legal, *pure theory of law* reverses the question and asks whether it is true that the subject of the law is indeed a subject. Massimo La Torre, *Disavventure del diritto soggettivo* (Milano: Giuffrè, 1996), 399. Kelsen's conception thus considers the natural person as the personification of the objective 'norm complex', which is therefore not human in the legal sense. Hans Kelsen, *Tiszta jogtan* (Budapest: ELTE Bibó Szakkollégium, 1988), 32.

It can also be stated with more general validity that contemporary continental legal systems – partly based on the above logic – consider the foetus to be a kind of quasi-human only because of its indirect, pending (that is, dependent on its live-birth) and partial legal capacity. In this way, a person yet to be born is not ab ovo a subject of law who having legal capacity can thus be entitled to rights and obligations, for example, that he may be appointed as an heir, but, in terms of the mode of thinking, it seems to be the opposite in the legal positivism approach, as inherited from German pandectists: Since it can be the addressee of a certain proprietory right, for example, it can be appointed as heir and therefore has an ability to acquire, so it can be inductively established that it can be the addressee of rights and obligations, which implies that it is conditionally (depending on the probability of the likely enforcement of its ability to acquire) declared as having legal capacity, and therefore – to such a relative and partial extent[55] – it is a subject of law, but not human with a personality *ab origine* for the law. Since it is not sure that it will be able to acquire, as it may not survive its birth, the Civil Code (that is, a positive law created by the state) declares it only conditionally legally capable. It seems that the (partial and conditional) proprietory capacity arising from the capacity for acquisition thus makes a man a person in the civil law sense.[56] This approach dates back to Roman law, (among other sources) where the foetus was not a person, and its legal capacity, as shown in its acquisition capacity, was conditional on a live-birth (pending legal status).[57] In addition to all this legal historical and cultural heritage, and beyond, in a number of cases, the incorrect application of Aristotle's concept of *potency/potentiality* (ability/opportunity)[58] to the (legal) subjectivity of the foetus still

[55] Cf. Fritz Fabricius, *Relativität der Rechtsfähigkeit. Ein Beitrag zur Theorie und Praxis des privaten Personenrechts* (München: Beck, 1963).

[56] The view that the legal capacity and acquisition capacity of the foetus is conditional until he is born alive came to us from Roman law; Umberto Vincenti, *Diritto senza identità, la crisi delle categorie giuridiche tradizionali* (Roma: Laterza, 2007), 38.

[57] According to this view, the foetus was considered a person by fiction (conditionally legally capable) and was not a person, but they pretended that it is – in defence of its interests, especially its acquisition interest. The opposite professional position, which is much more convincing, and therefore shared by myself, is represented by the Catholic Roman lawyer, Wolfgang Waldstein, *A szívébe írva. A természetjog mint az emberi társadalom alapja* (Budapest: Szent István Társulat, 2012), 132–139.

[58] For analyses of the work of some authors who have used the argument of potentiality in the bioethical debates of recent decades, albeit to varying degrees and in different ways, see Mori Maurizio, 'Il feto ha diritto alla vita? Un'analisi filosofica dei vari argomenti in materia con particolare riguardo a quello di potenzialità?', in Luigi Lombardi Vallauri (ed.), *Il meritevole di tutela* (Milano: Giuffrè, 1990), 735–839; Anne Fagot-Largeault, 'L'embryone umano come persona in potenza', in Evandro Agazzi (ed.), *Bioetica e persona* (Milano: Franco Angeli, 1993), 158–174; Anne Fagot-Largeault, 'The Notion of the Potential Human Being', in David R Bromham, Maureen E Dalton and Jennyfer C Jackson (eds), *Philosophical Ethics in Reproductive Medicine* (Manchester: Manchester University Press, 1990), 149–155; Anne Fagot-Largeault, 'Abortion and Arguments from Potential', in Raanan Gillon (ed.), *Principles of Health Care Ethics* (London: Wiley, 1993), 577–586; Emanuele Severino, 'Essere uomo "in potenza"', in Emanuele Severino, *Nascere e altri problemi della*

causes a misconception in our time, as a result of which many people consider the human person only as a 'potential person' during the foetal stage, in a way that also affects constitutional argumentation. It should also be mentioned that philosophical personalism also envisions the 'real'; that is, the actual, fulfilled human person, in the moral and social being embodied in the (adult) person, who morally fulfils his interpersonal human relations, and thus becomes who he has to become.

However, the majority opinion of the abortion decisions of the Constitutional Court of Hungary (with numerous Christian judges, mostly Catholics), set up after the change of the political regime in Hungary in 1989–1990, undoubtedly reflected the concept of German pandectist legal capacity that determines the Hungarian legal mindset. The notion inherited from German pandectists – and hence widespread in the legal systems of several continental countries – that legal capacity, which is defined as a formal concept defining the legal existence of a natural person, is *not a natural subjective right,* but a mere status granted by the state, as if it had also survived as such in the dogmatics of our legal system, hence it was necessarily present in the thinking of the Constitutional Court judges, mostly civil law specialists. This, in terms of the legal capacity of the foetus, resulted in the *acquisition capacity:* Inheritance property capacity considered necessary by everyday legal life is recognised by the state, but the legal capacity underlying this is only present if it is born alive, although, in this case retrospectively, from the time of its conception.

In essence, by granting a formal category of legal capacity, the state decides which person is a physical person in the eyes of the law and, in the case of the foetus (that is, at the very beginning of all human development), this is bound to the fact of birth. Thus, in these legal systems, the status of the foetus was regulated in civil law through the formal category of legal capacity granted by the state due to the considerations related to the ability to acquire property (heir's) rights, and the foetus is thus perceived in these legal systems, subject to the fact of birth in its legal status.[59] The final and full (retroactive) legal capacity linked to the fact of live-birth is aligned to the *medical-biological* knowledge base inherited from the nineteenth century or even earlier, and borne in the mundane *minds of the public,* namely that the conceived and gradually growing baby will 'really live' if born alive, that is, if it 'survives the birth' and is already visible to the naked eye. Thus, at any given point in the development of the foetus, it is not possible to know whether the foetal human is legally capable or not, and therefore, in fact, whether or not it is actually

coscienza religiosa (Milano: Rizzoli, 2005), 139–142; Emanuele Severino, 'Discussioni sulla potenza e l'embrione', in Emanuele Severino, *Sull'embrione* (Milano: Rizzoli, 2005), 51–57.

[59] Francesco Busnelli, cited above, states that 'the physical person is bound to the formal concept of legal capacity and therefore to the State. The state determines who is a 'physical person' and who is not, and this is due to the orientation of the Code, as it is clearly aimed at regulating property relations, and is linked to birth for obvious reasons.' Busnelli, 'Rilevanza giuridica', 27. The author has been a member of the esteemed Unione Giuristi Cattolici Italiani, the Italian Catholic law society since 1963.

a human. However, starting from the conception of a person, it must be asserted that a person has legal capacity even in the foetal state, because it is a subject of law, that is, because it is a human person, but it is possible that its acquisition capacity would not be realised later because it dies upon or immediately before birth.

The concepts of human and legal capacity in civil law and other branches of law should be aligned with the fundamental human right to the recognition of legal subjectivity enshrined in Article 6 of the Declaration, which contains the correct view, and they should be adapted to the constitutional human concept enshrined in the constitutions corresponding to the Declaration, starting from the equal and unconditional dignity of all human persons. There is only one *uniform* legal concept of man, and this must be based on the notion of the person qua natural person in the natural law sense, on the assumption that a man is a person with dignity and fundamental human rights from the outset, through the spiritual soul of man. On the basis of such a concept of legal subjectivity, the foetus could no longer be regarded as neither being a person nor a subject of law. Catholic, right-minded – mostly Italian – lawyers consider the continental (German pandectist) sense of legal capacity to be the greatest impediment to the recognition of the human personality of the foetus and thus, above all, its right to life. I also share this view.

Through this formal category, the state enforces the criteria for the effectivity, that is *actuality,* of the exercise of legal capacity when it actually considers the person an owner, and thus not incapacitated but *capable* of acting in legal relations *for his own benefit,* especially if the owner is *wealthy* as a citizen. This *facultas agendi,* or legal capacity, *Vermögen* in German, not incidentally includes, writes Ernst Bloch, the basis of legal capacity, the fortune that can be expressed in monetary terms as 'wealthiness'.[60] The *facultas agendi*, understood in this way as legal capacity, is the essence of *subjective rights*. That is, that person is legally capable who the legal person has the *opportunity* to act (as a lender, as a trader), and this opportunity is closely linked to *wealthiness* and to the disposition of *property*. It is noticeable that the legal existence of a natural person in civil law is tailored to the image of the *owner citizen* in the Civil Law Codes. The subject, the 'physical person', exists for the law insofar as he is capable of ownership, and since all born persons are able to do so, he exists as a subject in civil law as, due to the former criterion, formal legal capacity is *received in advance* from the state.

The Catholic image of man, on the other hand, respects in man – in all men – the *spiritual soul,* and the resulting absolute dignity, from the moment they are conceived. Respect involves active and uncompromising legal protection for this most fundamental human natural right. It is a natural right because it is the spiritual

[60] 'The subjective right that the individual holds in this conception is the right that the individual has the right to something: a claim, a demand, a right. This is a facultas agendi or legal capacity, which, however, is reminiscent of wealth that can be expressed in monetary terms, and not without reason.' Ernst Bloch, *Naturrecht und menschliche Würde* (Frankfurt: Suhrkamp, 1961), 239.

soul of man that gives the *essence of human nature,* the quality as a *human person*,[61] which in man is thus the carrier of a *supreme human quality,* and which is present *in a completely unique body* from conception. Whoever thus seeks to destroy man in the human embryo is committing the greatest sin, murder, against the individual man and, indirectly, against all mankind. Catholic lawyers are fighting for the acceptance of this approach as a natural law truth, but in increasingly difficult circumstances, as they have recently faced a number of new bioethical problems in relation to the various modes of artificial fertilisation, made possible by the latest biotechnology.

In relation to man, the newer constitutions refer to the human person, which is a conscious break from the formal approach of civil law codifications, for which legal capacity is a key category, as well as from the dichotomy of *physical* person and *legal* person.[62] This human person may, however, even if rooted in the philosophy of personalism, in essence encompass the personality that is fulfilled in his relationships (see, for example, economic, social and cultural rights), which does not help us to understand the status of the person in the foetal state.[63] This perception holds that man is not a person, but becomes a responsible, rational and self-transcendent, free and flourishing person and personality through his relations by living his moral and human rights imperatives.[64] One needs to have declared and enforced rights in order to be realised as a person. More recent Catholic personalism, on the other hand, focuses more on the inner essential element of the human person, distinguishing him from things even in the foetal stage, and this approach is better able to capture the human personality quality of the foetus,[65] while the legislation still operates with *right in rem* concepts in relation to a *human* embryo.[66]

[61] 'I am completely an individual in respect of what comes in me from the material, and completely a person in respect of what comes in me from the soul.' Jacques Maritain, *La persona e il bene comune* (Brescia: Morcelliana, 1998), 26; 'But each of us is also a person, and as a person is not subject to the stars; it has the entire subsistence of the spiritual soul („sussiste intiero della sussistenza stessa dell'anima spirituale"), and in it that is a principle of creative unity, independence and freedom.' Ibid, 23.

[62] Busnelli, 'Rilevanza giuridica', 27.

[63] Although the foetus is already in many ways connected to its mother in this intrauterine state, it does not exist in a philosophical sense because it is related to her, but because it exists, so it can be related to its mother – it is another matter that without this biological relation, he would not be able to live any longer under normal, that is, non-artificial conditions.

[64] Lauriola, 'La persona', 145.

[65] Robert Spaemann, *Persone. Sulla differenza tra 'qualcosa' e 'qualcuno'* (Roma: Laterza, 2005); Giorgio M Carbone, *L'embrione umano. Qualcosa o qualcuno?* (Bologna: Studio Domenicano, 2014); Possenti, *Il principio-persona*, 134; Josef Seifert, *Essere e persona. Verso una fondazione fenomenologica di una metafisica classica e personalistica* (Milano: Vita e pensiero, 1989). Seifert effectively demonstrates the human personality of the human embryo, confirmed by its spiritual-rational soul, from its conception, and the ontological immanent dignity rooted in it, see Josef Seifert, 'Essere e persona I fondamenti filosofici del personalismo', *Philosophical News,* 9 November 2014, 88.

[66] '[T]he Healthcare Act also operates in concepts of rights in rem with respect to the human embryo'; Zoltán Navratyil, *A varázsló eltöri pálcáját? A jogi szabályozás vonulata az asszisztált humán reprodukciótól a reproduktív klónozásig* (Budapest: Gondolat, 2012), 248.

The philosophical anthropological theoretical result of the Catholic moral and legal philosophical reflection – which any sober and impartial reflection must admit – is that the concepts of human person and human being, human personality, subject and subjectivity in man, and the physical (human) person are inseparable, and none can be omitted, as they all cover the same reality of the human person, from conception to death. Contradictory contemporary legal theoretical aspirations are aimed precisely at conceptually separating or disconnecting them from each other and not attributing certain attributes to the foetal person. For example, when some lawyers claim that the foetus has some kind of subjectivity, but not a personality, or that it has some kind of human character in a *biological* sense, but only later becomes – at some point – a human person as a subject of law and as the bearer of his own rights. In contrast, the situation is that, from the time a person is conceived, as long as he lives, he is a human person of infinite and unconditional moral value, whose essence is provided by his spiritual soul, which is present and indestructible, and not by his effective or potential use of reason, his capacity for moral decision-making or the exercise of any other functions. It seems that, in connection with the death of a person, this is already being perceived more and more, while in the case of the foetus, in order to perceive the same, further theoretical steps need to be taken so that the former can be fully admitted and accepted. It must be shown, therefore, that the foetus has not only some kind of subjectivity or human character, but that he is a fully-fledged individual, and as such is a unique human person, in a completely unique body and with a (moral) spiritual soul.

The legal question that arises, in fact, revolves around the theoretical consideration of what ultimately confers the essence of man in a (legal) philosophical sense, and whether this quality is possessed by a human foetus. If something really is an essential criterion, it must be present in man *all the way,* for as long as he lives, but if it is not, but merely an accidental or not so essential element, its absence, partial presence, or even lack of development (even just potential presence) cannot affect man's human existence at any state of life, and thus also not at the foetal age. The traditional answer to the question of the essence of man's existence is usually (including in value-based, morally philosophically conservative circles) that man possesses sense; in other words that his quality as *Homo sapiens* is the element that every human being has as a human being, including the human being of foetal age – even if only in a potential way. However, on the contrary, it may be asked whether a foetal age man be a human person only insofar as it will *then* be able to think or, as its highest level of spiritual expression, will be able to reflect on the meaning of its own life? As long as this is not achieved, will human embryos and foetuses be just 'potential individuals' who, while not persons, should still be treated as such, for legal and value protection safety reasons?

Where does this leave human foetuses who will never be able to think, either because they die earlier, or because they lack – or do not have enough to function, that is they have only partially – the necessary brain or central nervous system basis

(brain, in the case of anencephaly) because of their genetic impairment and thus in their (short) life they will never have it? Will they never be and have they never been human persons in the strict, true sense of the word? I should emphasise that my goal is not to determine the moral and philosophical status of special cases, but to conceptualise the human person correctly, the answer to which (or more precisely, its result), cannot be dispensed with by practitioners of law. The underlying reasoning that all constitutional courts and ordinary supreme courts need, is, by its nature, legal philosophical in nature. However, the conclusion can and must be admitted by the representatives of constitutional law and codified law in general, as the philosophy of law in this respect defines the common natural law identity of all people, according to which (constitutional) lawyers must consider all people, including the foetus, identical, essentially equal to other (adult) humans.

If one does not consider the foetus to be human then the opportunity remains for him to consider human life in some biological way human, but not personal, that is *not yet* belonging to a human person. At that time, however, it would be necessary to determine the time at which the qualitative biological (?) change (the point of development) occurs, when this biological substrate bearing human nature will (suddenly) become a person also in the view of the law.[67] Obviously, this *biological* stage cannot be determined because, by its mere occurrence, such *meta*physical (or metabiological) *qualitative* (that is, beyond the biological) turn cannot come about. Without going into deeper bioethical issues, we can conclude that if we confine the concept of the human person to a specific biological or physiological non-essential aspect of human existence, such as the criterion of the formation and function of the advanced central nervous system (let's say the existence of consciousness or self-awareness) then there may be natural persons who are 'not yet' or are 'no longer' persons in this approach.[68] The anti-human consequences of this approach are unforeseeable,[69] if it becomes widespread in legal public thinking, or if the creators of the law (legislators, judges) embrace it.

Unfortunately, the practice already shows such examples *en masse* in developed, highly civilised Western countries. We are thinking here, for example, of 'heart donors' with a beating heart but who have been declared brain-dead, a practice that can obviously only be considered homicide.[70] In response to this process, which can

[67] Vittorio Possenti analyses the legal status and person-nature of the human embryo as described above. Possenti, *Il principio-persona,* 132–133.

[68] Ibid. 133.

[69] Ignazio Lagrotta puts it this way: 'Similarly, the notion that linking the onset of the human person as a subject to the right to life to the awakening of self-consciousness in the individual seems utterly arbitrary, as it leads to aberrant consequences, such as the possibility of not treating individuals born as mentally handicapped as humans.' Ignazio Lagrotta, 'Il diritto alla vita ei diritti fondamentali dell'embrione', in Antonio Tarantino (ed.), *Culture giuridiche e diritti del nascituro* (Milano: Giuffrè, 1997), 135.

[70] Waldstein, *A szívébe írva,* 119–132.

be qualified as a 'slippery slope' effect, it becomes particularly necessary, for reasons of fundamental rights protection, to define the essential ontological characteristics of the human person that do not occur incidentally or to varying degrees in each person, but by the very nature of the person. These *essential criteria* characterise the existence of man at *every moment* from his conception, and cease to exist, in the case of a particular person, only when the entity marked by the concept (that is, the particular person himself) no longer exists because he has died. They cannot, therefore, be potential or semi-existent, because it is precisely these essential characteristics of the entity that are due to their existence, or that in their absence no longer exist or have never existed. The essential criterion precisely means that it gives the specific being, existence, the natural essence of that reality. In view of the above, we must say that the human individual, every individual from the moment of his conception by its very essence (that is, by virtue of his spiritual soul) is a human person with inviolable dignity, including in a legal sense, and therefore a subject of law.

V Do the embryo and the (adult) human relate to each other like acorns to an oak tree?

Among the positions which I consider incorrect but which have had a great impact on the international moral philosophical discourse, we must consider Michael J Sandel's analogical argument, which Robert P George has since effectively refuted, that the difference between a human embryo and a human is similar to that between an acorn and the large oak tree that develops from it. Sandel puts forward a number – a whole volume – of excellent arguments against genetic engineering,[71] although when it comes to determining the status of the human embryo, provides a false example that shows that its approach, in fact, does not focus on essence, that is, it is not legal philosophical, in this respect. (Sandel has also used the same analogy elsewhere.)[72] The analogy is that a squirrel eating an acorn on the tree in front of one's house is not something of the same nature as when a stout oak tree is knocked down by a storm.[73] Just as acorns and an oak are *different kinds of things,* so are the human embryo and man, although the former will become the latter. Then he writes that human life develops through stages.

Sandel argues that just as an acorn is not an oak tree, neither is a human embryo a human being. George rightly points out, however, that this argument is erroneous because, as a basic premise, it assumes that the human embryo has no fundamental

[71] Michael J Sandel, *Contro la perfezione. L'etica nell'età dell'ingegneria genetica* (Milano: Vita e pensiero, 2014).
[72] Ibid. 114; Michael J Sandel, 'Embryo Ethics: The Moral Logic of Stem-Cell Research', *The New England Journal of Medicine* (15 July 2004), 207–209.
[73] Ibid. 208.

value or dignity and thus has the status of embryonic research material. Sandel's argument already falters at this point, George points out, in his selection of elements to compare: The acorn is used as an analogy for the human embryo, and the oak tree for the human. However, argues George, in view of the continuous nature of development which has been fully demonstrated by science – and also acknowledged by Sandel – the oak would parallel not man himself, but a mature man (an *adult*).[74] Of course, Sandel's parallel undoubtedly has a kind of perceptible effectiveness, as we all really feel a loss if a fully grown oak tree falls in a storm. If we do not really feel the same loss when an acorn is destroyed, it is also true that we do not feel such a great loss if an oak sapling dies, even though a mature oak tree is obviously no different in species from an oak sapling. It can be seen from this that the oak tree is not valued because of its species but because of its maturity, its stately appearance and majesty.

Acorns, or even oak saplings, do not look impressive, so we do not feel such a sense of a loss when they perish, George argues. If the oak trees had value because of *their species,* it would follow that we would feel the same loss whether an oak tree or an oak sapling were destroyed. The basis for recognising the value of human beings is completely different, however, George points out. As Sandel acknowledges, we value people precisely because of their particular entity. That is why we consider every human being to be equal in dignity and rights, George argues. We do not think that people who are considered to be particularly 'great', such as, for example, Michael Jordan or Albert Einstein, have greater fundamental and immanent value and dignity than physically weak or mentally retarded human beings. We would not tolerate, George writes, the killing of a mentally retarded child or a cancer patient, for their organs, to save Jordan or Einstein. Similarly, we do not tolerate the killing of children who, by Sandel's analogy, would correspond to seedlings, whose destruction we do not mourn in the context of forest care, nor are we distressed if acorns perish in the context of this care. Foresters are free to cut down oak seedlings while destroying acorns to ensure the health of adult specimens, if necessary. No one cares about that, he notes. This is precisely because we have no reason to attach particular value to individuals of the oak species, which is quite the opposite of what happens to members of mankind (human race).

In summary, if we attributed value to the oak species itself, rather than to the splendour of the oak tree, we would feel as much distress about the destruction of oak seedlings and acorns as from the destruction and felling of a great, mature, magnificent oak tree. Just as a thought experiment, if we were to attribute value in the same way to people, he writes, as we do to oaks, we would have no reason to oppose the killing of children or even severely 'disabled' adults. Justifying the killing of human embryos by analogy between the acorn and the human embryo immediately loses its *raison d'être,* George concludes, if we consider the huge

[74] Robert P George, *Il diritto naturale nell'età del pluralismo* (Roma: Armando, 2006), 167.

difference between the basis on which we consider an oak to be valuable and the reason we attribute intrinsic value and dignity to human beings. The oak tree is considered valuable because of its *accidental* property that provides it with the value of an *asset,* while we recognise the value of human beings in themselves because of their immanent dignity arising from their own human entity.[75]

The position that captures the essence of things or beings, and the differences and identities between them, is obviously present in the argument set out by George, who can distinguish between an essential element and an accidentally criterion. This is exactly what legal philosophical thinking is all about: like must be treated as like, and the different differently according to the degree of difference that exists, in order to make fair judgements. To do this, however, one needs to be able to grasp the element that constitutes the *essence* of things and in beings, and which is not an incidental, contingent element. The appearance, level of development, and age of a man are merely accidental elements since, with the biological creation of man, the human person is present in him from his conception. This essential element, personality, gives the unconditional and equal dignity of all human beings from the embryonic stage to their death, regardless of the existence, maturity or absence of any of its accidental qualities, or any regression of them in old age. The question is what grants the essence of human personality, the real foundation of human dignity.

VI The essential content that gives the dignity of every human person – Towards their personal spiritual soul

The legal philosophical question is what provides the essence of human personality, the *de facto* normative basis of human dignity in the legal sense. The question is also whether practitioners of law can continue to be satisfied with asserting the normative nature of the concept of dignity while, at the same time, not moving one step further towards the normative nature of this concept, that is its content, by researching what human reality provides the personal dignity of all people. In our view, this can no longer be bypassed today, given that the notion of human dignity (but also of human life, as well as the notion of the person), has become utterly relativised and completely weakened in its normative distinctive content. Dignity is identified today semantically, in a radically relativistic way, with the *right of self-determination*.[76]

As a result, it has become completely detached from the ontological basis of man, as a consequence of which there is no longer a satisfactory answer – in this

[75] Ibid. 168.

[76] For the correct legal and political philosophical literature, see Claudia Navarini (ed.), *Autonomia e autodeterminazione. Profili etici, bioetici e giuridici* (Roma: Editori Riuniti University Press, 2011); Miguel Ayuso (ed.), *La autodeterminación: problemas jurídicos y políticos* (Madrid: Marcial Pons Ediciones Jurídicas y Sociales, 2020).

concept – to the utilitarian question of why man alone possesses the essential criterion of dignity, but not even the most advanced mammals have it. If anyone were to accept this, it would, of course, neglect the ontological difference between humans and the most intelligent mammals. Proponents of the post-humanist 'emancipatory' position, on the other hand, are pleading to assert the 'dignity' of robots resulting from its subjectivity with highly advanced artificial intelligence (thinking and 'pain sensing' ability, authorial ability, ability to commit an offence and so on) and to enforce the resulting instances. The consequence of this would be that human beings are no longer substantively different in law (that is, in their rights) from robots with advanced artificial intelligence which are endowed with humanoid (human-looking) properties. From this point on, it is not even meaningful (that is, justified) to speak of the human personality as an essential criterion of the natural human person. The new use of terms, intended to be emancipatory, (robots as 'sentient, thinking beings', humans as 'human animals', and animals as 'non-human animals') obviously does not recognise the essential differences between the natures of these things, that is, animals, human persons and robots with advanced artificial intelligence. The concepts and meanings must be shaped in such a way that their semantic content covers the essence of things.

In view of the above, in my view, there is a need for a (stronger) substantive, that is, theoretical philosophical foundation of human dignity, the legal philosophical consequences of which should be applied in almost all fields of codified law. The mere statement of the normative concept of dignity, lacking the overlapping content of different concepts of dignity and in the situation of the lack of any material substantiation of it, can no longer ensure an equal and adequate level of legal, solid normative (mandatory) protection of all people's lives.

For the law, the correct conception of man can be provided by legal philosophical thinking with a natural law disposition, which in turn relies on the tools of philosophical anthropology. The truly correct natural law thinking on a right moral theological and philosophical anthropological foundation is the Catholic Christian one.[77] However, any correct philosophical anthropology can establish the

[77] For Martin Luther, neither law nor natural law plays a real role in the path to God, that is, in achieving the ultimate goal. Hence the antipathy to law attributed to Protestantism, which seems to be much moderated in our time, but which, in the final assessment, as revulsion to natural law, still exists. Francesco D'Agostino, *Il Diritto come problema teologico* (Torino: G Giappichelli, 1995), 18. This is especially so when the Protestant concepts of natural law are compared with the role of natural law in the Catholic line of thought. The Protestant opposition to law and natural law, which is often formulated, ultimately means that the content of law (in the Protestant theological sense) is not given by natural moral law but by the commandments of God Himself. This recalls the opinion of A Lang, Ernst Troeltsch or even Francesco D'Agostino, that it was originally somewhat more restrained in the theology and social science of the famous representatives of the Reformation, compared to the natural law doctrines of other ages, the natural law with its research topics and position at all, but there are also those who are more radical in their statements.

absolute dignity of the foetus only by the personality granted by the presence of the spiritual soul in it: the human embryo is a human individual, a unique being whose unconditional dignity can only be provided by the soul present in it from the first moment of biological existence. Fundamental human rights belong to people because they are dignified, because they have a soul from the moment they are conceived. Human nature has a biological side and a spiritual (and also psychological) nature:[78] Fertilisation creates a new human being with a unique genetic program, who in this way is, in a *biological* sense, a new individual of the *Homo sapiens* species, but the most essential part of this nature is its personal soul.

Of course, the person does not exist before fertilisation, yet human nature is more than the genetic programming of the new individual: It acquires its essential content in the human personality, and is the soul of that person, present in the new human being from the moment of conception. Man does not have basic human rights, including those for the protection of his dignity and life, because he belongs to the species Homo sapiens, but because a human person, with a personal soul, is completely unique in the human body from his conception. The existence of the person is the existence of man: individual human life begins at the time of the emergence of biological existence; that is, at the point of conception, and lasts until the cessation of its existence, the determination of which is a much more complex issue than was previously thought. The reality of human death goes beyond the dimension of the factuality of biological death, hence the determination of its definitive occurrence, and thus its irreversibility, is otherwise a matter for and the responsibility of medicine.

However, it seems that the latter cannot be reduced to brain death at all, as it is more a *prognosis* of the occurrence of death, based on statistical (quantifiable) phenomena, rather than a diagnosis that can be established with certainty in an individual case. It should be noted that, in recent years, the definition of death as brain death (which was previously treated as an indisputable biological fact in public discourse), has been disputed from several directions, raising questions of a medical, biological, bioethical and philosophical nature. Since the method of establishing

[78] By the 'spiritual' dimension, I mean the immortal spiritual dimension of the human person, which is the most essential characteristic of the divine image, the sensory organ of which in the human person capable of moral action is the conscience: 'The spiritual soul does not come from the parents, but is created directly by God and is immortal. When it is torn from the body at the moment of death, it is not lost; it will be reunited with the body at the moment of the final resurrection.' The Compendium of the Catechism of the Catholic Church, para 70. It gives dignity to all human beings and ensures the essential equality of human beings (para 412). The soul is immortal and will be judged on the basis of the moral deeds of the soul of a particular human person (para 205). The human soul comes from God and, by its divine nature, travels toward Him, a process aided by moral virtues, but sin – because it weakens true love – hinders it (para 396), and the 'psychological' dimension is what is examined by psychology, which has the right attitude.

death has serious human rights implications, we will return to some of its questions of a legal philosophical nature in the last chapter.

It can be stated with general validity that personality is not a qualified state or characteristic of human biological existence or human life, but is completely identical with human existence itself.[79] The human-specific quality of this being is conferred by the spiritual soul in man, which is therefore a key factor in both man's creation (conception) and death. Although we tend to perceive, primarily in adults, the criteria of the spiritual existence of the perfected personality and the human dignity manifested through them (the law also historically protected adults against inhuman and degrading treatment, that is, punishments contrary to human existence), nevertheless, it must be said that the human rights of all human beings stem from their human personal nature throughout their lives and are thus present from the moment of their natural existence for as long as they live in their bodies.[80]

Looking at the development of legal history, it can be stated that the legal protection of the human body was aimed at the protection of human dignity, as the violation of the law of this body constitutes a violation of dignity. The law, by protecting human dignity *via the body,* actually protects the spiritual dimension – the soul – of man, which is the essential dimension of humanity. The basis for the prohibition of humiliating corporal punishment and torture or inhuman treatment, grounded on the enforcement of fundamental human rights, also rests on this concept, even if it is not always reflected.[81] An interesting fact related to this is that civilised humanity has always somehow despised the profession of executioner, considering its practice incompatible or hardly compatible with human dignity, while the person put to death had a special opportunity to demonstrate his dignity at the time of his execution, thereby evoking respect from those watching the execution.[82] It can be stated with general validity that, on the one hand, the immanent moral dignity inherent in human nature cannot be dishonoured by degrading treatment, because it is inaccessible by external means, and, on the other hand, that its external violation must be prohibited by legal means,[83] and, in particular, if the law itself seeks to infringe it by its means.

[79] Cf. Spaemann, *Persone,* 241.

[80] 'This dignity is rooted in human character. However, a person's independence depends on no one having the right to judge whether or not another person holds the basic features of personality *(Personalität).* Human rights depend on no one being competent to determine who is entitled or not entitled to the right of personality. This means that these rights, although based on human individuality, must still be recognised for all human beings, from the first moment of their natural existence, without any criteria with additional content being imposed.' Robert Spaemann, 'Az emberi természet fogalmáról', in Krzysztof Michalski (ed.), *A modern tudományok emberképe* (Budapest: Gondolat, 1988), 147–148.

[81] Cf. Stefano Rodotà, *La vita e le regole. Tra diritto e non diritto* (Milano: Feltrinelli, 2009), 74.

[82] Spaemann, *Tre lezioni,* 35.

[83] Ibid. 34.

Dignity is so 'inviolable' in nature and so immanent in man, that no one can take it from him; at most, in some cases, it may not be respected by a specific individual, and in this sense it is violated in him, yet he cannot deprive anyone of his dignity.[84] This is how we have to look at the human person in the foetal stage, and we have to treat him that way. The 'causes' of the existence of human dignity are not biological, although we have dignity as a result of or through the fact that we belong biologically to the family of free spiritual beings.[85] One who violates the dignity of another, at the same time violates the self same dignity in himself, and one who does so grievously and regularly becomes slowly dehumanised or 'animalised', because, as human persons, we belong to *humanity,* so we share the dignity that gives us our essence. In this way, a serious and massive violation of dignity is a sin against the whole of humanity, the 'humanity', that is, the essence of the human race; and thus whoever is the subject of the violation in the human race who has been treated as an object: foetal-stage people (abortion), unconscious, dying people (euthanasia) or members of entire ('racial') ethnic groups that their enemies want to exterminate (genocide). Because it is difficult for man to justify to himself that he is committing a sin against his own human essence (that is, his very 'humanity itself',) and the moral, rational and affective instances that arise from it, he invents euphemistic names for his actions: 'good' or 'mercyful' death, 'termination of pregnancy', the exercise of sexual reproductive self-determination rights over one's own female body and so on.

From a bioethical approach to human creation, the human body, from its unicellular zygotic stage, is a human organism; that is, a living organism of the human race, with its own unique, integrated, and organised organism that includes and contains entirely unique and specific genetic information that teleologically and autonomously progresses towards the realisation of the whole body through various phases of continuous, gradual and coordinated development. We can talk about uninterrupted development, gradual complexification, orderly and purposeful regularity in the direction of the formation of the body, so it is by no means a random occurrence or causal seriality.[86] However, if development is continuous then, according to the leading Catholic legal philosophers dealing with bioethics, the human embryo, in a *bioethical* sense, is already a *person,* provided that all its features have not yet been realised and fulfilled, the conditions are already in place to provide the necessary support for a continuous dynamic process that will allow these criteria to be realised.[87]

[84] Ibid. 36.

[85] Ibid. 34.

[86] Francesco D'Agostino and Laura Palazzani, *Bioetica. Nozioni fondamentali* (Brescia: La Scuola, 2016), 80.

[87] Ibid. 81. The authors clearly state, rightly, that the human embryo is already a human person, which strongly establishes and justifies its immanent dignity. The human personal nature of the

From a strictly ethical point of view, in my view, the only thing that can be said, which otherwise is of great importance in itself, is that the human embryo is a human being in a *biological sense*. However, whether the human embryo is a *person* with a spiritual soul, and therefore a subject of law, can be established by moral and legal philosophy (natural law) in addition to moral theology and philosophical anthropology, the representatives of which must at the same time declare this if they consistently focus on defining the essence of man in their analyses. The contribution of these disciplines in the field of the legal protection of human life is essential, since, in my view, human dignity can only arise from the spiritual soul. The sciences of medicine and bioethics are able to protect the personal dignity of the human being having soul in the human embryo and foetus in an indirect way, which is irreplaceable by other disciplines, by demonstrating the essential biological identity in man at all stages of his biological life. The primary, direct and decisive approach to establishing the legal protection of human life and dignity is therefore a broad, natural law-based legal philosophical approach, which identifies the spiritual soul in man as a criterion that is essential; that is, present in all people, and which confers the dignity of the human person, its basis from its conception.

In our so-called postmodern age, dignity has now become an empty concept: It must have necessarily become so, because this factual ideology containing doctrinal (unproven) principles denies the existence of the essential nature of things, and especially that of man and its examinability, while dignity served to confirm it, not long before our times, in both legal and philosophical thinking. In my view, the philosophically correct, consistent theoretical position is to look at things on their own on the basis of natural law (ontological) realism, and to state that man's spiritual soul makes him what he is, and this essential characteristic of his dignity does distinguish him from animals, even the most advanced mammals.

The moral and legal philosophical debates surrounding human genetic engineering have only revitalised and added a new dimension to the set of arguments that have long been used in relation to abortion, euthanasia, the rights of the severely disabled and infants. The essence of this is that only an adult with the most basic abilities who is rational and autonomous is considered a human person; that is, one is able to make a moral decision himself, in the above sense, that is, who is able to determine values for himself. Those who are unable to do so because they lack basic abilities, either because they have not yet developed (a foetal human person), or because they, in their view, are not currently functioning with them (a person in a stable vegetative coma), or have stopped using them (as the physiological functions necessary to exercise them have terminated in a state close to death), or because they have never developed (in the case of a person living with very severe brain damage), are considered to be *non-human persons*. They are regarded, as the case

embryo underpins its legal subjectivity; that is, that it has rights (ibid. 82). However, this they can express more as philosophers of law, and not so much as scientists in bioethics.

may be, only as prospective or potential persons, or even as human bodies without a human person-identity. They may have a human life in a certain sense, as their human bodies live, but because they have not yet, or no longer, or never even had the most important abilities of human personal existence necessary for autonomous self-determination, these persons are deprived of their person-existence and thus of their dignity.

Although their ('critical') interests might be taken into account, the interests and fundamental rights of living – healthy adult – people take precedence over them. John Finnis had a multi-round debate on the issue of euthanasia with a renowned philosopher, John Harris, who bore all the hallmarks of the liberal position, and in Finnis's argumentation all the weaknesses and inadequacies of the neoclassical natural law argument become manifest,[88] however, Finnis is absolutely right that there are demonstrably categories of people in Harris's argument who 'must die' because of their condition.[89] It is not entirely without reason that Harris keeps contending that, despite appearances, his argument has much more in common with Finnis's than he admits, which Finnis, by the way, is at pains to deny, as can be seen from the vehemence and style of the debate. Finnis tries to end the debate with that fact and bring the matter to a head. However, in my view, he also remains a prisoner of the mindset that focuses on the criterion of using abilities (as Harris also points out), as it is clear from Finnis's argument that human personal existence is ultimately tied to the exercise of a certain 'radical' human ability, even if Finnis, after all, assumes that it is present in every living human person.

In all honesty, it is difficult to understand how a person who has been in a coma for years still has these abilities, while both Finnis and I, of course, regard him as a human person with the same dignity as any other human person. The direction of Finnis's argument can be said to link the beginning of the protection of human life to the biological life of the human being, in a correct way from the natural law point of view, and his aspirations to criticise euthanasia, which violates and even attacks the most basic human values, are correct, and pursued with a vehemence that is obviously explained by the intent of defending the supreme value of the endangered object of law (human life). (The strength of his argument, however, is weakened by the fact that human life, based on his thesis, as a fundamental human good is incomparable with other fundamental human goods. In our view, human life is comparable with other human goods and values, and occupies the highest place in their hierarchy according to the order of human nature.)

I do not, however, consider every living person to be a person bearing absolute dignity because of the existence or potential exercise of certain most basic abilities,

[88] Cf. Frivaldszky, *A jogfilozófia,* 182–188.

[89] John Finnis, 'Misunderstanding the Case Against Euthanasia: Response to Harris's First Reply', in John Keown (ed.), *Euthanasia Examined: Ethical, Clinical and Legal Perspectives* (Cambridge: Cambridge University Press, 1999), 62, 65 and 67.

but because every human being has a completely unique, spiritual human soul. Not even the exercise of abilities oriented to the basic human values, but the existence of human life makes him a person, since every living person has a human soul. His humanity and dignity are objective, as they are inherent in human life. Dignity should not be inferred from belonging to the human race *(Homo sapiens),* as I have already pointed out, since the most essential features of human nature, even in this way, cannot in fact be explained by genetic or social reasons, while they exist objectively. All this should be stated in connection with Francis Fukuyama's influential book, *Our Posthuman Future*.[90] It lists many of the basic qualities of man as a moral, social and political being, but does not mention the human soul. Unfortunately, but perhaps not so surprisingly, Finnis does not base his studies on this when he argues against euthanasia. The proper direction is followed by the representatives of the traditional Thomasian-Thomist doctrines of natural law, which I also consider to be the best foundation for the three most basic human rights (the right to life, dignity and recognition of legal subjectivity), adding that, unlike Christian philosophical personalism, I do not consider man's moral-interpersonal-social *fulfilment* to be primary in the human person but *the existence of a spiritual soul* itself, which requires this fulfilment and is also a prerequisite for them.

In contrast, Finnis, in line with his theoretical approach,[91] does not wish to articulate the humanity and human dignity of the human person from human nature viewed in a metaphysical way, on the basis of the human essence theoretically formulated in this way, and to derive directly from them the right to recognise and protect human dignity and life. However, the decision in favour of an objective moral order (guided by 'spiritual knowledge') and the ability to enquire not only about the meaning of human life, but also moral emotions, are all expressions and manifestations of the operation of the human *soul* in various ways, yet in one direction. The functioning of the human spiritual soul cannot, of course, be justified by empirical means, but the 'spiritual dimension' of man, as the founder of logotherapy, Viktor Frankl called it, has been proved to exist,[92] and it can be seen in action; moreover, it cannot, in itself, become ill.[93] The spiritual soul is, of course, also present in those persons (foetuses, infants, those with severe brain damage, dementia, those in a coma and so on) for whom its function is not realised

[90] Francis Fukuyama, *Our Posthuman Future: Consequences of the Biotechnology Revolution* (New York: Farrar Straus & Giroux, 2002).

[91] Frivaldszky, *A jogfilozófia,* 182–188.

[92] Viktor Frankl declares categorically that the 'person is a spiritual' being. Viktor E Frankl, *Értelem és egzisztencia. Előadások és tanulmányok* (Budapest: Jel, 2006), 60. The spiritual in the person is the specifically human dimension. Stephen J Costello, 'Logotherapy as a Philosophical Practice', *Logoterápia és egzisztenciaanalízis* 7, no 3 (2015), 137.

[93] 'In reality, there are no "mentally" sick people at all, because the "spirit", the spiritual person himself, cannot become sick at all.' Frankl, *Értelem,* 61. Cf. Stephen J Costello, 'The Spirit of Logotherapy', *Religions* 7, no 3 (2016), 6.

in a tangible way by external actions. As is well known, the presence and functioning of the soul cannot be seen in external actions.

Spaemann's argument seems convincing, and can be effective to some degree in those instances where he draws some of the main arguments from the truth of ordinary intuitive thinking as to why human cloning and creation by *in vitro* fertilisation is forbidden, including genetic manipulation.[94] The equality of human creation means that everyone was created by nature, and no one wanted to be 'produced' by man. A human simply cannot take responsibility for the existence or non-existence of anyone. The ban on homicide can be deduced from the latter, he writes. And, based on the former, when the child asks his parents why they wanted to create him, they can say 'you came into the world, my child, just like any other person, through our love relationship, that is, through nature', Spaemann writes. A very important moment for a child may be that he came from the loving relationship of his parents, that is, out of love. Furthermore, the fact that he is not personally a product of human will, but born of the love of his parents, although still in his specific individual form, is unforeseen and thus, the not specifically known man is a person, that is a gift, and his existence is a kind of *mystery*. However, on the basis of the Christian teaching, we can add that someone, on the other hand, specifically wanted him to be born and to have a life, and this is the Creator, who called him to life out of love and who has a very specific plan of love for him. This awareness that he came from love, and that his existence is not a human product, not a product of human will (and especially that he was not 'forced to life' by *in vitro* fertilisation), may be important to him, especially in difficult moments in life when the meaning of his life may be questioned, even to the point of considering suicide. Spaemann's argument is also very effective in the sense that, based on everyday perception, the mother is very correct in saying to her child, 'when I was pregnant with *you*',[95] for then she does not mean a general or impersonal subject, but a very *specific person;* in this case, 'you', who was referred to by a personal pronoun even then in my individual, unique being in her 'belly'. The majority opinion of the Constitutional Court of Hungary ran contrary to correct everyday intuition when it did not acknowledge the personal, (that is, legal) identity of the foetal-age human person. The legal practitioner must perceive whether ordinary moral intuition is correct on the basis of the nature of the thing – where it is correct, it can be relied on in reasoning; where it is incorrect, there the correct natural law way of thinking must be followed.

In this regard, it is important, in case of people who are at a disadvantage due to their biological development or biological condition, not to start from what we see from the outside, or how many of the capabilities of adults or healthy people they

[94] Robert Spaemann, 'Christianity and Western Philosophy', in Silja Vöneky and Rüdiger Wolfrum (eds), *Human Dignity and Human Cloning* (Leiden: Martinus Nijhoff, 2004), 47–51.
[95] Ibid. 48.

can fulfil, or what our relationship is like with such human persons. The existence of their equal and unconditional human dignity does not depend either on the perception of it by others, or on how much we feel and experience their humanity, for example through attachment to them. Most people are not yet very attached to a foetus of a few weeks (which is why in the event of its death they are not usually buried), while for infant children their parents (and especially their mother who may find herself in such a situation) would be ready even to give their lives. However, the moral status of a human being of foetal age, as a human person, is not inferior to that of an infant or young child, contrary to Fukuyama's assertion. Infanticide is considered by all of us to be the greatest possible sin but not because it does not allow a child to become a 'moral person' as an adult,[96] otherwise killing adults would be considered a greater sin than infanticide. The real situation is that we consider the latter to be more horrible than killing an adult because, in an infant and a child, we believe we see the value of humanity, of human existence, in its innocent and pure form in a kind of condensed manner; that is, the dignity and inviolability of the human soul itself in the small human being.

VII The presence of the spiritual soul in everyone and at all times gives the essence of man and the dignity of all men

In a correct moral and legal philosophical view, the spiritual soul is thus the essence of human existence and provides the basis for the absolute dignity of the human person. This spiritual soul cannot only and primarily be perceived in the action of rational-moral insight, decision-making, and action, and not even in the ability to question and find the answer to the meaning of human life, even if the *logos* in man is traditionally understood in such a way. So far, those who think in the right direction have reached at most the point where, in the uterus and in infancy, a person does not yet have the biological development of the brain and central nervous system that is necessary for the existence of the mental function of thinking, but their souls are ready even at this age to practice this function later. At any rate, the quality of the pianist as such does not, of course, change despite not having a piano at his disposal on which to practice or demonstrate this ability, and thus is not 'able' to play the piano at the moment.[97]

[96] Young children, in Tristram Engelhardt's concept, do not have the rights that are implied in their existence. The legal protection of the future person can be morally justified, as far as possible; H Tristram Engelhardt, *Manuale di bioetica* (Milano: Il Saggiatore, 1999), 169. According to him, the protection of human and non-human animals, who are not persons, from meaningless torture can be a matter for charity (good deeds). From this, it can be felt that this conduct is generously attestable, that is optional, non-binding, and that if this conduct is attested, it will be the moral merit of the moral actor (adult).

[97] Spaemann, *Tre lezioni,* 65.

However, the significance of the spiritual soul that confers the natural essence of man is not that he will *then* be able *to exercise* the mental-cognitive functions *effectively,* which the (rational) soul potentially has already at the foetal stage, but it has not yet manifested itself due to the immaturity of the central nervous system and other biological functions. I am convinced that the soul is completely present in the foetus and, of course, in the infant, even without its cognitive functions developing later or ever, and even in a person with the most severe genetic impairment to his central nervous system and brain function.[98] It is evident that, in the mature man, the soul manifests itself in many forms of moral judgement and thinking (from the operation of *spiritual* knowledge to the ability to be *enthusiastic* about noble moral ideals); however, it is the immediate presence of the spiritual soul from the moment of conception which makes the individual created in the biological sense a human being, a person in a philosophical, that is, essential (in a proper) sense. The soul is and will remain in him until the end of his human existence.

The spiritual soul is not the mind, so it is not the same as the physiological-neurological functioning of the brain, nor can it be localised there topically or organically. That is why death is not only and not primarily a biological concept, but a reality related to the existence and nature of man, which can be grasped in a *philosophical* (and especially theological) manner. The problem is that the concept of the human soul, which gives the human person this essence, is avoided by many analysts, even those making *pro-life* attitude arguments, not to mention other types of approaches, and if they aim to protect the value of the foetal life then they lay the foundations of a certain kind of human dignity with different quality, mainly that he also is a member of the *human race*. However, a biological endowment, the nature of the species, cannot be the basis of a transcendent, that is, metaphysical *quality,* such as the spiritual soul in man.[99]

As a result of recent tendencies in moral and legal philosophical thinking, unfortunately, the concepts of the human soul, dignity and personality have now been delegitimised in the scientific discourse. They were first detached of their metaphysical basis and so emptied, and then, as a result, became incomprehensible in content, and therefore became superfluous in theories formulated about man and thus about human rights. The basis for the theoretical definition of the human person in legal discourses has almost disappeared, as the nature of the human person has become fatally problematic in the legal and moral philosophical

[98] Spaemann puts it very succinctly: 'Instead of getting there, where there is no longer any ability to think, the *forma corporis* of the human being disappears; we can only come to the conclusion that, until the death of the human body, the personal soul remains present.' The latter, he writes, is the only interpretation that is consistent with Catholic doctrine, and then adds that it is the only one that is compatible with the tradition of European philosophy. This is a remarkable statement, because he is one of the most outstanding scholars of the history of thought. Ibid. 67.

[99] Cf. Navratyil, *A varázsló,* 264, 266.

(and possibly political philosophical) arguments that fundamentally influence the use of legal concepts. With new terminological innovations or forms of human reductionism (for example, the concept of brain death) resulting from the changes in approach, this philosophical problem, which can best be viewed as a void in thinking, can no longer be solved or remedied; in fact, such reductionism has thoroughly muddied the waters.

Until a few decades before these developments, it was clear to everyone what a human person was, that its soul was somewhere 'in its heart', and that its spiritual dimension permeates its mind and way of thinking. In contrast, today, the notions of both the person and the soul are avoided in scientific reasoning, often even in life-protecting reasoning, when it is desired to emphasise the human nature of the foetus. Therefore, the emphasis remains on 'human likeness' or merely the need to protect (human) life at this stage of the foetus. However, the 'dignity' that sometimes features in the arguments resulting, according to them, from belonging to the human race, is a concept that is not well defined philosophically, just like they say, the concept of the person. Anyway, Peter Singer would be right in querying this: Why would a biological species, *Homo sapiens,* have dignity while other developed mammals (who are similarly able to suffer because of their perception of pain) do not, since this would constitute something akin to 'racial discrimination'?[100]

The correct approach, on the other hand, is, as we have already pointed out, that the human embryo and the foetus have human dignity because they are human persons, which is because persons have a spiritual soul from the moment they are conceived.[101] It is not the use of reason (and not even its potentiality) but the soul that results in dignity that makes a human person a person, as can be seen from philosophical research on the essence of beings, beyond the existence of the human soul created by God, which forms the cornerstone of Christian theology.[102]

[100] Peter Singer complains that the new-born's right to life is based on the fact that it belongs in a biological sense to the *Homo sapiens* species, in contrast to (mammalian) animals. This is, in his view, an unjustifiable and arbitrary racial discrimination which confers on the human race the right to life, to which, however, animal species are not entitled. Peter Singer, *Animal Liberation* (London: Pimlico, 1995), 18.

[101] Kevin D O'Rourke, 'The Embryo as Person', *The National Catholic Bioethics Quarterly* 6, no 2 (2006), 241–251. Of course, it is not possible to prove 'empirically' that the human soul enters the human embryo at the moment of conception (the existence of the soul would be difficult to establish by positivist means), but any other argument that does not hold that it enters the foetus upon conception cannot be defended theoretically. That is, philosophically, the only correct argument is that, when conceived, the foetus receives a soul. This is therefore the reality, since philosophy proves reality with coherent arguments and theoretical tools.

[102] According to Robert George, it is not necessary to turn to the theological questions of 'ensoulment' and the eternal destiny of those who died before birth in order to substantiate the moral value and full dignity of the foetus arising from the existence of a new human life with convincing arguments, as these theological questions are irrelevant to moral debate and in terms of pursuing the right *public policy*. Since the foetus is the same whole human being as the new-born, the adolescent

All exercises of human capabilities, for example, thinking, moral decision and so on, are only the acts of someone who was already pre-stated to exist. This 'someone' must be conceptually defined, because if he did not exist, he would not be able to perform these actions, nor would he have the potential capability to do so, since all ability to act can only be someone's ability to do something.

It is not the exercise of the ability or its mere (potential or theoretical) ability that makes him human, but due to the fact that he is an existing and living human being, he may be able to perform these acts, or not because of some kind of internal or external impediment. According to some scholars, including Catholic moral theologians, the Church has not yet declared with complete clarity in an official document that the entry of the soul into the foetus, the embryo, takes place with certainty upon conception, and the foetus is therefore a human person considering that a philosophical question. In response, it can be said that philosophy can state

or the adult, it is only at a very early, still immature stage of its natural development, so as a human being it belongs in the same *Homo sapiens* species and is not part of another biological organism in its existence. In his view, it is quite sufficient to apply the basic relevant philosophical principles to new scientific knowledge of embryology. George, *Il diritto naturale,* 154–155. Possenti, on the other hand, rightly points out that fundamental rights do not belong to man as a human (in the biological sense) but as a human person. In my view, the person nature of man is constituted by its soul, and not based on its *rationality* nor the potentiality of rationality, the possibility of its later formation. Today, mainly due to the influences of German theology, it can be perceived that, also in Catholic moral philosophy, a kind of caution and restraint seems to be exercised in the application of the concept of both the soul (which has been also influenced by the history of Greek philosophical ideas) and the person. Understandably, this has a particularly significant impact on the ontological determination of a person's foetal developmental status, especially since the philosophical debates surrounding the doctrine of ensoulment have made it difficult from the outset to accurately determine the time of creation of the person's nature of the foetus.

In my view, the Church does not claim that the personality of the foetus is problematic in any sense, but the Teaching Office merely states that it is not committed to explicit philosophical personal concepts, or that the foetus is entitled to even the strictest protection of life, even if his person quality may only be assumed. See the Catechism of the Catholic Church, 2274 and 2270; *Donum vitae,* I.1; *Evangelium vitae,* III.60; *Dignitas personae,* I.5. The foetus is thus a human person with a soul, who has such unconditional personal dignity, and has the right to life according to Catholic teaching, which practically professes simultaneous or immediate ensoulment, that is, the soul entering the foetus at the moment of conception. The 1974 document of the Congregation for the Doctrine of the Faith, 'Declaration on Procured Abortion', merely refers to the centuries-old philosophical debate surrounding ensoulment. The final document of the Twelfth General Assembly of the Pontifical Academy for Life (Pontificia Accademia per la Vita) clearly states that there is no significant argument that could deny the person quality of the foetus. (Although the document also contains the argument that the mere probability of the presence of a human person's existence would be sufficient for the strictest protection of the life of the foetus.) The Declaration states that the doctrine of direct ensoulment supporting the foetal personality is fully in line with the biological reality of the newly created human being. The ecclesiastical body, which operates under the auspices of the Pope and is scientifically concerned with the protection of human life, has thus declared that the human foetus is a human person with a soul.

with absolute certainty that the human embryo is a human person with a unique spiritual soul from the moment of its conception. This has thus been proved philosophically. Some Catholic scholars with the right approach to bioethics state this as a bioethically verifiable statement. However, let us first review the main claims of contemporary bioethical views on this subject.

VIII Contemporary mainstream utilitarian and libertarian bioethical theories of human and non-human life, the subjectivity and dignity of man

Utilitarian and libertarian bioethical theories separate the existence of the living human body from the existence of the human personality. Consequently, it is argued that in certain phases in the life of the human body no human personality is attached to that body. Utilitarian theories date the creation of the human person to at least the fourteenth day after conception, when there is already a minimal ability to perceive feelings, that is when the initial furrowing, the starting form of the central nervous system of the zygote is formed, and the eighteenth week after conception is regarded as the final time, when the central nervous system is already completely developed, which is a necessary condition for the foetus to feel pleasure and pain. Libertarian theory sees the ability of self-determination as a condition of personal existence, in part by misunderstanding, or perhaps instead misinterpreting, the 'proprietory right of his own person' of man in the Enlightenment, such as by Locke, and man's autonomy, as expressed by Immanuel Kant. This theory therefore considers self-determination to be a criterion to which the grant of status as a person must be linked. Accordingly, at a minimum level, it links personality formation to the moment of the cerebral cortex's formation (week 22), which is a neurophysiological condition for exercising the ability of rationality; and, to the maximum extent, it recognises the formation of the personality when the ability to perceive or practice self-consciousness appears in the subject or in the 'moral actor' (that is, in the postpartum period of human life).

As for the question of the end of life, the above theories rule out the existence of subjectivity in individuals who, although living in a biological body, suffer too much or cause too much suffering to others by not being able to alleviate their suffering and are unconscious, that is they not have any kind of cerebral cortex activity, and thus although their vegetative functions are operational, they are incapable of self-awareness, rationality and moral decision-making. Libertarian and utilitarian theories thus narrow down the existence of subjectivity in relation to the biological existence of the human body: The formation of the personality is placed later than the biological origin of the human body, while conversely the human personality may disappear earlier than the (biological) death of the human body. Furthermore, this concept applies to human beings whose personalities are never

recognised (in the case of birth with very severe central nervous system damage) or whose personalities temporarily cease because of the termination of exercising certain essential human functions (permanent coma, from which there is a chance to wake up) or it ceases definitively while still living biologically in their bodies. The bioethical and legal philosophical consequence of these theoretical positions is that they assume the existence of categories of human beings who, although living in a biological sense, have no personality and thus no dignity. Human embryos and foetuses, as well as infants and young children, do not have subjectivity *yet,* and individuals in a coma, with brain damage or dementia, the elderly, the mentally handicapped, but also people in severe pain do not have the personhood *any more*.[103]

At the root of the separation of the notion of body and personality is the basic view that the body has been objectified by those who adopt this approach; that is, it has been put through desubjectivisation, which means the removal of human dignity from the human body. The objectification of the biological body stems from the scientistic reduction approach to the body, according to which it is a spatially expansive, moving collection of organic matter, a set of interconnected cell groups and their aggregates that can be described in spatial and temporal coordinates. They differentiate into tissues and organs by transmitting biochemical and genetic information to each other according to morphological, functional and neurophysiological complexities regulated by the law of causation.[104] This reductionist approach is not limited to describing the functioning of the body empirically, but argues that this is the scientific and the only correct way to describe the nature of the body, thus denying that there may be another dimension of the human body beyond that.

The unsustainable one-sidedness of this becomes immediately apparent when we consider the rights to respect for the deceased, which are accorded to a now-deceased person who is obviously no longer alive. How much more, then, is the body of a living human person completely permeated by the dignity of that person in all its states of existence? Moreover, his body, which is easily perceived by almost everyone but at the same time easily injured by society, primarily displays his personal dignity to the outside world. It is no coincidence, as we have already pointed out, that the oldest and most well-established dimension of the protection of human dignity is the protection of the human body against all forms of torture or inhuman treatment. Man's humanity, his dignity and humanity itself, assumes its normative form primarily in the protection of the human body, the body of every human being, including criminals and terrorists, and prescribes the absolute legal protection of human dignity in and through the human body. This is because the human person lives in his body, and therefore, any insult and humiliation affecting his humanity is a violation of human personality, that is, of dignity. The existence of rights to

[103] Laura Palazzani, *La filosofia per il diritto. Teorie, concetti, applicazioni* (Torino: Giappichelli, 2016), 158.
[104] Ibid. 159.

respect for the deceased sheds light on another dimension of the personal dignity of man, even in his dead body. In contrast, the scientistic reduction just discussed argues that only mechanical quantitative measurement of extent and motion can authentically describe and grasp the nature of the human body with scientifically empirical data, and therefore deny the existence of all the dimensions and realities in man that cannot be known in these ways; that is, the existence of human qualities, natural essences and goals inherent in human nature.[105]

In the mainstream bioethical concept which is to be discussed now, human subjectivity is associated with the various stages of the existence of the human body reduced to a mere object, and in others it ceases to exist. Therefore, in this concept, Laura Palazzani rightly points out, the subjectivity becomes a kind of *external classification* of the human body, stripped to its quantitative dimension. This subjectivity is created by the development of the human biological organism to certain levels and then ceases with its regression from those levels. A general tendency in these concepts is the 'disembodiment' of human subjectivity,[106] and on the other hand, the linking of it to the existence of certain human biological functions and their effective exercise,[107] and at the same time its exhaustion in them. Individuals are consequently considered to be persons who are actually capable of performing certain functions considered relevant: these are the ability to perceive pain that underpins the subject's interests (in the avoidance of pain), the abilities of rationality, autonomy, will and self-determination. Those are considered to be subjects, in the physical functioning of which the external manifestations of the existence of these functions can be perceived. Not all categories of humans with biological life are in this situation, while it is not only humans that they believe are able to perform these functions, as certain advanced mammals and robots with very high technology and artificial intelligence can also produce such functions, that is 'non-human animals' and 'posthuman subjects' may also be persons in this bioethical model. Utilitarianists, such as those with trans- and post-humanist tendencies, seek to transcend the thesis of the ontological superiority of man over animals.

[105] Ibid.

[106] Ibid.

[107] All those who make the personal existence of man, the existence of man's subjectivity (personality), and therefore his dignity, dependent on the exercise of specific abilities, are wrong. Unfortunately, even Martha Nussbaum makes the mistake of struggling, quite rightly, to ensure that the rights of people with disabilities are not abstract declarations but are actually embodied in the exercise of extra abilities, therefore inversely linking the existence of human dignity to the concrete exercise of abilities. Cf. János Frivaldszky, 'Dignità, soggettività e capacità giuridica delle persone con disabilità – riflessioni critiche partendo da Martha Nussbaum', in Paolo Heritier and Pierangelo Sequeri (eds), *Deontologia del fondamento: Seguito da verso una svolta affettiva nelle law and humanities e nelle neuroscienze* (Torino: G Giappichelli, 2016), 259–315. In the correct approach, the human soul is primary, the contingent secondary expressions of which are the abilities to act, and thus their value is derived from the former; Paola Bernardini, *Uomo naturale o uomo politico? Il fondamento dei diritti in Martha C Nussbaum* (Soveria Mannelli: Rubbettino, 2009), 59.

Because the pain-sensing ability of living beings is considered a central element of personal existence, thus personal existence is assumed even in the most advanced mammals, with some proponents of this approach sharply criticising anthropocentric 'racial discrimination' between humans and animals, considered fully unjustified discriminative differentiation to the detriment of animals.

According to them, there is no essential difference between the body of a 'non-human animal' and the body of a 'human animal,' as both of their bodies are able to sense pain through their central nervous system, and therefore seek a pleasant external stimulus and try to avoid pain. Even the category formations just mentioned ('non-human animal' and 'human animal') are telling: even from the point of view of the ethics of moral treatment, man is, for them, only an animal species, only one of the species of advanced mammals. For utilitarianism, the key issue is not the human way of life, but the existence of a sentient body capable of responding to external stimuli with pleasant or painful sensations, whether human or non-human (advanced mammalian), and this is what they think creates subjectivity. Furthermore, in libertarian concepts, a robot with artificial intelligence (or even perhaps sensitivity?) can also be considered a subject. Hence, there is no essential difference between the biological body of the human being and artificial intelligence, as long as both are capable of demonstrating the existence of the basic functions characteristic of the subject, namely self-awareness, rationality and self-determination. Representatives of trans- and post-humanism expand subjectivity beyond the 'human' and the organic being in a way that includes new virtual, cybernetic, synthetic, inorganic and non-living subjects.[108] In this vision of future that they have outlined and appear to desire, converging technologies (nanotechnologies, biotechnologies, informatics, cognitive sciences) the bodies will be emptied by reducing them to mere recipients of biotechnological components.[109] This will be done in an effort to achieve and create a 'technohuman' way of life that transcends biological, physical and mental limits in the fusion of man and machine *(cyborg)* or by the design of automated and self-contained machines that replace the flesh-and-blood man with the promise of immortality and unlimited perfection.[110]

[108] Palazzani, *La filosofia,* 160.

[109] By using convergent sciences, the representatives of trans- and post-humanism do not intend to use bioengineering and genetic engineering for therapeutic purposes, that is, to restore damaged human functional capacity but to transcend the defective features of human nature that they believe need to be eliminated, prompted by an ideological or merely consumer approach (including pain, unwanted personality traits, and death itself) to create, more precisely to breed, by improvement, boosting and enhancement, a genetically new posthuman breed out of man; János Frivaldszky, 'Transhumanismo y dignidad – mejoras terapéuticas y no terapéuticas', in Miguel Ayuso (ed.), *¿Transhumanism o posthumanidad? La política y el derecho después del humanismo* (Madrid: Marcial Pons, 2019), 139–155.

[110] Palazzani, *La filosofia,* 160.

IX Man and his dignity at his death

The legal concept of human life and death is closely linked to its biological-medical meaning, on the one hand, and to the meaning employed in public discourse, on the other. The death of a person (killing or causing the death of another person or the death of the subject in general) has a legal quality and legal consequences in many respects and, since it means the end of a person's existence, it necessarily affects fundamental rights, their existence and the possibility to exercise them. The protection of human existence and life is the basis, meaning and purpose of any legal system, as the minimum function of law is to protect man and ensure the survival of human society. The theoretical lessons of the theoretical system of perhaps the most influential contemporary legal theorist, Herbert Hart, which proved to be fundamentally flawed, show that human life can only be effectively protected by legal – theoretical – means if man and his life, and the violent taking away of it, is rendered theoretically on an ontological and metaphysical basis, hence the protection of his life and the issue of the prevention of violent death will also be based on natural law.[111]

Defining the concept of death in the context of the significance of human life is also essential, because the proper protection of human life can be ensured largely through awareness of it. However, instead of defining 'What is death?', the interest of doctors, and hence also lawyers, has recently shifted towards answering the more reductionist question: 'When does death occur?' As a result, the more complete question of death has receded, especially since today, unfortunately, the correct conceptual definition of the human person and his or her life is not at the forefront of legal philosophy either. Understanding the phenomenon of death has consequently been reduced to a biological-medical or action-oriented approach to the occurrence of death. Evidently, the current state of medicine and the thinking 'paradigms' that operate in it, as well as the medical and other human interests that have emerged (facilitating and accelerating organ transplantation from a person just declared dead, or the cost of keeping someone alive), largely determine the evolution of public thinking about death, which also determines the main trends of legal thinking on this matter. It should be borne in mind that the content of law is most often manifested in conflicts of interests in arguments and cases, and develops and changes according to this logic. Consequently, the legal assessment of death is also primarily the subject of non-academic debates. However, the task of a lawyer is to polish the legal reality of human death in the fabric of these practical legal and other interests, especially if it is about the most critical event and vital circumstance of the most basic protection of man.

As long as cardiac function and respiration proved to be functionally and artificially irreplaceable, their cessation meant death, but today, since they can

[111] Frivaldszky, *A jogfilozófia,* 280–308.

be ensured by artificial means, the fulfilment of criteria for brain function has superseded this standard, that is, the former are no longer sufficient criteria. Thus, the set of medical criteria for determining brain death can be used to identify the onset of death today, which is a condition rather than a well-defined time. This is largely because the neurological-physiological, integrative function of brain function in terms of the functioning of the body cannot be established in a binary way; that is, it cannot be used as a clear and definitive criterion unless we apply a distinction in life functions, such that there are higher, more essential and lower level, less essential biological functions. Furthermore, multidirectional, parallel meanings of brain death have become widespread, not to mention that 'brain' function cannot be localised to any single organ, while brain and neuroscience often identify the brain function itself with the entire human way of life, which is a huge reduction of the life of man.

As a result, there is a need for a much more complex approach in biological terms, taking into account all the physiological criteria involved.[112] Complete and irreversible brain death, which would mean the disintegration of the unity of the human body, does not seem to be a sufficient criterion for determining death, although many, including even Catholic lawyers dealing with legal philosophy and bioethics, have backed this standard.[113] In addition, there is an urgent need for the jurist not to view the existence of human life as limited to the functioning of the central nervous system and brain functions but to grasp the nature of life and death itself with human existence, in harmony with and in connection with its spiritual and incorporeal aspects, because otherwise he cannot conceptualise man's nature as a human person in any way, forcing him to accept practices contrary to human life.

We aim to demonstrate that the question, considered in the most complex context, of when a person's death actually occurs, can only be answered if it has been conceptually clarified in advance what it means, what a person's death is, and only then can it be thematised in an adequate way, if we have already become aware in advance of what a person's life is, having identified the essence of his existence that is relevant also from a legal philosophical point of view. However, since lawyers no longer seek to define the legal concept of man (as contemporary legal thinking has no use for the overly metaphysical concepts of the human person and human dignity), naturally, a conceptual grasp of death cannot be certain either. All the less so since, in the meantime, neuroscience has developed to such a high level as

[112] Abigail Maguire, 'Towards a Holistic Definition of Death: The Biological, Philosophical and Social Deficiencies of Brain Stem Death Criteria', *The New Bioethics* 25, no 2 (2019), 172–184.

[113] Cf. D'Agostino and Palazzani, *Bioetica,* 119. Waldstein, on the other hand, vehemently rejects this position using legal philosophical and Catholic doctrinal arguments, referring to the relevant ecclesiastical documents and pointing to the opposite tendencies of interpretation, often pointing to their erroneous nature, often revealing the context of some relevant documents. Waldstein, *A szívébe írva,* 119–132.

a result of artificial intelligence research that brain function already seems able to be triggered in many respects, so that soon there will be no biological-physiological function in man that cannot be artificially replaced or reproduced.

If some of the central nervous system functions of the brain can be reproduced after artificially ensuring the heart and respiratory function, then the death of man considered merely a thinking being, or even to be a thinking animal species, does not seem biologically necessary, but instead its time can be postponed or varied, or it can even be (in theory) artificially eliminated, as long as death appears to be merely the result of neurological-physiological processes and is seen as such. In this case, however, we have not considered what is specifically human in human life; that is, what makes it human, and what actually ends as human reality upon the death of a human. Therefore, in this concept, there is nothing left in man that is truly, specifically human, according to its natural essence.

Proper legal philosophical thinking, on the other hand, focuses on the philosophical, anthropological essence of man, in which the human intellect, as the meaning of life, goes beyond man's brain function, and man's spiritual soul, which is man's true essence, surpasses it even more in its metaphysical nature: It is present as long as the specific individual is not dead, but its existence is not an emanation or derivative of the biological body, so it cannot be detected by scientific means or by positivist scientific methods. That is why legal thinking also needs to consider the findings of basic research obtained by moral and natural law oriented legal philosophical thinking in this field. In my view, such a conceptual grasp of the human person is the only way to correctly define human death and regulate, in legal terms, the legal issues involved.

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Marriage and Family as Christian and European Values

András Zs Varga

Some of the most criticised parts of the provisions of the Fundamental Law of Hungary are the sentences in the National Avowal that refer to the family ('We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are loyalty, faith and love'), as well as Article L) pursuant to which 'Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children'.[1] The objections commonly focus on the link between marriage and family, the central role of such notions in social life and legal values, and the limitations imposed by them on individual self-determination.[2] It seems clear that international human rights documents use less categorical language. They tend to emphasise the voluntary nature of marriage, along with respect for established family ties. This paper seeks to provide an overview of effective international law on the matter, and argues that the Christian understanding of marriage between a man and a woman is inseparable from the European concept of society and law. In conclusion, an attempt is made to show that the wording of the Hungarian Fundamental Law reflects both the Christian and traditional European understanding of such concepts simultaneously, without violating any of Hungary's international obligations.

I Marriage and the family in international documents on fundamental rights

All the fundamental documents of international law include provisions on marriage and the family, including the protection of these institutions. The first such document

[1] For details on the evolution of the original wording of the Fundamental Law, see András Zs Varga, 'A házasságra és a családra vonatkozó rendelkezések változása az alkotmányozás során', *Iustum Aequum Salutare* no 2 (2012), 119–127. The provisions were amended by the fourth and seventh amendment of the Fundamental Law.

[2] For example, András L Pap, 'Ki és mi a magyar? Az Alaptörvény preferenciái kritikai perspektívából', in Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon* (Budapest: NKE KTK, 2014), 245–264.

https://doi.org/10.36250/00907_14

is the Universal Declaration of Human Right (UDHR). It is not legally binding in and of itself, but its provisions are reflected in two binding documents, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly (XXI) on 16 December 1966. The ICCPR and the ICESCR were promulgated in Hungary by Decrees 8 and 9 of 1976, respectively. Of more contemporary relevance, the European Convention on Human Rights (ECHR), was adopted on 4 November 1950 in Rome, before the above covenants, but was only promulgated in Hungary in 1993 by Act XXXI, shortly after the change of political regime, which also includes provisions on family and marriage. The last of the fundamental documents relevant to this topic is the Charter of Fundamental Rights of the European Union (CFR), which was signed on 7 December 2000 in Nice and forms part of binding primary EU law under Article 6(1) of the Treaty on the European Union since the Treaty of Lisbon came into force on 1 December 2009. As the wording of these documents is rather similar, it seems expedient not to discuss them in chronological order (or individually), but to focus on their most important provisions.

A The social role of marriage and family

Somewhat surprisingly, the social role and significance of the family is only mentioned in the UDHR and the two covenants, not the other documents. This suggests that the State parties, over half a century ago, proceeded with great care when they adopted these international conventions. It seems that they were not ready to adopt specific detailed rules without establishing the core meaning of these notions.

The UDHR (adopted two years after the UN Charter emphasised and made respect for human rights a binding rule of international law)[3] is a non-binding instrument. Nonetheless, it is of great significance, considering that it was adopted by all the UN Member States with only eight abstentions and without any votes against.[4] It is an instrument whose values are acceptable to all cultures and nations. Article 16 UDHR provides that men and women, without any limitation due to race, nationality or religion, have the right to marry and to found a family; they are entitled to equal rights with regard to marriage, while the family (note that it is the *family,* not its members) is the natural and fundamental group unit of society and is entitled to protection by society and the State.[5] The final part of the UDHR wording, that is, the defining provision, is repeated without any material modification in Article 23 ICCPR and, with some additional reinforcement, in Article 10 ICESCR:

[3] Gábor Kardos, *Az emberi jogok nemzetközi védelmének általános kérdései*.
[4] Universal Declaration of Human Rights, https://bit.ly/2P5iSky.
[5] János Frivaldszky, *Természetjog és emberi jogok* (Budapest: PPKE JÁK, 2010), 7.

> The States Parties to the present Covenant recognize that: 1 The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

Naturally, the UDHR and the covenants also had an impact on Hungary. They were adapted to Hungarian law by the Constitutional Court in its decision No 4/1990 (III. 4.): 'Marriage and the family is the most fundamental and natural community of citizens of society.' Their conclusions were summarised in decision No 14/1995 (III. 13.):[6]

> [T]he institution of marriage is traditionally the union of a man and a woman. This union typically is aimed at giving birth to common children and bringing them up in the family, in addition to being the framework for the mutual taking care of and assistance to the partners. The ability to procreate and give birth to children is neither the defining element, nor the condition for the notion of marriage, but the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage. The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children. This is why Art. 15 of the Constitution refers to the two subjects of protection together.

In the same decision, the Constitutional Court also clarified why defining marriage as a relationship between a man and a woman is not prohibited as unconstitutional discrimination: 'An enduring union of two persons may realise such values that it can claim legal acknowledgement on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together. Equal treatment always has to be interpreted with respect to the social relations that are subjects of the legal regulation.' The decision also notes, possibly as the innermost core of its reasons, that '[e]quality between man and woman has a meaning if we acknowledge the natural difference between man and woman, and equality is realised with respect to this'.

This adaptation process, which aimed to afford specific protection for marriage and the marriage-based family was concluded by Article L) of the Fundamental Law of Hungary, arousing some controversy, as noted at the start of this paper. The development of the instruments concerning the detailed rules on marriage and family has been somewhat less spectacular, however.

B The right to marry and the equality of spouses

The right to marry freely and the equality of spouses, the first aspects of marriage to be regulated by the above instruments, were already commonly observed in Europe at the time, but were far from evident in other cultures. As noted, Article 16 UDHR provides that men and women of full age, without any limitation due to race, nationality or religion,

[6] See Balázs Schanda, 'Házasság és család az alkotmányjogban', in Lóránt Csink, Balázs Schanda and András Zs Varga, *A magyar közjog alapintézményei* (Budapest: Pázmány Press, 2020), 681–601.

have the right to marry and to found a family, while men and women are also entitled to equal rights with respect to marrying, during marriage and upon its dissolution. It is also made clear that marrying is a right, but not an obligation (in particular, not an obligation created by family pressure), by providing that marriage shall be entered into only with the free and full consent of the intending spouses. This approach is reflected and supplemented in Article 23 ICCPR and Article 10 ICESCR, which impose active regulatory obligations on States Parties. In essence, Article 12 ECHR repeats the wording of the UDHR and the covenants without any clarification. Such clarification is to be found in Article 5 of Protocol No 7, providing that '[s]pouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution'. It also adds that the above provision does not prevent States from taking such measures as are necessary in the interests of the children. The wording of the CFR is quite laconic; it merely provides that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights. It seems reasonable to assume that this laconicism is due to the fact that, by the twenty-first century, the fundamental social role of marriage, as recognised in the UDHR, had changed or, more explicitly, become more limited throughout Europe. Nonetheless, it seems significant that the regulations of Member States concerning marriage are considered mandatory.

C The protection of family as a part of privacy

Compared to the previous considerations, even less deviation can be found regarding the prohibition of unauthorised interference with family affairs, which is covered by the above-mentioned instruments as part of the protection of privacy, integrity and reputation. According to Article 12 UDHR, no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Materially similar provisions are laid down in Article 17 ICCPR, Article 8 ECHR and Article 7 CFR. This fundamental wording is only supplemented by any substantive text in the ECHR for the purpose of determining the reasons and extent of any such restriction. 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

D Protection of the social security of families

The protection of the social security of families is a field that is somewhat more detailed, but less relevant to the subject of this paper. The reason for this is

that first, this field is not purely a matter of public law; second, family relations have become less durable and even less significant from a national economic perspective (certainly when compared to previous eras) in Europe; and third, providing support for families is a major policy priority in only a handful of countries (Hungary is one of the hopeful exceptions regarding this trend), and it is often limited to providing protection and support for children. While this topic certainly seems worthy of more thorough investigation, such efforts should be presented in a separate paper. Nonetheless, it is worth noting that Article 23 UDHR provides that '[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'. Article 25 elaborates the right to adequate remuneration in more detail, by specifying that it includes the right to a standard of living adequate for the health and well-being of a person and of his family, including food, clothing, housing, medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. It also provides that motherhood and childhood are entitled to special care and assistance (for all children, whether born in or out of wedlock). These rights are detailed further in the covenants, in particular in the ICESCR.

These rights are not mentioned in the ECHR, while the CFR reflects the changes in attitude and values that took place during the decades following the adoption of the covenants. The CFR merely provides in Article 33, as an abstract principle, that the family shall enjoy legal, economic and social protection, and it lays down two specific rules, one concerning the prohibition of dismissal for a reason connected with maternity, the other on the right to paid maternity leave and to parental leave (without specifying the minimum period of the latter). Following this short overview of international and European rules adopted after the Second World War, it seems clear that the protection of marriage and family is present (at least to a limited extent) in the major international instruments of fundamental rights. Consequently, it seems safe to conclude that marriage and the family are recognised and protected by international law even nowadays.

II The Christian concept of marriage and the family

The following part provides a broader overview of the roots and history of the concepts of marriage and the family in European culture. First, the role of the family at the birth and during the development of Christianity is presented. During the persecution of Christians in the first centuries, all those who participated in the life of the Church (and masses) were baptised, as, with a view to protecting the *arcanum* or *mysterium fidei,* the details of the Christian faith and the course of religious practices could not

be disclosed to non-Christians.[7] This consideration prevailed even over the need for families to break bread together, even if the Christian concept of the family (and, most of all, marriage) always remained of great significance (marriages between Christians and pagans, as well as sins affecting marital status, were subject to strict rules).[8] The presence of families with minor children at the celebration of Eucharist became a reality (and possibly common practice) after the era of persecution ended and, as children started to be baptised after birth, families of Christians became the standard. Over the centuries, the liturgy became increasingly solemn (and formal), but, as suggested by the lack of considerable historic evidence, the presence of families at masses did not cause any difficulty. Nonetheless, it seems clear that holy masses also provided a place of religious education. This is also confirmed by the Catechism of Saint Cyril and other subsequent sources.[9] Later, however, the period following the Second Vatican Council saw changes regarding the role of congregations in the Church (and liturgy), as well as the recognition of the significance of families (possibly triggered by the crisis of families).

A The significance of the family in the early period of Christianity

Originating in a province of the Roman Empire that included Judea, Christianity favoured the family model to which the first followers of Jesus Christ, the apostles and other disciples, and other persons converting from Judaism to Christianity were accustomed from the very beginning. In particular, the concepts of the family, as understood by pagan Romans and the Old Testament Jewish tradition, were not especially different; both concepts involved a family unified through the prominent role of the head of family, and were based on marriage-based relations and a blood descendant.

(i) Roman family law

Marriage *(matrimonium)* and descent played a fundamental role in Roman private law.[10] An *agnat* family included the head of the family *(pater familias),* his wife *(uxor),* men related to the father by blood, and male lineal descendants of the same family,[11]

[7] Henry Chadwick, *The Early Church* (Grand Rapids: William B Eerdmans, 1968), 32–33; Mihály Kránitz, *A keresztény hit kialakulása és védelme* (Budapest: Szent István Társulat, 2018), 22–24; Péter Erdő, *Az ókori egyházfegyelem emlékei* (Budapest: Szent István Társulat, 2018), 151.

[8] See *Privilegium paulinum,* 1 Corinthians 7:12–15; *Traditio apostolica,* XV, 6–7; *Didascalia,* II–II; *Apostolic Canons,* XVII; *Canons of the Council of Elvira,* VIII–X, XV–XVIII, LXI–LXXII; *Canons of the Council of Elvira Arles,* X–XI.

[9] Kránitz, *A keresztény hit,* 30–35.

[10] Róbert Brósz and Elemér Pólay, *Római jog* (Budapest: Tankönyvkiadó, 1989), 148–155.

[11] Domitius Ulpianus, *Omini nostri sacratissimi principis Iustiniani iuris enucleati ex omni vetere iure collecti digestorum seu pandectarum,* Dig. 11.4.

that is the children of the father and their wives, grand-children and adopted children, as well as the wives and children of such children.[12] Consequently, marriage-based blood relations were the basis of *agnatio*. Roman law also used the concept of *cognatio*, meaning blood relations based on descent only (not marriage-based relations). These were not limited to male lineal descendants (power-based descent), but included both male and female line descendants. Marriage was not taken into account in the context of *cognatio*, meaning that wives (or husbands, in the case of female line *cognatio*) were not considered *cognat* relatives as they were not related by blood (the latter relationship was known as affinity or *affinitas*.) These two groups of family relations overlapped. For example, children belonged to the family of their father both through *agnatio* and *cognatio* (while they belonged to the family of their mother through *cognatio* only).

Marriage and kinship also had an impact on personal status and assets through, for example, conjugal community *(consortium),* passing on the legal status of the father (Roman citizenship), and status as an heir when the father (head of the family) died *(heredes).* The requirements for entering into marriage included the capacity to marry *(conubium),* the absence of any blocking factor (obstacles to marriage), and a formal and mutual promise *('nuptias enim non concubitus, sed consensus facit').*[13] All these aspects had a clear impact on the marriage-related rules of the Catholic Church,[14] and they served as an institutional (formal) framework for the Christian concept of marriage and the family.

(ii) The law of Israel on marriage and family

The Jewish concept of the family did not differ significantly (at least from a sociological perspective) from the Roman family,[15] in that family is based on a patriarchal monogamous marriage (that is one based on the power and primacy of the head of family) and blood descent. The differences were more content-related than formal. An important difference regarding the content of marriage was its sacral nature, meaning that marriage was considered a concept rooted in the will of God[16] (Genesis 1:28, 2:24). This sacral nature did not exclude the possibility of divorce (although it was considered an exception), so that, from an institutional perspective, the Roman and Jewish concept of marriage remained quite similar. However, such sanctity was not limited to marriage, as it also included extended groups of blood descendants. This was because descent was considered a key factor that linked a person to the Jewish people, as the people selected and distinguished from other

[12] The differences between marriages with complete patriarchal power *(manus),* more liberal forms of marriage, and marriage between persons who are not Roman citizens are not discussed here, as they are not related to the topic of this paper directly.

[13] Ulpianus, *Principis Iustiniani,* Dig. 15.1.15.

[14] Péter Erdő, *Egyházjog* (Budapest: Szent István Társulat, 2003), 503, 509–510.

[15] Imre Kocsis, *Bevezetés az Újszövetség kortörténetébe és irodalmába, I* (Budapest: Szent István Társulat, 2014), 27–28.

[16] Ibid. 27.

peoples by God (JHWH). This is confirmed by the family trees often mentioned in the Old Testament, the discussion of the descent of significant persons[17] and the way that descent determined the role a person might assume in society (for example, priesthood was connected exclusively to the Tribe of Levi).[18] Furthermore, the symbolism of marriage was also used to describe the relationship between JHWH and Israel[19] ('For your Maker is your husband – the Lord Almighty is his name', Isaiah 54:5).

This sanctity of marriage and family is also reflected in the legal texts of the Old Testament. The entire legal system is sacral in nature, regulating the relationship between JHWH and his people (see, in particular, the strictly understood law of holiness: 'Be holy because I, the Lord your God, am holy', Leviticus 19:2), which meant that legal texts regulating everyday life in detail are also considered sacred. It should be noted that the strictly understood law of holiness is closely followed by a rule on the family and Saturday, also suggesting the clearly sacred nature of the text: 'Each of you must respect your mother and father, and you must observe my Sabbaths. I am the Lord your God' (Leviticus 19:3). The importance of marriage and family is also emphasised in numerus rules of the Ten Commandments *(Decalogue)* (honour your father and your mother, you shall not commit adultery, you shall not covet your neighbour's wife; Exodus 20:12–17, Deuteronomy 5:16–21). The sacral nature of these concepts is also apparent from legal texts that were preserved in various forms and discuss marriage and the family.[20]

(iii) The Christian concept of marriage and the family

Christianity, which originated in Jerusalem and spread to all the major parts of the Roman Empire within twenty-five years, promoted respect for marriage and the family for both social and religious reasons, and it brought about significant changes regarding the religious and sacred quality of these concepts. First, descent was replaced by baptism and personal faith in the divine nature of Jesus Christ and his work as Saviour as the basis of membership in the new people of God. This change was particularly relevant for pagans converting to Christianity,[21] and it meant that membership of the Christian Church was not based on descent or birth but on a personal decision. Second, the sacred and holy nature of marriage became even more significant. According to the gospels, Jesus Christ eliminated the possibility of divorce, which was permitted under the Old Testament as an exceptional measure ('Moses permitted a man to write a certificate of

[17] Huba Rózsa, *Bevezetés az Ószövetség könyveibe* (Budapest: Szent István Társulat, 2016), 178, 183, 186, 241–243; Béla Szathmári, *Magyar egyházjog* (Budapest: Századvég, 2004), 383–384.

[18] Rózsa, *Ószövetség,* 204.

[19] More broadly, the law of holiness means chapters of Leviticus 17–26, see ibid. 6.

[20] Ibid. 156–165; Szathmári, *Magyar egyházjog,* 394, 401, 423.

[21] Mihály Kránitz: *Alapvető hittan* (Budapest: Szent István Társulat, 2015), 333–334; Kránitz, *A keresztény hit,* 23–24, 36–37.

divorce and send her away.' 'It was because your hearts were hard that Moses wrote you this law', Jesus replied. 'But at the beginning of creation God "made them male and female".' 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.' 'So they are no longer two but one flesh. Therefore, what God has joined together, let no man separate.' Mark 10:4–9); furthermore, he explicitly prohibited divorce and re-marrying (Mark 10:11–12). This contrast with the former toleration of divorce is also emphasised by the two antitheses made in the Sermon on the Mount following the statements of blessedness.[22] Thus, marriage, understood as a consequence of God's will and a unity indissoluble under natural law, attained holiness.[23]

Once personal faith in Jesus Christ became the basis of membership in the Church, the nature of the internal laws of Christianity also changed. Respect for the law remained and the idea that law originates in God persisted, but law itself, as a product of human work and effort, lost its holiness.[24] Both the Roman and the Jewish people considered law to be of great importance. Respect for the law as a set of norms *per se* (that is, regardless of its specific content) is a characteristic of Roman law, which also serves as a basis for the European concept of law. For Romans, respect for the law originated in natural law, which also held, as a 'strict legal axiom', that persons are equal by nature.[25] This great respect for the law constituted the step of advancement that eventually came to define European civilisation.[26] Everyday life was regulated by law, and law, being *sacrata,* was observed with unconditional respect.[27] All these factors, as dogmas of natural law and the 'heritage of Rome', ensured that the dignity of individuals could not be subjected to state power.[28]

For reasons that are independent of Roman law, but still reflect the great respect Christians had for the law, the laws of the Old Testament were considered of great importance. This legal order included respect for human dignity (as humans were regarded as having been created in the image of God), a requirement for liberty and justice, and the concept of social responsibility (as a prototype of social rights). Similarly to their faith in and respect for a single, personal, creating and providing God (without which Christianity would be meaningless),[29] respect for laws *per se* (and not out of fear of the consequences of their enforcement) also originate in the Jewish traditions of the Old Testament.[30] These values were adopted by Christianity at first

[22] Imre Kocsis, *A hegyi beszéd* (Budapest: Jel, 2005), 84–94.

[23] Erdő, *Egyházjog,* 501–09.

[24] Géza Kuminetz, *Egy tomista jog- és állambölcselet vázlata, I* (Budapest: Szent István Társulat, 2013), 756, 759–764, 767–768.

[25] Henry Sumner Maine, *Ancient Law* (London: Joseph M Dent, 1936), 9, 11–12, 54–55.

[26] Ibid. 57.

[27] János Zlinszky, *Ius publicum* (Budapest: Osiris–Századvég, 1994), 32, 177–179.

[28] Ibid. 196–197.

[29] Mihály Kránitz, *Hidak a vallások felé* (Budapest: Szent István Társulat, 2014), 22–26; Pope Benedict XVI, *Verbum Domini,* [41].

[30] Szathmári, *Magyar egyházjog,* 392–393; Rózsa, *Ószövetség,* 156–168.

in a moral and theological sense, and later also in a legal sense.[31] When Christianity became the state religion, the concept of law as a means of limiting or defining state action became common.[32] Consequently, it seems that respect for the two legal layers of values (historic and universal), as well as law *per se,* constitutes an integral and inseparable part of the Christian tradition (and, in a broader sense, the European legal tradition).[33] Respect for laws formed part of both of its roots (that is, Roman law and the laws of the Old Testament), was as well as later being adopted into the concept of natural law[34] (and later still into the paradigm of the rule of law) without difficulty.

In conclusion, it seems that canon law, the law of the Christian Church, can be considered one of the sacred studies (theology),[35] even though it is no longer considered a direct source of salvation (only as a possible means of ensuring the rightful behaviour that leads to salvation). This is emphasised by canon 1752 of the effective Code of Canon Law, pursuant to which 'the salvation of souls, which must always be the supreme law in the Church, is to be kept before one's eyes'.[36] Supported by its divine origin and the existing social background, this law provides the concepts of marriage and family with considerable and ever-increasing support and protection. This is reflected by the disciplinary rules of the Church,[37] as well as the secular rules (of the Roman emperor) adopted after Christianity was permitted and eventually became the state religion. The new rules that protected marriage, the family, spouses and other family members sought to preserve families (granting recognition of communities of slaves as families), to restrict the possibility of divorce, prohibit adultery and re-marrying, limit paternal power over family members and slaves, and, as a specifically Christian measure, restrict mixed marriages.[38] Consequently, the Christian concepts of marriage and family, founded on and protected by a threefold basis (social, legal and holy), were reinforced and remained essentially unchanged for the subsequent period of about two millennia.[39]

B Catholic teaching on marriage and family

The Catholic concept of marriage and family faced a considerable challenge as a result of the Enlightenment. In particular, since the second half of the nineteenth

[31] Ferenc Beran and Vilmos Lenhardt, *Az ember útja* (Budapest: Szent István Társulat, 2012), 29–42.
[32] Ibid. 44–46.
[33] János Frivaldszky, *Természetjog – eszmetörténet* (Budapest: Szent István Társulat, 2001), 50–60.
[34] Pál Kecskés, *A keresztény társadalomelmélet alapjai* (Budapest: Szent István Társulat, 1938), 110–121.
[35] Erdő, *Egyházjog*, 53.
[36] Ibid. 809; for a detailed analysis, see Péter Erdő, *Az élő Egyház joga* (Budapest: Szent István Társulat, 2006), 73–75.
[37] See the works mentioned in note 8.
[38] Pál Sáry, *Pogány birodalomból keresztény birodalom* (Budapest: Szent István Társulat, 2009), 30–49, 49–50.
[39] Arno Anzenbacher, *Keresztény társadalometika* (Budapest: Szent István Társulat, 2001), 81–86.

century, the impact of the emergence of civil matrimonial law and the dissolvability of marriage has become critical (especially in the last decades),[40] as durable and monogamous marriage became only one of the possible forms of cohabitation. The idea of undissolvability proved unable to preserve even Catholic marriages, and the definition of marriage as the community of a man and a woman has also recently lost its exclusivity.[41] In regard to such persistent and increasing challenges, the Catholic Church was compelled to emphasise the importance of family time and time again, even though its concepts and teachings remained unchanged from the perspectives of both holiness[42] and society.[43]

(i) The Second Vatican Council on marriage and family

The pastoral constitution *Gaudium et spes* was finally adopted by the Second Vatican Council in 1965 after a long debate on the last day before the last period of the Council was closed.[44] An entire chapter in Part II of the constitution was dedicated to emphasising the dignity of and respect for marriage and the family.[45] This chapter begins by presenting the contemporary situation, role and purpose of marriage and the family. It takes account of some of the main challenges then facing marriage and the family, such as the plague of divorce, the trend toward short periods of cohabitation without marrying and various misunderstandings concerning population growth.[46] It then reaffirms the convictions of the Church regarding the holiness (ordained by God) and sanctity (founded by Jesus Christ as a sign toward salvation) of marriage. It is of great importance that it connects marriage to family. Education and example, originating from the dignity of fathers and mothers, are also presented as means of providing general and religious education for children.[47] Next, it discusses the significance of conjugal love in

[40] Károly Szladits, *A magyar magánjog vázlata II* (Pécs: Ponte 1999), 310–314; Gyula Eörsi, *Összehasonlító polgári jog* (Budapest: Akadémiai Kiadó, 1975), 345; Tamás Lábady, *A magánjog általános tana* (Budapest: Szent István Társulat, 2013), 30–32; Gábor Jobbágyi, *Magyar polgári jog I* (Budapest: Szent István Társulat, 2013), 153–155, 161–164.

[41] Jobbágyi, *Magyar polgári jog I,* 161.

[42] Catechism of the Catholic Church, 1601–1666. The sanctity of marriage is not discussed in this paper, meaning that the following topics are not covered here: matrimonial annulment suits in general and recent changes (see Katalin Hársfai, *A házassági semmisségi perek a DC után* (Budapest: Szent István Társulat, 2013); Pope Francis, *Mitis Iudex Dominus Iesus;* Pope Francis, *Amoris laetitia*.

[43] Cf. Kecskés, *A keresztény társadalomelmélet alapjai,* 188–201; Compendium of the Social Doctrine of the Church, 123–143; Catechism of the Catholic Church, 2196–2233, 2357–2400, 2514–2533.

[44] John W O'Malley, *Mi történt a II. Vatikáni Zsinaton?* (Budapest: Jezsuita, 2015), 353–359, 362–367, 382, 387–392; János Goják, 'Bevezetés' in *A II. Vatikáni Zsinat dokumentumai* (Budapest: Szent István Társulat, 2007), 607–648.

[45] Second Vatican Council, *Gaudium et spes,* 1965, 47–52.

[46] Ibid. 47.

[47] Ibid. 48.

detail, including the fruitfulness of marriage, the relationship between conjugal love and respect for human life.[48] Finally, the text returns to the need (and reasons) for caring for marriages and families, including the tasks of pastors in this field.[49]

It seems clear from this constitution that marriage and the family are considered by the Council to be of great importance due to both biological necessity (ordained for the procreation and education of children) and its holy nature (ordained and, in individual cases, arranged by God): 'By their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children, and find in them their ultimate crown.' The text of the constitution expands on this:

> [N]ow the Saviour of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony. He abides with them thereafter so that, just as He loved the Church and handed Himself over on her behalf, spouses may love each other with perpetual fidelity through mutual self-bestowal. Authentic married love is caught up into divine love and is governed and enriched by Christ's redeeming power and the saving activity of the Church.[50]

Furthermore, the last part of this Chapter imposes various tasks on all persons concerned with marriages and children, such as parents, civil authorities, other Christians, pastors, priests, religious scholars, scientists and other organisations, related to support for and education of marriages and children. In conclusion, it seems quite clear that the Church pays great attention to the loving community of fathers, mothers and children living in marriages and families. The family and marriage are thus not merely natural phenomena or a form of cohabitation approved and expected by society and the Church; it is a loving community entrusted with a mission:

> Finally, let the spouses themselves, made in the image of the living God and enjoying the authentic dignity of persons, be joined to one another in equal affection, harmony of mind and the work of mutual sanctification. Thus, following Christ who is the principle of life, by the sacrifices and joys of their vocation and through their faithful love, married people can become witnesses of the mystery of love which the Lord revealed to the world by His dying and His resurrection.[51]

(ii) The impact of *Gaudium et spes*

The teachings of the Council turned out to be fruitful. While in *Humanae vitae,* an encyclical letter of 1968, Pope Paul VI primarily assessed issues related to procreation, sexuality outside of marriage and contraception, his assessment was based, among other considerations, on the relationship between marriage and parental

[48] Ibid. 49–51. The considerable debates sparked by this issue at the Council were eventually concluded by Saint Paul VI in his Encyclical Letter *Humanae vitae* issued four years after the Council, see O'Malley, *Mi történt?,* 389–390.

[49] *Gaudium et spes,* 52.

[50] Ibid. 48.

[51] Ibid. 52.

responsibility.[52] In order to approach man in a holistic manner, Pope Paul VI relied on the constitution of *Gaudium et spes*[53] when he reiterated and elaborated the essential features of marriage, such as procreation and parental responsibility, which must be consistent with God's plans.[54]

In 1981, thirteen months after the Sixth Synod of Bishops on the Christian family, Pope Saint John Paul II issued *Familiaris consortio,* an apostolic exhortation providing a summary of the results of the synod and various related matters.[55] Pope Saint John Paul II clearly understood that the traditional role of the family was being suppressed: 'The historical situation in which the family lives therefore appears as an interplay of light and darkness'; the Synod identified:

> [T]he spread of divorce and of recourse to a new union, even on the part of the faithful; the acceptance of purely civil marriage in contradiction to the vocation of the baptized to 'be married in the Lord', the celebration of the marriage sacrament without living faith but for other motives; the rejection of the moral norms that guide and promote the human and Christian exercise of sexuality in marriage.[56]

The exhortation describes the theological significance of marriage and family with a level of clarity and detail that exceeds that of the synod's constitution ('The Plan of God for Marriage and the Family'; 'Marriage and Communion Between God and People'; 'Jesus Christ, Bridegroom of the Church and the Sacrament of Matrimony; 'Children, the Precious Gift of Marriage'),[57] concluding that '[t]he Church thus finds in the family, born from the sacrament, the cradle and the setting in which she can enter the human generations, and where these in their turn can enter the Church'.[58] Thus, the mission of marriage is clear: It must remain close and lead future generations to God. After discussing in detail the various tasks to be performed by fathers, mothers, married couples and children to carry out this mission, it provides a lengthy assessment of the educational role of the family:

> For Christian parents, the mission to educate, a mission rooted, as we have said, in their participation in God's creating activity, has a new specific source in the sacrament of marriage, which consecrates them for the strictly Christian education of their children: that is to say, it calls upon them to share in the very authority and love of God the Father and Christ the Shepherd, and in the motherly love of the Church, and it enriches them with wisdom, counsel, fortitude and all the other gifts of the Holy Spirit in order to help the children in their growth as human beings and as Christians.[59]

52 Pope Paul VI, *Humanae vitae,* 1968, 1–2.
53 Ibid. 7.
54 Ibid. 9–10.
55 Pope Saint John Paul II, *Familiaris consortio,* 1981, 1–3.
56 Ibid. 6–7.
57 Ibid. Title of Part Two and 11–13.
58 Ibid. 15.
59 Ibid. 38.

The wording is clearly new. In previous centuries, the family was the natural social reality of society and the Church, and it carried out, almost independently, its tasks related to the procreation of life and education. However, such tasks had become somewhat less self-evident by the end of the twentieth century. By that time, marriage and the family had become an obligation undertaken voluntarily and against the spirit of the age, and it included the (voluntarily undertaken) mission of education and Christian education as a 'Specific and Original Ecclesial Role'[60] and a ministry of evangelisation.[61]

The rather specific analysis and practical guidance of *Familiaris consortio* is reflected in the 1983 Code of Canon Law[62] and in the 1997 Catechism.[63] About twenty-five years after the Code, the 'Compendium of the Social Doctrine of the Church', an even more detailed and general document commissioned by Pope Saint John Paul II, was produced in 2004. It discusses the social and religious role of the family in a separate chapter.[64] The document is of a more general nature, as it is not limited to the matter of family, and it is not intended for Catholics only.[65] However, it is also quite specific, as it discusses practical considerations (for example, in terms of education and cooperation between family and society). About a decade later, its impact is also quite clear: The Church must emphasise family values, and it must support families in the light of such values.[66] The latter effort has not subsequently proved easy to maintain. The existence of such difficulties is confirmed by the fact that the calling and mission of the family was discussed at two synods in the following years. 'The Pastoral Challenges of the Family in the Context of Evangelisation', an *instrumentum laboris* issued in 2014 by the Third Extraordinary General Assembly of the Synod of Bishops, was tasked with analysing a clearly confrontational situation between the Catholic concept of family and the reality of society. Thus, it is not by accident that, according to one of the final conclusions of this document, the family is threatened by fundamental challenges that are hard to resist, even though the task of evangelisation is also entrusted to families, and the Church must support families in that regard.[67]

The same issues were considered one year later in 'The Vocation and Mission of the Family in the Church and in the Contemporary World', the final report of the Fourteenth Ordinary General Assembly of the Synod of Bishops.[68] After describing

60 Ibid. 50.

61 Ibid. 52–53.

62 Cf. *Codex iuris canonici,* Canons 1055–1065.

63 Catechism of the Catholic Church, 2196–2233, 2357–2400 and 2514–2533.

64 Compendium of the Social Doctrine of the Church, 123–143.

65 Ibid. 17–19; Letter of Cardinal Secretary of State Angelo Sodano.

66 Péter Várnai, 'Jegyeseknek a családról a zsinat után', in István Pákozdi (ed.), *Öt évvel a lelkipásztori zsinat után* (Budapest: Vigília, 2013), 130–143.

67 III Extraordinary General Assembly of the Synod of Bishops, *The pastoral challanges of the family in the context of evangelization* (Vatican City: Vatican, 2014), 60–61.

68 XIV Ordinary General Assembly, *The Vocation and Mission of the Family in the Church and in the Contemporary World,* 2015.

socio-cultural and anthropological challenges and tensions to which families are exposed and which weaken and endanger families in the twenty-first century, the document provides a short overview of the Church's teaching, with particular regard to the period following the Second Vatican Council and the role of individual popes. Finally, it seeks to offer guidance for pastors and families in performing their common mission of evangelisation by pointing out practical considerations and discussing various general and Christian aspects of education. The final part of the document describes this role with utmost clarity: 'Through Baptism, the Family of the Church is missionary by nature and increases her faith in the act of sharing that faith with others, above all, with her children. . . . The family is thus an agent of pastoral activity.'[69] Pope Francis issued *Amoris laetitia,* his apostolic exhortation, in light of the above instrument.[70] The *exhortation* emphasises the divine origin, beauty and mission of marriage and the family, without ignoring the challenges faced by families. In Chapter 6, it reaffirms the conclusions of the last two synods, that is, the family is an actor in evangelisation and is the primary place of education. The family is an indispensable means of and actor in catechesis and religious education.[71]

C The Hungarian Catholic Church on marriage and family

The challenges to marriage and the family and the need to support these institutions were also noted by the Hungarian Catholic Church, and it sought to provide support and answers to such questions. The first circular letters of the Hungarian Catholic Bishops' Conference on social matters were published in the light of the results of the Second Vatican Council and the instruments of Pope Saint John Paul II shortly after open speech became possible following the change of political regime.[72] These include the Circular letter on opening the International Year of the Family of 1993, the Circular letter on closing the International Year of the Family of 1994, and the Circular letter for happier families of 1999.[73] The former circular letter took an expressly pastoral approach. It states that '[t]he Christian family is an attestation of God, who is love. It is an attestation that God is the archetype of the human family as the unity of the Holy Trinity, . . . an attestation of God, who is love and who gave His Son for the world so that we receive His gift in the Holy Spirit and a new life is planted in our hearts', and that the Christian family is the subject of and an actor in

[69] Ibid. 92–93.

[70] Pope Francis, *Amoris laetitia*.

[71] Ibid. 199–258.

[72] Magyar Püspöki Konferencia, *Pásztorlevél a magzati élet védelméről*, 1992; Magyar Püspöki Konferencia, *Igazságosabb és testvériesebb világot!,* 1996.

[73] Magyar Püspöki Konferencia, *Körlevél a Család Nemzetközi Éve megnyitására,* 1993; Magyar Püspöki Konferencia, *Körlevél a Család Nemzetközi Éve befejezése alkalmából,* 1994; Magyar Püspöki Konferencia, *A boldogabb családokért,* 1999.

evangelisation, as a profession and attestation of faith. The Encyclical letter of 1994 follows a similar approach. However, it also emphasises that 'the fundamental task of the family is to serve life, and that task is closely linked to the task of education', and it also notes the crisis the concept of the family is facing as a result of social changes (as well as mentioning the term 'civilisation of death' used by Pope Saint John Paul II).

However, the long circular letter of 1999 (consisting of 153 sections and drawing on all the documents mentioned above, as well as some other synodic and apostolic documents)[74] takes quite a different tone. It was not addressed to Christians only, but to 'all benevolent men'. In its first part (Sections 1 to 50), it provides, instead of an analysis of the Christian concept of marriage and the family, a detailed assessment of the social reality of Europe and Hungary. Its conclusion is quite unsettling: Both concepts show signs of crisis as a result of challenges to marriage and the family.[75] For this reason, the second part (Sections 51 to 87) describes the distinctive social values of marriage and the family, which are not present in any other forms of cohabitation. The last part (Sections 88 to 153) focuses on the teachings of the Catholic Church. In line with its fundamental approach, it states that 'the Church also reflects on marriage and family from the perspective of God's plan of creation and salvation'. It reiterates the teachings of the two previous circular letters and other documents of the Church (marriage is a sacrament and is undissolvable; the family is a depiction of the Holy Trinity), emphasising that the family itself constitutes a household Church *(Ecclesia domestica)*[76] and the first school of Christian life, which is the fundamental cell of the Church[77] and which is responsible for passing on the Gospel. Various sections (119 to 133) discuss the pastoral care of families, noting that providing such care is not entrusted to the clergy exclusively but that families themselves should participate in such care (the word education is used in the text 23 times). The introductory part of the circular letter reiterates that, according to Pope Saint John Paul II, the family is the 'primary and fundamental way for the Church' and the basis of social courtesy.[78]

Naturally, the Circular letter of 1999 was not the last document of the Hungarian Catholic Bishops' Conference on this matter, and it was followed by other significant instruments.[79] As a result of the circular letter, an international

[74] Charter of the Rights of the Family, 1983; Congregation for the Doctrine of the Faith, *Donum vitae,* 1987; Pope Saint John Paul II, *Evangelium vitae,* 1995.

[75] It should be noted that the letter also criticises state action (legislation in particular); the Fundamental Law (effective as of 2012 as a new written constitution) gains a particular significance in this light.

[76] Magyar Püspöki Konferencia, *A boldogabb családokért,* 99; cf. Catechism of the Catholic Church, 1657.

[77] Magyar Püspöki Konferencia, *A boldogabb családokért,* 99; cf. *Gaudium et spes,* 52.

[78] Magyar Püspöki Konferencia, *A boldogabb családokért,* 153.

[79] Magyar Püspöki Konferencia, *Az élet kultúrájáért,* 2003; Magyar Püspöki Konferencia, *Nyilatkozat a bevezetés előtt álló abortusztablettáról,* 2005; Magyar Püspöki Konferencia, *Nyilatkozat a művi meddővé tételről,* 2006; Magyar Püspöki Konferencia, *Állásfoglalás a bejegyzett élettársi kapcsolatról,* 2007; Magyar Püspöki Konferencia, *Közlemény a bejegyzett élettársi kapcsolatról szóló törvényről,* 2009.

conference was organised in 2001 (on education for happier families).[80] Similarly to the circular letter, the conference was not addressed to Catholics exclusively but sought to engage in a dialogue with society (the State and government authorities). Its closing document confirms that 'the primary place of education for family life is the family itself, and this role could not be replaced by any other actor without shortfall. . . . Families themselves must take a role in shaping the family-friendly attitudes of society. . . . Direct life experience is the most effective means of shaping the personality of a person'.[81]

III Conclusions

As a brief summary of the historic, social, religious and legal considerations presented above, it seems that the social structure and setting of European culture has always been based on the durable (even though not always undissolvable) cohabitation of a man and a woman since its very beginnings. Of course, this does not exclude the existence or even acknowledgment of other relationships (possibly between persons of the same sex), and it certainly does not mean that marriage, as the basis of family relations, is always free of troubles. However, it certainly means that all other rules, social norms of behaviour and traditions are explicitly or implicitly based on this fact.[82] It seems clear that, for one and a half millennia, Christianity was a factor that determined the concept of society. This influence was presented in this paper (even if the sacral fundaments that constitute fundamental components of this matter were omitted on purpose). In conclusion, it seems clear that Christian thought on marriage and the family, itself based on the Roman concept of society and law that adopted and followed the intertwined (and inseparable) Jewish concepts of religion and society as described in the Old Testament, fundamentally determined what is known as European culture today. This close relationship is also reflected in the approach taken by international law over the last roughly five decades, ever since the UDHR, even though it has attempted to deviate from its roots in the last few decades;[83] it remains to be seen if such attempts will remain unsuccessful (as these material cultural components eventually prevail)[84] or whether it will give rise to a different culture in the long run.

[80] József Radnai (ed.), *Neveléssel a boldogabb családokért* (Budapest: Országos Lelkipásztori Intézet – Corvinus, 2001).

[81] Ibid. 12–13.

[82] János Frivaldszky, 'Család (katolikus, természetjogi szemmel)', in *Magyar politikai enciklopédia* (Budapest: Mathias Corvinus Collegium – Tihanyi Alapítvány, 2019), 98–100.

[83] Sarolta J Molnár, *A házasság intézményének perspektívái* [PhD dissertation] (Budapest: PPKE JÁK, 2018).

[84] János Frivaldszky, 'A házasság és a család jogfilozófiai szempontból', in Imre Balásházy, Gyöngyi Major and Péter Farkas (eds), *Boldogabb családokért és ifjúságért* (Budapest: L'Harmattan, 2018), 165–216.

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The Bavarian *Crucifix* Case

One of the Biggest Crises of the Bundesverfassungsgericht

Kálmán Pócza

Undoubtedly, the German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) is one of the most respected institutions not only in Germany but throughout Europe. Although its decision on the European Central Bank's bond purchase programme (2 BvR 859/15) has been widely criticised in Europe, this has not led to a crisis of confidence (at least among the German population) for the time being. The extent to which the court's open conflict with European institutions (European Central Bank, Court of Justice of the European Union) and the criticisms surrounding it will affect German citizens' perceptions of their own Constitutional Court in the longer term remains to be seen. On the other hand, it is worth noting that the BVerfG's public support was by no means strong in its early years. This was partly due to the fact that some German citizens were unfamiliar with the institution, and partly due to its serious conflicts with the Adenauer Government.[1] How the court subsequently managed to gain authority is undoubtedly a fascinating question, but it would stretch the framework of the present study.[2] This paper will investigate the reasons why political actors circumvent a decision of this highly respected institution, even by engaging in open conflict with it.

[1] For an early history of the court, see Kálmán Pócza, 'Politika és alkotmánybíróság: a Bundesverfassungsgericht létrejötte', *Külügyi Szemle* no 1 (2014), 111–131.

[2] On the building of authority and public support for the BVerfG, see Werer J Patzelt, 'Warum mögen die Deutschen ihr Verfassungsgericht so sehr?' in Robert C van Ooyen and Martin HW Möllers (eds), *Handbuch Bundesverfassungsgericht ibid. politischen System* (Wiesbaden: Springer Fachmedien, 2015). In general, for courts, see Georg Vanberg, *The Politics of Constitutional Review in Germany. Political Economy of Institutions and Decisions* (Cambridge: Cambridge University Press, 2005), 21; Georg Vanberg 'Establishing and Maintaining Judicial Independence' in Gregory A Caldeira et al. (eds), *The Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008); Georg Vanberg, 'Constitutional Courts in Comparative Perspective: A Theoretical Assessment', *Annual Review of Political Science* 18, no 1 (2015), 167–185, 177; Philipp A Schroeder, *The Political Constraints on Constitutional Review* [PhD dissertation] (London: University College London, 2019), 20; Brandon L Bartels and Eric Kramon, 'Does Public Support for Judicial Power Depend on Who is in Political Power? Testing a Theory of Partisan Alignment in Africa', *American Political Science Review* 114, no 1 (2020), 144–163.

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The case under scrutiny is the court's so-called *Crucifix* decision of 1995 (1 BvR 1087/91), which provoked an unprecedented wave of resistance in Germany against the decision of the Federal Constitutional Court. Analysis of the *Crucifix* decision seems relevant in two respects. On the one hand, it was and still is the only decision in the post-World War II history of the Federal Republic of Germany on which politicians and a significant proportion of German voters have voiced highly critical views in tens of thousands of demonstrations, and even openly called for resistance. The result, in fact, was that the BVerfG's decision was, in a sense, sabotaged: Despite the Court's decision to remove the crosses from the walls of Bavarian public educational institutions, they still hang on the walls of classrooms in Bavaria to this day. On the other hand, considering this topic is also relevant because the *Crucifix* case is still at the centre of public debate in Bavaria. This is well illustrated by the fact that the prime ministerial candidate of Christlich-Soziale Union in Bayern (CSU) promised in the 2018 Bavarian state election campaign, that if they won, it would now be mandatory to display the cross not only in classrooms but in all Bavarian state offices.

This paper will first address the findings of the theoretical literature on the implementation of and compliance with court decisions, based on which four hypotheses will be formulated. According to the theoretical literature, political and institutional actors comply with the decisions of constitutional courts enjoying high levels of public support because they fear the negative reactions of the electorate. In other words, it is not worthwhile for political actors to openly (or in a concealed way) sabotage the decision of the Constitutional Court, which enjoys great recognition among voters, because it could lead to serious loss of votes in the next general election. Interestingly, however, in the *Crucifix* case, this hypothesis did not hold up at all. Moreover, rational choice models have not attempted to explain the reasons of this deviance in any way. After a brief presentation of the research methodology, I will outline the historical context of the *Crucifix* decision, take stock of the reactions to the decision, and examine whether it is reasonable to suggest that compliance with the decision was sabotaged. I will further establish that the hypotheses formulated in the theoretical literature should be rejected as far as the *Crucifix* case is concerned. I will then offer an alternative explanation for the *Crucifix* decision, which is considered to be a deviant case.

I Theoretical literature and hypotheses

According to the classical view, the judiciary does not have the means to enforce its own decisions at all, which is one of the reasons why it is considered the least dangerous branch of government. As Alexander Hamilton argued in his essay *Federalist* No 78:

> Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; . . . and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[3]

What Hamilton referred to as the 'efficacy' of court judgments in modern legal language actually means the compliance with court decisions. As the court does not have the means (purse or sword) to enforce its decisions, it must in fact rely on the power of the executive and the legislature, and it is not at all clear to the latter why they should enforce or comply with court decisions that do not benefit them.

Two approaches to examining the reasons of compliance with court decisions can be identified in the modern literature. According to the *instrumental theory*, the actors involved implement the court's decision because it is in their own well-conceived (but selfish) political interest. According to the *norm-based approach,* on the other hand, political actors implement court decisions because, facing legitimate power, compliant behaviour is the default setting.[4] Although the latter approach is not one of the mainstream approaches, and its explanatory power seems to be somewhat weaker, it should also be noted that norm-based compliant behaviour may emerge over time, even if court decisions were originally complied with only due to well-conceived self-interest.[5]

According to the instrumental approach, the court itself can have some influence on whether the addressees comply with its decision: The persuasive power of the reasoning or the clarity (ambiguity) of its language can affect, for example the compliance.[6] The same is true as far as the temporal effect of the decision is concerned: If its decision has only *pro futuro* effect, actors may be more likely to comply with it.[7] At the same time, the court reduces the chances of compliance if the judges formulate dissenting opinions, or if only a narrow majority of the judges lines up behind the decision.[8] In contrast, it increases the chances of compliance if the court is able to set up a monitoring body to track the implementation of the

[3] John Jay, Alexander Hamilton and James Madison: *The Federalist Papers* (New York: New American Library, 1961), 465.

[4] Diana Kapiszewski and Matthew M Taylor, 'Compliance: Conceptualizing, Measuring, and Explaining Adherence to Judicial Rulings', *Law & Social Inquiry* 38, no 4 (2013), 803–835, 819.

[5] Ibid. 822.

[6] Jeffrey K Staton and Georg Vanberg, 'The Value of Vagueness: Delegation, Defiance, and Judicial Opinions', *American Journal of Political Science* 52, no 3 (2008), 504–519, 515; Sebastian Sternberg, *No Public, No Power? Analyzing the Importance of Public Support for Constitutional Review with Novel Data and Machine Learning Methods* [PhD dissertation] (Mannheim: Universität Mannheim, 2019), 141.

[7] Alexei Trochev, *Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006* (Cambridge: Cambridge University Press, 2008), 23.

[8] James F Spriggs, 'Explaining Federal Bureaucratic Compliance with Supreme Court Opinions', *Political Research Quarterly* 50, no 3 (1997), 567–593, 571.

decision. Strategically, the court has the opportunity to influence compliance by holding public hearings and thus becoming the focus of media interest, or simply by delivering its decision during an election campaign period, when all important political issues may have a much greater impact.[9] Compliance may also be affected by who the decision applies to, which institutions or administrative bodies should act, the level of complexity of action needed to comply with the court decision, and to what extent it is needed to re-regulate the policy area concerned. If only one actor has to change relatively little, through a relatively simple process, the chances of compliance are obviously much higher than if several complex organisations have to change many things through complex processes.[10] The political actors involved may also sometimes have an interest in the court deciding on sensitive issues and assuming responsibility for it.[11]

In addition, one of the most dominant models in the literature, based on the insights of rational choice theory, assumes that court decisions are most likely to be complied with if the court enjoys significant public support and is able to make its decision visible to the public in an appropriate way, or to put it more simply, that the public will notice and monitor the court's decision.[12] According to the rational choice model, in such situations the political actors will have a rational self-interest in accepting the decision of the court, otherwise it is likely that the voters may punish them in the next election. If the decision of the court which

[9] Jay N Krehbiel, 'The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court', *American Journal of Political Science* 60, no 4 (2016), 990–1005; Jay N Krehbiel, 'Elections, Public Awareness, and the Efficacy of Constitutional Review', *Journal of Law and Courts* 7, no 1 (2019), 53–79.

[10] Spriggs, 'Explaining Federal Bureaucratic Compliance'.

[11] Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary', *Studies in American Political Development* 7, no 1 (1993), 35–73; George I Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge: Cambridge University Press, 2003); Scott E Lemieux and David J Watkins, 'Beyond the "Countermajoritarian Difficulty": Lessons from Contemporary Democratic Theory', *Polity* 41, no 1 (2009) 30–62.

[12] Georg Vanberg, 'Legislative-Judicial Relations: A Game-Theoretical Approach to Constitutional Review', *American Journal of Political Science* 45, no 2 (2001), 346–361; Vanberg, *The Politics of Constitutional Review in Germany;* Vanberg 'Constitutional Courts in Comparative Perspective'; Tom S Clark, *The Limits of Judicial Independence: Political Economy of Institutions and Decisions* (Cambridge: Cambridge University Press, 2010), 17 and 159; Krehbiel, 'The Politics of Judicial Procedures'; Krehbiel, 'Elections'; Sebastian Sternberg et al., 'Zum Einfluss der öffentlichen Meinung auf Entscheidungen des Bundesverfassungsgerichts. Eine Analyse von abstrakten Normenkontrollen sowie Bund-Länder-Streitigkeiten 1974–2010', *Politische Vierteljahresschrift* 56, no 4 (2015), 570–598, 574; Clifford J Carrubba and Christopher J Zorn, 'Executive Discretion, Judicial Decision-Making, and Separation of Powers in the United States', *Journal of Politics* 72, no 3 (2010), 812–824; Matthew EK Hall, 'The Semiconstrained Court: Public Opinion, the Separation of Powers, and the US Supreme Court's Fear of Nonimplementation', *American Journal of Political Science* 58, no 2 (2014), 352–366; Kevin T McGuire and James A Stimson, 'The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences', *Journal of Politics* 66, no 4 (2004), 1018–1035.

enjoys high level of public support is not implemented by the political actor concerned, and this resonates strongly with the public, voters will punish them at the ballot box.[13] The premise of this suggestion is that although the courts have neither the purse nor the sword, high level of public support and public awareness together give them enough strength and authority to 'enforce' the obedience of political actors, or at least ensure that they do not dare to oppose court decisions in any form. Reading the story conversely, one may also make the hypothesis based on the rational choice models that opposing and sabotaging the decisions of courts with high public support can simply imply too high political costs for the political actors.[14]

In order to maintain this diffuse public support and thus ensure the obedience of other branches of government, the court must be very careful not to turn against the majority view of the society systematically and regularly.[15] This, in turn, may lead to the court actually representing the will of the majority, which challenges the so-called counter-majoritarian difficulty[16] thesis elaborated first by Alexander Bickel. As empirical data show, Bickel's thesis proved to be less relevant in practice, since courts tend to make decisions that reflect the opinion of the majority of the society. This fact has been highlighted in the literature, not only in relation to the US Supreme Court[17] but also in quantitative and qualitative works which have reached the same conclusion with regard to the BVerfG.[18] On the other hand, researchers have analysed cases where not only the Constitutional Court enjoyed high level of public support but also the incumbent political force had good reason to

[13] Vanberg, *The Politics of Constitutional Review in Germany,* 176.

[14] Of course, there are many problems with these assumptions, one is that courts are generally assumed to have high levels of social support, but usually research focuses only on courts for which this is really true. However, such cases may be an exception, see Amanda Driscoll and Michael J Nelson, 'The Costs and Benefits of Court Curbing: Experimental Evidence from the United States', 2018, 5; Sternberg, *No Public, No Power?,* 9. The French Constitutional Council has much less social support than the German one, and accordingly has much less room for manoeuvre, and the implementation of its decisions is much more questionable, see ibid. 139.

[15] Sternberg et al. 'Zum Einfluss', 589; Sternberg, *No Public, No Power?,* 4.

[16] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 16.

[17] Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', *Journal of Public Law* 6, no 2 (1957), 279–295; Clark, *The Limits of Judicial Independence,* 160; Jonathan P Kastellec, 'Empirically Evaluating the Countermajoritarian Difficulty: Public Opinion, State Policy, and Judicial Review Before *Roe v Wade*', *Journal of Law and Courts* 4, no 1 (2016), 1–42; Keith E Whittington, '"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court', *American Political Science Review* 99, no 4 (2005), 583–596; Sternberg et al., 'Zum Einfluss', 589.

[18] For quantitative works, see Vanberg, *The Politics of Constitutional Review in Germany;* Sternberg et al., 'Zum Einfluss'. For qualitative work, see Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010).

expect a re-election due to its high level of public support.[19] This latter circumstance may prompt the court to self-limitation, as it may fear that its decision will be sabotaged in some way by popular political actors.[20]

While empirical evidence suggests that courts tend to reach decisions which are in harmony with the majority views of the society,[21] more recently, convincing theoretical arguments supported by some empirical evidences have identified conditions under which the self-limitation of courts plays an important role.[22] The deferential behaviour of the political actors is not necessarily guaranteed if the close alignment of voters with their parties overrides the respect for and the high public support of the court. Such conditions may lead committed party supporters to approve the sabotaging of a court decision, if it is done by their favourite party. For this reason voters will not punish, but rather reward their favourite party in such cases.[23] This thesis thus argues that voters' attitude to the courts depends on their party affiliation: If a court promotes the agenda of their favourite party, they consider

[19] Matthew EK Hall and Joseph D Ura, 'Judicial Majoritarianism', *Journal of Politics* 77, no 3 (2015), 818–832; Schroeder, *Political Constraints,* 51.

[20] Mario Bergara, Barak Richman and Pablo T Spiller, 'Modeling Supreme Court Strategic Decision Making: The Congressional Constraint', *Legislative Studies Quarterly* 28, no 2 (2003), 247–280; Tom S Clark, 'The Separation of Powers, Court Curbing, and Judicial Legitimacy', *American Journal of Political Science* 53, no 4 (2009), 971–989; Hall, 'The Semiconstrained Court'; Michael A Bailey and Forrest Maltzman, *The Constrained Court: Law, Politics, and the Decisions Justices Make* (Princeton: Princeton University Press, 2011); Schroeder, *Political Constraints,* 48.

[21] For American aspects, see William Mishler and Reginald S Sheehan, 'The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions', *American Political Science Review* 87, no 1 (1993), 87–101; Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009); Lee Epstein and Andrew Martin, 'Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're not Sure Why)', *University of Pennsylvania Journal of Constitutional Law* 13, no 2 (2010), 263–281; Christopher J Casillas, Peter K Enns and Patrick C Wohlfarth, 'How Public Opinion Constrains the US Supreme Court', *American Journal of Political Science* 55, no 1 (2011), 74–88; Kastellec, 'Empirically Evaluating'; Hall and Ura, 'Judicial Majoritarianism'. For German aspects, see Rudolf Gerhard, 'Die Medien haben Einfluss auf die Justiz – aber welchen? Eine Umfrage und ihre Ergebnisse' in Organisationsbüro der Strafverteidigervereinigungen (ed.), *Erosion der Rechtsstaatlichkeit: Werteverfall or Paradigmenwechsel?* (Berlin: Schriftenreihe der Strafverteetigervereinigungen, 2001); Hans M Kepplinger and Thomas Zerback, 'Der Einfluss der Medien auf Richter und Staatsanwälte', *Publizistik* 54, no 2 (2009), 216–239; Christoph Hönnige and Thomas Gschwend, 'Das Bundesverfassungsgericht im politischen System der BRD – ein unbekanntes Wesen?', *Politische Vierteljahresschrift* 51, no 3 (2010), 507–530.

[22] Jeffrey K Staton, 'Judicial Policy Implementation in Mexico City and Mérida', *Comparative Politics* 37, no 1 (2004), 41–60; Amanda Driscoll and Michael J Nelson, 'Judicial Selection and the Democratisation of Justice: Lessons from the Bolivian Judicial Elections', *Journal of Law and Courts* 3, no 1 (2015), 115–148; Gretchen Helmke, *Institutions on the Edge: The Origins and Consequences of Inter-Branch Crises in Latin America* (Cambridge: Cambridge University Press, 2017); Schroeder, *Political Constraints,* 32.

[23] Bartels and Kramon, 'Public Support'; Driscoll and Nelson, 'Costs and Benefits', 32.

it a legitimate institution and support it as such; if not, they will also withdraw their support from the court.[24] As a result, a ruling party or coalition, the voter base of which is closely tied to its favourite party, finds it easier to sabotage the court's decision because it does not have to fear alienating voters.[25]

Based on the above findings of the theoretical literature, two main hypotheses and two sub-hypotheses may be formulated:

(1) if courts wish to maintain their diffuse public support, the majority view of the *society* will be reflected in court decisions;
    a) if the political majority has good reason to expect to remain in power, then the *political* majority's opinion will be reflected in court decisions;
(2) if the courts have a high level of public support, the political actors will *comply* with court decisions;
    b) if the political majority has strongly committed supporters, the political actors may *defy* court decisions.

II Research methodology

The following section will attempt to test the four hypotheses formulated on the basis of the theoretical literature by presenting a case study. As a preliminary note, it should be stressed that the selected case refutes three of the four hypotheses, and further reasoning will be needed for the fourth hypothesis, which is why the *Crucifix* case will be considered a clearly deviant case. Process tracing seems to be the best method of explaining the causes of deviant cases.[26] Large-N studies relying on comprehensive theories and hypotheses, usually do not give explanation to deviant cases, as their primary purpose is to provide some explanation for the normal cases that make up the vast majority. Because necessities and regularities in social sciences cannot by their nature be universal, large-N social science studies usually do not aim to discover universal laws of social interactions but to identify probabilities. The explanation of the deviant case is thus better served by examining case studies, and to do so effectively, the method of process tracing is the best strategy.[27] Furthermore, case studies based on such process tracing methods may contribute to the modifications of general theories, refinement

[24] Brandon L Bartels and Christopher D Johnston, 'On the Ideological Foundations of the Supreme Court Legitimacy in the American Public', *American Journal of Political Science* 57, no 1 (2013), 184–199.

[25] However, it is also pointed out that in less polarised countries, such as in Germany for example, this kind of attitude towards the courts is less decisive, Driscoll and Nelson, 'Costs and Benefits', 31.

[26] Alexander L George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT, 2005), 215.

[27] Andrew Bennett and Jeffrey T Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool. Strategies for Social Inquiry* (Cambridge: Cambridge University Press, 2014), 13.

of the theoretical framework of large-N studies, or they can lead to contingent generalisations that may clarify the conditions under which deviant outcomes of events can be expected.[28]

III Historical context of the *Crucifix* decision

An important element of the historical context of the *Crucifix* decision is that the Bavarian Constitution, adopted in 1946, mentions humility towards God as one of the main educational goals to be achieved in public schools,[29] while referring to two types of public educational institutions: Christian denominational schools *(Bekenntnissschule)* on the one hand, and 'Christian community schools' *(Gemeinschaftsschulen),* in fact ecumenical schools, on the other. In practice, however, the establishment of the latter was more the exception than the norm, and their establishment often encountered serious administrative obstacles; as such, in deeply Catholic Bavaria from 1945 onwards, the majority of Bavarian students attended Christian denominational (primarily Catholic) schools.[30] By the mid-1960s, voices that considered denominational public schools to be obsolete and demanded equality for 'community schools' *(Gemeinschaftsschulen)* were becoming stronger.[31] The constitutional amendment proposed by the Bavarian Government, led by the Christian Socialists, abolished the distinction between denominational and ecumenical schools, but explicitly included a requirement in the constitution that pupils in all schools be raised on the basis of Christian teachings.

Incidentally, the Social Democrats also approved this compromise solution (as in the case of the 1946 constitution), so after the 1968 amendment to the Bavarian Constitution, which was also approved in a referendum,[32] Article 135 of the Bavarian Constitution provided that pupils in all public schools in Bavaria were to be taught and raised in accordance with the principles of the Christian denominations, the details of which were laid down in the Public Education Act of 1983, as amended.[33] Section 13 of the Act, referring to the above-mentioned Article 135 of

[28] David Collier, 'Understanding Process Tracing', *Political Science & Politics* 44, no 4 (2011), 823–830, 824.

[29] Bavarian Constitution of 1946, Article 131.

[30] Although the Social Democrats (SPD) argued in favour of community schools, they recognised the traditions of denominational schools in deeply Catholic Bavaria, and given the fact that the CSU alone had a nearly two-thirds majority in the Bavarian Constituent Assembly, they, at the end, abandoned lobbying for more community schools, see Fritz Schäffer, 'Bekenntnisschule', 2006.

[31] Fritz Schäffer, 'Gemeinschaftsschule', 2006.

[32] With a turnout of 40.7 per cent, 76.3 per cent of participants agreed with the constitutional amendment, see Otmar Jung, 'Volksabstimmungen', 2006.

[33] Article 135 of the Bavarian Constitution of 1946.

the Bavarian Constitution, provided that the cross was to be displayed in Bavarian public schools. From a Bavarian point of view, then, basically everything was quite clear: The Constitution of the Bavarian state stipulated the obligation to teach in public schools on the basis of Christian principles. This constitutional principle was implemented by the Public Education Act of 1968 as amended in 1983, which required the Crucifix to be hung on the wall of all classrooms. Why, then, did this provision become a source of intense conflict?

The series of events leading to the BVerfG's *Crucifix* decision date back to the mid-1980s.[34] In 1986, the parents of three Bavarian siblings complained that their children were adversely affected by the school's worldview, which was different from that of the family; moreover, they could not avoid being affected by the worldview of the school, since the cross hung on the wall of the classroom of every public school. Following Rudolf Steiner's teachings, the parents were adherents of anthroposophy. First they attempted to persuade the leaders of the local school in Reuting to remove the cross from the wall of the classroom, but were unsuccessful, despite compromise solutions being suggested (instead of a Crucifix, a smaller cross was placed over the door). In addition, when their younger children were enrolled in the same school, the controversy between the school and parents flared up again, and parents now demanded that the Crucifix be removed from the walls of every classroom and the corridors, as their children would be faced with it there, too. Although their children were temporarily admitted to a Waldorf school, they were unable to fund attending private school, so the case was referred to the Bavarian Administrative Court (Bayerischer Verwaltungsgerichtshof) in 1991, demanding that crosses should be removed from all rooms their children should attend during their compulsory education. The Bavarian Administrative Court dismissed the petition, and the parents appealed to the German Federal Constitutional Court, seeking the annulment of the Bavarian Administrative Court's decision and of the relevant passage of the Public Education Act, as they violated the fundamental right to freedom of faith and conscience enshrined in Article 4(1) of the German Basic Law (Grundgesetz).

In its decision of 16 May 1995 (1 BvR 1087/91), the BVerfG upheld the petition and annulled not only the decision of the Bavarian Administrative Court but also the relevant passages of the Public Education Act, since they violated the fundamental right of 'negative religious freedom'. By the notion of negative religious freedom, the court meant that citizens of the state did not have to 'confront' religious doctrines with which they disagreed. In line with this decision, which was only made public on 10 August, crosses in the classrooms of the Bavarian public schools were supposed to be removed, although this never took place in practice (except in a few exceptional cases). The crosses still hang on the walls of the classrooms in Bavarian state public educational institutions and, since 1 June 2018, they are required to be hung not only

[34] For details on the case, see the decision of the Bundesverfassungsgericht, 1 BvR 1087/91.

in the classrooms but also at the entrances of all Bavarian state offices. In April 2018, as a kick-off of the campaign of the Bavarian parliamentary elections in October 2018, Bavarian Prime Minister Markus Söder passed a government decree requiring the cross to also be placed on the wall in Bavarian state offices. Surely, in Bavaria, crucifixes were already hanging in many places (including in public buildings), and Söder himself admitted that its administration did not systematically check whether the decree was being implemented.[35]

The *Crucifix* cases of 2018 and of 1995 have, nevertheless, a highly important common denominator. On both occasions, the question revolved around whether the Crucifix was primarily a religious or a cultural symbol more or less deprived of its religious character. The Söder Government, learning from the controversy surrounding the 1995 Constitutional Court ruling and, of course, from the second *Lautsi* ruling of the European Court of Human Rights (ECtHR),[36] referred to the Cross in the relevant government decree explicitly as a cultural and historical feature of Bavaria *('als Ausdruck der geschichtlichen und kulturellen Prägung Bayerns'),* and indeed the religious dimension did not even appear in the official document.[37] In subsequent statements, the Bavarian Prime Minister made it even clearer that the Cross was not only the ultimate symbol of Christianity, but also a cultural symbol of Western civilisation: 'The cross is a fundamental symbol of cultural identity.'[38] This argument, that the Cross is not exclusively nor primarily a religious, rather a cultural symbol, has also been of great significance in the Crucifix debate, but in its 1995 decision, the German Constitutional Court decided to consider the Cross to be primarily a religious symbol. The mandatory display of religious symbols in public schools is incompatible with the principle of state neutrality and violates the individual's right to (negative) freedom of religion guaranteed by Article 4 of the German Basic Law, which is why the Cross must be removed from the wall of all public schools, according to the BVerfG verdict in 1995.

[35] 'Söder ist offen für Kritik am "Kreuzerlass"', *Domradio,* 20 April 2019.

[36] The interpretation of the Crucifix as a cultural or religious symbol has already given rise to more serious tensions in other European countries, and, in the European arena, the so-called 2009 and 2011 *Lautsi* decisions of the ECtHR contributed to the legal clarification of the *Crucifix* issue (or just to the issue becoming even more controversial). However, this paper does not undertake legal dogmatic analysis; see András Koltay, 'Európa és a feszület jele: a Lautsi and Others v. Italy ügy alapvető kérdéseiről', in Levente Tattay, Anett Pogácsás and Sarolta Molnár (eds), *Pro vita et scientia. Ünnepi kötet Jobbágyi Gábor 65. születésnapja alkalmából* (Budapest: Szent István Társulat, 2012); Balázs Schanda and András Koltay, 'A Lautsi-ügy a feszületről az állami iskola osztálytermében: a vallási jelképek használatának megengedettsége a semleges állam közéletében', *Jogesetek Magyarázata* no 4 (2011), 77–85.

[37] Allgemeine Geschäftsordnung für die Behörden des Freistaates Bayern (AGO) vom 12 Dezember 2000 (GVBl. S. 873; 2001 S. 28) BayRS 200-21-I (§§ 1–38) – Bürgerservice, para 28.

[38] Markus Söder: 'Bayern schreibt Kreuze in allen Staatsbehörden vor', *Die Zeit,* 24 April 2018.

IV The response: Threats, petitions, demonstrations and amendments to the law

Since the BVerfG published its famous decision in 1995, a lot of water has flowed down the Danube, and the issue of Crucifix and Christianity has reached the wider European stage, first in connection with the debate on the European Constitution and then in ECtHR judgments (*Lautsi No 1* and *No 2* cases). Today, from a legal or legal dogmatic point of view, the debate, one of the starting points of which was the BVerfG's *Crucifix* decision, seems to have peaked and reached its standstill.[39] However, the silence of legal or legal dogmatic disputes and the Court decisions themselves do not always mean the final closure of a case. It is not just a question of how the courts' own views may change decades later but also of how the parties, political actors or even the social groups concerned react to the court's decision immediately after the decision is made public. With regard to the first *Lautsi* decision, for example, after losing the case, the Italian state appealed, and even certain groups in Italian society expressed their dissatisfaction with the outcome, but it would be a gross exaggeration to call this a radical mobilisation of Italian or European public opinion.[40] Furthermore, after the second *Lautsi* decision of the ECtHR, the waves seemed to have subsided and the issue of the Crucifix receded from view not only among lawyers and stakeholders but also on the European stage and in European societies. However, that was not the case following the 1995 *Crucifix* decision of the BVerfG. Although the topic of the Cross placed on the walls of classrooms was not the subject of German public discourse at all prior to the decision of the German Federal Constitutional Court (or more precisely before the decision was made public on 10 August 1995),[41] when the decision was finally made public, everything changed at once.

'Die Kreuze bleiben' ('The crosses remain in place') insisted Edmund Stoiber, the then Prime Minister of Bavaria a few days after the BVerfG published its *Crucifix* decision, which has since become famous, on 10 August 1995. Peter Gauweiler, Chairman of the Bavarian ruling party, a member of the CSU in Munich, pointed out that the Court's decision might remain mere words: 'It will be a measure of our political courage to see if we actually enforce the court ruling.' Hans Maier, a former Bavarian Minister of Culture, was clearer than this when he stated that 'resistance to such nonsense and arrogance in the supreme judicial forum is not only permissible

[39] The ECtHR Chamber first ruled in the *Lautsi* case in 2009 similarly to the BVerfG's 1995 decision, and this decision was reviewed by the Grand Chamber in 2011, finding that the fundamental right to negative religious freedom was not violated if there is a cross hanging on the wall of Italian public educational institutions. For a legal analysis of the case, see Schanda and Koltay, 'A Lautsi-ügy'.

[40] Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life: Crucifixes in the Classroom?', *Human Rights Law Review* 11, no 3 (2011), 451–502, 470.

[41] Gary S Schaal, 'Crisis! What Crisis? The "Crucifix-Beschluss" and Seine Folgen', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2015), 275.

but downright mandatory'. Theo Waigel, President of the CSU and not incidentally Minister of Finance for Chancellor Helmut Kohl (1988–1998), also pointed out vaguely but rather suggestively that this decision could even have the effect of radically reshaping the BVerfG.[42] Cardinal Friedrich Wetter of Munich recalled the period of the Nazi regime in connection with the court decision: According to the cardinal, the Nazis were the last ones to remove the cross from the school classroom wall; accordingly, it is necessary to act in the same way as against the Nazis on this matter, that is to resist the implementation of the decision.[43] A Christian Socialist MP from the Bavarian State Parliament, Sepp Ranner, directly threatened to beat up the judges: 'Let the judges and complainants come here themselves and take the crosses off the classroom wall. In any case, we country folk will be waiting for them with flails.'[44]

Public dissatisfaction was not limited to Bavaria: Joachim Hörster, leader of the CDU and CSU joint faction of the federal legislature (Bundestag), initiated a debate on how to protect the majority against the tyranny of the minority, and Rupert Scholz, deputy leader of the CDU and CSU faction, stated that 'the Federal Constitutional Court is not the Pope of the Republic', while some joked that the judges should be hanged in place of the crosses.[45] Death threats were also sent to the judges, and Dieter Grimm, judge of the BVerfG, was asked by his American colleagues if the German Chancellor must now really send troops to Bavaria to implement the BVerfG's decision, referring to an act of President Dwight D Eisenhower, who sent federal troops to Arkansas to enforce the US Supreme Court's decision in the *Brown v Board of Education* case there.[46]

The politicians, public figures and Catholic faithful concerned expressed a great deal of dissatisfaction and outrage, not only orally but also in writing: More than 250 thousand signatures were collected and sent to the judges in Karlsruhe, while the *Bild* daily newspaper also set up a telephone line where Bavarians could voice their dissatisfaction with the Court's decision, although many called the Karlsruhe Court directly instead. According to a report in the *Süddeutsche Zeitung,* the lines and fax machines were very busy in Karlsruhe, while the door-staff were also busy with those who wanted to express their dissatisfaction in person.[47] If that was not enough, barely a month later (at least in Munich), the ire that the BVerfG's decision had provoked spilled onto the streets: On 23 September 1995, the Odeonsplatz in Munich was filled with people, twenty-five thousand protested against the Court's decision. Never in

42 Rolf Lamprecht, *Das Bundesverfassungsgericht. Geschichte und Entwicklung* (Bonn: Bundesentrale für politische Bildung, 2011), 246.

43 Uwe Wesel, *Der Gang nach Karlsruhe. Das Bundesverfassungsgericht in der Geschichte der Bundesrepublik* (München: Karl Blessing, 2004), 317.

44 'Das Kreuz ist der Nerv', *Der Spiegel,* 14 August 1995.

45 Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951–2001* (Oxford: Oxford University Press, 2015), 263.

46 Ibid. 264.

47 Wesel, *Der Gang nach Karlsruhe,* 318.

the history of the Federal Republic of Germany had a court decision triggered such a mass movement. Bavarian Prime Minister Stoiber spoke at the demonstration about how in some cases the minority must also be tolerant of the majority. 'We respect the Court's decision, but we do not accept it in substance', he added, concluding his speech with what he had already emphasised in his interview the day after the decision was made public: 'The crosses remain in place.' Cardinal Wetter, referring to the Edict of Nantes in 1598, spoke to the masses of an 'edict of intolerance' in connection with the *Crucifix* decision, and again referred to the parallel with the Nazi dictatorship.[48]

Commentators from local newspapers, editorials in the national dailies and the majority of constitutional commentators, expressed their dissatisfaction.[49] An analysis of the discourse in the national dailies also showed that the vast majority of opinion articles did not accept the BVerfG's argument for state neutrality and focused much more on the fact that Germany is a Christian-based political community.[50] Only a minority of opinion articles advocated in favour of the BVerfG's argument; moreover, 40 per cent of the articles argued subtly or in a less sophisticated way that the court decision could be ignored. The latter was problematic because the BVerfG was now forced to suffer serious losses not only in the symbolic but also in the instrumental dimension. In other words, there was an increased chance that, in addition to open criticism, disobedience could become more widespread – at least in connection with the *Crucifix* decision.[51] Newspaper op-eds were fundamentally negative in tone; only in the late 1970s had so many negative-toned articles appeared about the Federal Constitutional Court as in 1995.[52] In addition, opinion poll data showed that more than half of the respondents clearly considered the BVerfG's decision to be a bad decision, and only 22 per cent of them considered it correct.[53] The general public's perception of the Federal Constitutional Court also changed significantly: While previously half of Germans held a good opinion of the Federal Constitutional Court, in 1995 it was only 36 per cent, while the BVerfG's general confidence index fell to 40 per cent, compared with the 1980s when it was well above 50 per cent.[54]

The tension was therefore palpable, and after the demonstration and the wave of protests, the big question of the autumn remained what the Bavarian legislature would do. Two days before Christmas, on 23 December 1995, the Bavarian legislature passed an amendment to the relevant Public Education Act, which ultimately ensured that the crosses would remain in place, and be removed from the classroom wall only

48 Barbara Supp, 'Heiliger Edmund, bitt' für uns', *Der Spiegel,* 2 October 1995.
49 Schaal, 'Crisis!', 271; Collings, *Democracy's Guardians,* 264.
50 Schaal, 'Crisis!', 272.
51 Ibid. 274.
52 Oliver Lembcke, *Über das Ansehen des Bundesverfassungsgerichts: Ansichten und Meinungen in der Öffentlichkeit 1951–2001* (Berlin: Berliner Wissenschafts, 2006), 47.
53 Schaal, 'Crisis!', 271.
54 Hans Vorländer and Gary S Schaal, 'Integration durch Institutionenvertrauen?', in Hans Vorländer (ed.), *Integration durch Verfassung* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2002), 357.

in very exceptional cases. While the BVerfG's decision stated that no cross could be hung anywhere on the walls of Bavarian public education institutions, the reality was quite different. The amendment brought about a change in only two areas: On the one hand, the amended law on the Cross now explicitly stated that it belonged to the historical and cultural peculiarities of Bavaria and should therefore be present in all classrooms, that is, the religious dimension of the Cross was pushed into the background.[55] The second sentence suggested that the main educational goals set out in the Bavarian Constitution should be pursued on the basis of Christian and Western values while preserving religious freedom. The most significant addition was in the third sentence: If parents concerned objected to a Crucifix hanging on a wall, they can raise this with the head of the school, but only if they can give a *serious* and *acceptable* reason to demonstrate that their religion or worldview is being violated by the Cross. In this case, the school head shall 'attempt' *(versucht)* to resolve the situation. If no agreement can be reached with the parents concerned, the school head has the right to enforce a solution in the individual case that respects the religious freedom and worldview of the child of the parents concerned, but which also takes into account the religious beliefs of the classmates. In addition, 'the will of the majority must be taken into account as far as possible' *('dabei ist auch der Wille der Mehrheit soweit möglich zu berücksichtigen'),* states the text of the amended law. Thanks to this amendment to the law, the Cross remained on the walls of the classrooms, and if one parent did not like it then the head of the school was authorised to settle the conflict.

Of course, this amended version of the Bavarian Public Education Act was also challenged in court, first in a case before the Bavarian Constitutional Court (Bayerischer Verfassungsgerichtshof): In its decision of 1 August 1997, the Bavarian Constitutional Court ruled that, in the event of a conflict, the request of the parent concerned must be granted against the will of the majority if there is *serious* and *foreseeable* reason to conclude that the party concerned is overburdened by the sight of the cross.[56] What represents a serious and foreseeable reason is, of course, again left to the school head alone. For this reason, the case was referred again to the BVerfG, but the First Chamber of the First Senate of the German Federal Constitutional Court refused, for formal reasons, to consider the merits of the petition, as it did not consider the matter to be of fundamental importance from a constitutional point of view. At the same time, the judges also pointed out that the (Bavarian) legislature has a great deal of leeway in trying to resolve conflicts between negative and positive religious freedom, and claimed that the Bavarian legislature had fulfilled its obligation to regulate the resolution of conflicts by amending the law.[57] Whether this rejection was correct, in a legal dogmatic sense, we will not, of course, go into, since the purpose of this paper is not to examine the correctness of the Court's

[55] Bayerisches Gesetze über das Erziehungs und Unterrichtswesen vom 23 December 1995.
[56] Entscheidung des Bayerischen Verfassungsgerichtshofs vom 1 August 1997 – Vf. 6-VII-96.
[57] Beschluss der 1. Kammer des Ersten Senats vom 27 Oktober 1997 – 1 BvR 1604/97.

decisions, but to explore the reasons leading to the *Crucifix* decision. However, it is sure that, compared to the BVerfG's 1995 decision, it showed an almost complete *volte-face* with this new, negative decision, as it did not even examine the merits of the complaints, while indicating that the responsibility of the legislature is to settle the conflict between positive and negative religious freedom. As a result, it no longer insisted on removing the crosses from the walls of state-run schools.[58]

V Non-compliance with the court decision and rebuttal of the hypotheses

A Non-compliance with the court decision

The first question to be asked in connection with the 1995 *Crucifix* case concerns the implementation of the BVerfG's decision. It is undoubtedly true that the Bavarian legislature amended the Public Education Act, allowing at least a minimal possibility of resolution in the event of a conflict. Of course, the key question is whether placing the 'remedy' option in the hands of school leaders will really pass the test of access to justice – and there can certainly be serious doubts about that. In any event, it is clear that in 1997 the BVerfG, which was otherwise at the forefront of the protection of fundamental rights, no longer saw anything objectionable in the amended Public Education Act. The extent to which the 1997 decision of the German Federal Constitutional Court was influenced by the wave of protests that accompanied the 1995 decision is, of course, very difficult to establish, but it seems certain that it would have been much stricter (and more consistent) in its second decision had it not had to face the forms of protest outlined above during 1995.

It is absolutely clear that the BVerfG's 1995 decision not only explicitly stated that nowhere in public schools could a Cross hang on the wall of classrooms but also that the spirit of reasoning made it clear that, according to the BVerfG, there should be no place in Germany where students have to encounter a Crucifix within the walls of state-run schools. The intent and purpose was clear: Crosses could not hang on the walls of public schools. With the benefit of hindsight, it is clear that the BVerfG's 1995 decision has been almost completely neglected – or, to put it more severely, the opposite became reality. A substantial international literature has emerged on compliance with court decisions and on the concept and measurability

[58] One further development is worth mentioning: in 1999, the Federal Administrative Court (Bundesverwaltungsgericht), when examining a specific case, concluded that the amended Bavarian Public Education Act should be interpreted in such a way that the simple fact that the parents declare that they are atheists or have anti-religious views can be treated as a serious and foreseeable reason (BVerwG 6 C 18.98). However, since the Federal Administrative Court ruled only in individual cases, that is, its decision was not *erga omnes,* crosses were in fact removed from the walls of Bavarian public educational institutions only in individual cases where the parents took the case to court and won there.

of compliance – although it is also true that the problem of conceptualisation and measurability raises very serious questions. According to Diana Kapiszewski, a court decision is implemented when the relevant actors commit the act (or merely refrain from committing the act) that the court ordered (or forbade) in its decision.[59] Compliance therefore has an impact on the behaviour of the actors involved, on legal regulations and thus (if all goes well) on the state of affairs. Of course, court decisions are often only partially implemented and, as a result, the extent of their implementation should be placed on some kind of a scale. In addition, it should be borne in mind that the actors involved may, in certain circumstances, override the court's decision or even retaliate against the court on the pretext of a decision.

In any event, with regard to the case examined here, the original decision did not declare the Bavarian Public Education Act unconstitutional because there was no possibility of legal remedy or access to justice, but because it encroached on the fundamental right to (negative) freedom of religion (Article 4(1) of the Basic Law). That is, the court did not object the deficiencies of legal remedy, but sought to give a full guarantee of negative religious freedom in its decision, by removing the Cross, rather than introducing a somewhat weak conflict resolution procedure. In light of this, with regard to the *Crucifix* decision, it can be stated with absolute certainty that this is a case located at one of the endpoints (the non-compliance end) of the compliance scale. The *Crucifix* decision stipulated removing the Cross from the walls of public schools (in general, without exception). In fact, however, this never happened (or only in very exceptional cases). What exactly may have been the reason for the 'sabotage' of the decision, is a question that we will seek to answer based on the assumptions of the theoretical literature, on the one hand, and on the method of process tracing, on the other.

B Rebuttal of theory-based hypotheses

With regard to the theory-based hypotheses, it is clear that hypotheses (1), a) and (2) did not hold up at all in the *Crucifix* case. On the one hand, the verdict of the BVerfG stood in sharp contradiction to the opinion of the vast majority of the public and the political party (the CSU) which enjoyed high public support, thus the court risked a significant reduction in its public support, which could have significantly limited its room for manoeuvre against political actors [rebuttal of hypotheses (1) and a)]; on the other hand, the Bavarian Government quite simply sabotaged the implementation of the BVerfG's decision in spite of the fact that the Court has previously enjoyed consistently widespread public support, and that its decisions were constantly monitored by the German public.[60] Based on a rational choice model, this could have posed a danger to the Bavarian

[59] Kapiszewski and Taylor, 'Compliance', 805.

[60] Lembcke, *Über das Ansehen,* 47; Vorländer and Schaal 'Integration durch Institutionenvertrauen?'; Schaal, 'Crisis!'.

Government, in that voters would punish it. Nevertheless, the Bavarian parliamentary majority opted to sabotage the BVerfG's decision [rebuttal of hypothesis (2)]. Although the close party affiliation may, to some extent, explain the disobedience of the Bavarian legislators toward the *Crucifix* decision [hypothesis b)], overall, the hypotheses based on the rational choice literature do not seem to have sufficient explanatory power in connection with the *Crucifix* decision.

VI Explanation of the deviant case

A Why did the court behave in a deviant manner?

What could be the reason that neither the first hypothesis nor the second hypothesis were substantiated? Why did not the judges go along the majority of society, given that this would have been strategically rational on their part? And why did the Bavarian Government openly oppose the decision delivered by the BVerfG, if on the basis of the rational choice model, it could have been expected that the Bavarian parliamentary majority would behave in a deferential manner? Simply put, what could be the reason for the strategic or rational choice models not being substantiated for either the BVerfG or the Bavarian Government? Why was the BVerfG's decision not implemented at the end? The answer is complicated enough in both cases, so it is worth taking a closer look at the matter.

As for the first hypothesis, based on a thorough examination of the circumstances and the judges' statements, it seems clear that the judges did not think strategically about the *Crucifix* case, did not consciously take into account the possible social and political consequences of the decision, and that they *were not aware* that the issue could generate serious political and social conflicts. The possible responses by political actors and stakeholders were not taken into account at all; no consideration was given to the reactions that the decision could provoke in the majority of Bavarian voters or on the part of the Bavarian Government, and the extent to which these reactions could destroy the Court's authority or reduce the trust in it. What are the clear signs that judges neither thought nor acted in accordance with the strategic model of judicial behaviour?

First of all, it must be noted that, prior to the Court's decision, public political discourse had taken no interest in the case at all in Bavaria nor in Germany. The case was not covered in either the regional or national press. Gary Schaal points out that court decisions (1) *can settle* conflicts which have previously erupted, but (2) they may even contribute to *escalating* prior conflicts.[61] On the other hand, (3) it is also conceivable that

[61] Gary S Schaal, Kelly Lancaster and Alexander Struwe, 'Deutungsmacht und Konfliktdynamiken – Eine Analyse der Akzeptanz von Entscheidungen des Bundesverfassungsgerichts', in Christian Boulanger, Anna Schulze and Michael Wrase (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Baden-Baden: Nomos, 2013), 196.

no social conflict of a more serious nature will be registered in connection with the given case, either before or after the decision. The conflict dynamics of the *Crucifix* decision, on the other hand, tend to fall into a category (4), whereby a more serious social conflict erupted as a result of the decision; prior to the decision, no heated debates were raging in Germany or even Bavaria over the issue of hanging crosses on the walls of school classrooms. This factor is worth emphasising because the judges did not add fuel to the fire with their decision – as there were not even any embers.

This lack of pre-existing social conflict may have contributed greatly to the fact that judges were unaware of the possible consequences of the decision, did not consider the consequences when making their decision, and were therefore quite surprised by the wave of reaction that swelled after the decision was made public. Although they admitted that they were aware that their decision would be criticised, they did not anticipate at all that they would encounter such widespread, significant, and massive resistance.[62] In retrospect, many judges considered that it would have been better to have had public hearings on the *Crucifix* case, as this would have allowed the public to be prepared to the decision well in advance; those interested in the case could have been informed and the press could have covered the case more thoroughly, with the result that it may have been easier for the public to accept the decision while at the same time it could have 'forced' its implementation.[63] In addition, several judges subsequently considered that not only a public hearing would have been necessary, but also the disclosure of concurring opinions, as through this the Court would have shown that the decision was ultimately a compromise solution.[64] The lack of a conscious account of the external circumstances and possible reactions to the court's decision is also indicated by the fact that the *Crucifix* decision was not published during an election campaign, as both the Bavarian parliamentary elections and the national parliamentary elections were held a year earlier in autumn 1994 (September and October). In addition, the decision was announced in the middle of the political 'silly season', in early August. As a result, the judges did not have any inkling that their decision would be at the centre of political battles. However, the social resistance also came as a surprise to the judges, because they thought that the decision was consistent with the Court's previous practice. The BVerfG, in a 1973 decision (*Kreuz im Gerichtssaal,* 1 BvR 308/69), had already ordered crosses to be removed from the walls of courtrooms. They also referred to this earlier decision in the 1995 *Crucifix* decision, which further supports the view that the judges were unaware of the explosive potential of their decision; after all, they took their decision on the basis of an earlier decision that did not provoke any serious social response at all.

[62] Dieter Grimm, *'Ich bin ein Freund der Verfassung': Wissenschaftsbiographisches Interview von Oliver Lepsius, Christian Waldhoff and Matthias Roßbach mit Dieter Grimm* (Tübingen: Mohr Siebeck, 2017), 154; Wesel, *Der Gang nach Karlsruhe,* 318; Collings, *Democracy's Guardians,* 262.

[63] Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses,* 307.

[64] Ibid. 321.

On the basis of all this, it can be stated that, while deliberating on the *Crucifix* decision, the judges certainly did not consider its social impact, did not assess what reactions it could provoke from political actors or from part of the Bavarian electorate, and that the judges were not motivated in their decision by the possible reaction of external actors. Hypotheses based on rational choice theory proved to be incongruent, in this instance, with judicial behaviour, because the judges did not think strategically but made decisions based on other considerations. The question, then, is that if the judges were not guided by strategic-rational considerations, what could be the explanation for the *Crucifix* decision? The answer may be based partly on an alternative theoretical model, partly on the text of the decision, and partly on interviews with judges. Up to now, four main types of explanatory models have been proposed for judicial behaviour in the literature: The first of these is a *formal–legal model,* according to which the judicial and court decision is determined only by adherence to the text of written law (in our case, the Constitution) and the related interpretive techniques. The judge, according to the classic wording, is only the mouthpiece of the law; he makes his decision on the basis of what the text of the constitution actually contains. This explanatory model now seems slightly outdated; scholars of empirical legal research have mostly turned to the other three models instead.[65]

In the discussion above we came to the conclusion that the *strategic model* of judicial behaviour is unable to provide an explanation for the *Crucifix* decision, as the hypotheses based on it proved to be false. Two other models, however, may together provide some explanation for the Crucifix decision. The *attitude model* suggests that judges have specific public policy preferences, while a *modified version of this model* argues that judges' voting behaviour may be greatly influenced by their 'loyalty' to the party organisations that nominate them.[66] Of the judges who took the *Crucifix* decision, four Social Democrat judges of the first Senate, and Johann F Henschel, who was nominated by the Free Democrats (who also served as rapporteur) formed the Senate majority, while three Christian Democrat judges were in the minority, who vehemently opposed the majority decision. The attitude model or its modified version may thus have more or less explanatory power in this case, since the fault-lines developed along the party attachment. As the Free Democrats (FDP) clearly represented the principle of state neutrality in religious matters and the Social Democrats were already striving to separate the state and the church, it is tempting to draw the conclusion that the line dividing the court cannot be considered an accidental mapping of the party or public policy fault-lines.

At the same time, party or public policy preferences tend to be more important in cases that have a serious political stake. Political conflicts often end at the courts

[65] For the four models, see Kálmán Pócza, 'Az alkotmánybíráskodás gyakorlata összehasonlító szemszögből', in Lóránt Csink and Balázs Schanda (eds), *Összehasonlító módszer az alkotmányjogban* (Budapest: Pázmány Press, 2017), 328.

[66] Ibid. 330.

and, according to a modified version of the attitude model, party affiliations can play a crucial role in such cases. However, as has been noted, the court was not part of a major political game in connection with the *Crucifix* case; it did not make a well-known decision as an arbiter of national party-political struggles, as the case did not actually exist for the public before the decision. As a result, the party-political variant of the attitude model may have less explanatory power in the *Crucifix* decision. The explanatory power of the party-political attitude model is further weakened by the fact that judges who signed the majority decision referred to an earlier decision of the court passed in 1973 by a Senate with a Christian Democratic majority. At the time of the *Kreuz im Gerichtssaal* decision, five Christian Democrat and three Social Democrat judges formed the first Senate, and nobody raised a dissenting opinion on this decision in 1973 (although it should be noted that the possibility of publishing a dissenting opinion was introduced only two years earlier, in 1971). In addition, it is evident that the court did not use the tool of vague wording at all, which could have given the Bavarian legislature a great deal of leeway in implementing the decision, but it made a decision very clearly and unequivocally that the Cross should be removed from the walls of state-maintained schools.

The explicit reference to the 1973 *Kreuz im Gerichtssaal* decision, the crystal-clear and unambiguous language of the decision, and the theoretical foundation of negative religious freedom therefore support the validity of another explanatory model, namely the *role model*.[67] According to this, judges are ordinary people who really care about what others think about them. Viewing the judges and their decisions from this perspective, the question arises as to who, what audience, the judge wants to satisfy best by his decisions and the reasoning of his decisions. Lawrence Baum's thesis is that judges want to satisfy multiple audiences at once, or they can even choose which sub-audience is the target group they would prefer to satisfy.[68] According to Baum, most judges have an interest in gaining recognition among their peers and the wider professional public for their decisions and for the reasoning for their decisions. Their fellow judges or colleagues in other courts may be an audience from which they wish to gain appreciation for their decisions and the statements of reason. Of course, for judges, a narrower social group, public policy pressure groups, the media, the general public or even government actors can also be a point of reference in this regard.[69] Applied to the *Crucifix* decision, this role model may perhaps explain the motivations of the judges in reaching the majority decision, as the reference to the previous decision, emphasising the consistency of court practice and the theoretical underpinning of the principle of negative religious freedom, also suggests that judges primarily sought to convince the competent legal community by their arguments.

[67] Ibid. 333.
[68] Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behaviour* (Princeton, NJ: Princeton University Press, 2008), 50.
[69] Ibid. 60.

Furthermore, the explanatory power of the role model is supported not only by the decision but also by the claims of the judges themselves. Uwe Kranenpohl cites one of the judges, who claimed a good decade after the events that he regarded the *Crucifix* decision as the consistent aftermath of the *Kreuz im Gerichtssaal* decision.[70] Defending the position of the Court majority, Dieter Grimm specifically stated, in an interview in December 1995, that it is not the duty of the Court to reflect the views of the majority of society in its decisions or to create social peace, but to interpret the constitution consistently.[71] Henschel, who acted as a rapporteur judge and presided over the first Senate, addressed the Bavarian Prime Minister in such a way that everyone must acknowledge that not only Christians live in Germany.[72] Overall, therefore, it can be stated that the decision of the judges who supported the majority opinion is certainly not explained by the strategic model but rather by the impetus of the role model. The majority of the judges made their decision primarily by focusing on the potential reactions from the legal community and wrote the reasoning for them, preferring to satisfy the legal community rather than the majority of society, political actors or even pressure groups.

B Why did political actors behave in a deviant manner?

Having fixed why the German Constitutional Court behaved in a deviant manner compared to the hypotheses of rational choice theory, let us now turn to why the hypothesis of the strategic model was not proved in case of political actors reacting to the Court decision. As we have seen above, the decision of the highly prestigious German Constitutional Court was in fact circumvented by the Bavarian Government and the parliamentary majority behind it. The key moment in this case was obviously the amendment of the Public Education Act by the Bavarian parliamentary majority, as this allowed the Crucifix to continue to hang on the walls of school classrooms. The statements of Catholic leaders, the petitions and the demonstration in Munich clearly show that the BVerfG's decision encountered opposition not only from politicians. Nevertheless, the main question is why the Bavarian legislature opposed the BVerfG's decision. Based on the rational choice model, it could have been expected that the decision of a highly respected court would eventually be accepted by the Bavarian parliamentary majority and the crosses would be removed from the classroom [hypothesis (2)].

Surely, after the Court's decision the Bavarian legislature did not have to do anything, since the relevant passage of the Public Education Act was annulled by the BVerfG. Thus, remedying the unconstitutional situation did not require a complex procedure in which several institutions had to be involved at the same

[70] Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses,* 350.
[71] Dieter Grimm, 'Interview mit der *Süddeutschen Zeitung*', *Süddeutsche Zeitung,* 9 December 1995, 284.
[72] Collings, *Democracy's Guardians*, 265.

time in order to re-regulate the case in an appropriate manner. Even the majority of the Bavarian legislature could have put their hands up, saying there was nothing to be done; the BVerfG had annulled the law, thus the case was closed. This would have practically meant removing the crucifixes and complying with the decision of the Constitutional Court. It was due to the coexistence of several factors that the Bavarian legislature did not let the case lie.

It is undoubtedly true that the Bavarian Christian Socialists had ruled Bavaria alone without interruption from 1962 (until 2008): They won an absolute majority in the Bavarian Parliament in all parliamentary elections, but they achieved one of their worst results since World War II in 1994. It is also true that the CSU voters were indeed very committed: apart from the 1950 and 1954 elections, the CSU gained consistently above 45 per cent of the votes, and from 1962 (up to and including 2008) they consistently won over 50 per cent (often around 60 per cent) of the votes in the Bavarian state elections.[73] However, these two factors alone would not have been enough to resist the decision of the BVerfG and to amend the Public Education Act so that the Crucifix could still hang on the walls of Bavarian state-run public education institutions. In other words, although hypothesis 2.1 holds true in part, that is the Christian Socialist Bavarian parliamentary majority did indeed dare to oppose part of the BVerfG's decision because it may have had the backing of a substantial number of very committed voters, that one factor alone would not have been enough to actually ignore the decision of the Court. The unprecedented disobedience of the Bavarian parliamentary majority required a combination of several further factors.

On the one hand, even before the *Crucifix* decision, the Federal Constitutional Court had been the subject of some serious criticism in other cases since mid-1994; that is, by the autumn of 1995, the Court had been in the crossfire of conflicting interests and criticism for over a year. In other cases, leading Bavarian politicians (such as Waigel), among others, had become embroiled in a serious conflict with the Federal Constitutional Court. On 12 July 1994, the BVerfG did not find the government's decision on the deployment of German forces abroad (Bosnia and Somalia) to be unconstitutional, but made it a constitutional requirement that the

[73] Russell J Dalton and Wilhelm Bürklin, 'The Two German Electorates: The Social Bases of the Vote in 1990 and 1994', *German Politics & Society* 13, no 1 (1995), 79–99; Rüdiger Schmitt-Beck, Stefan Weick and Bernhard Christoph, 'Shaky Attachments: Individual-Level Stability and Change of Partisanship among West German Voters, 1984–2001', *European Journal of Political Research* 45, no 4 (2006), 581–608; Herbert Maier, 'Das Kreuz mit dem Wähler: Erhöhte Komplexität der Wählermärkte als gesamtdeutsche und bayerische Herausforderung', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010); Ruth Dassonneville, Marc Hooghe and Bram Vanhoutte, 'Age, Period and Cohort Effects in the Decline of Party Identification in Germany: An Analysis of a Two Decade Panel Study in Germany (1992–2009)', *German Politics* 21, no 2 (2012), 209–227; Martin Elff and Sigrid Roßteutscher, 'Social Cleavages and Electoral Behaviour in a Long-Term Perspective: Alignment Without Mobilisation?', *German Politics* 26, no 1 (2017), 12–34.

Bundestag must approve such deployments in advance [90 BVerfGE 286 (1994)]. There was talk, for the first time since World War II, of Bundeswehr reconnaissance aircraft being deployed abroad as part of an action overseen by the United Nations during the Balkan war without mobilising the army for self-defence. This decision had not only transformed the Bundeswehr into a parliamentary army, but also raised the possibility of German soldiers indirectly participating in foreign military actions, in which soldiers or, worse, civilians could lose their lives, without such a deployment falling under the self-defence clause.

The political elite generally accepted the BVerfG's decision, but this case was a directly and closely related antecedent to another decision, which in turn had already met with serious opposition from the Kohl Government. The *Soldaten sind Mörder* judgment of 25 August 1994 was delivered by the Third Chamber of the First Senate of the BVerfG, consisting of three judges (2 BvR 1423/92), stating that Kurt Tucholsky's famous sentence ('*Soldaten sind Mörder*' – 'Soldiers are murderers') did not violate the reputation of the Bundeswehr. The three-judge Chamber almost routinely found a court decision convicting the defendant for affixing a sticker to his truck during the First Gulf War repeating the famous Tucholsky quote to be unconstitutional. Foreign Minister Klaus Kinkel of the Kohl Government said such a decision would greatly undermine the authority of the military, and former Foreign Minister Hans-Dietrich Genscher referred to it as a scandalous decision. Defence Minister Volker Rühe called the decision unacceptable, but Chancellor Kohl himself also commented on the matter – albeit with restraint, saying only that millions of Germans were severely affected by the BVerfG's decision.[74] The CDU Chief of Defence said: 'This case is a disgrace to the German judiciary.'[75] The decision was not made public until 19 September, but Judge Grimm, who drafted the Chamber's decision, subsequently received threatening letters en masse, and a bodyguard even had to be assigned to him, as there were death threats in the letters.[76]

There was a public debate on the decision of the Chamber, and members of the political elite, both Christian Democrats and Liberals, expressed serious reservations. This critical mood was only heightened by the decision of the First Senate of 10 January 1995 [92 BVerfGE 1 (1995)], in which the Senate stated, with the narrowest possible majority (5:3) that a sit-in blockade could not be interpreted as violent coercion, and accordingly could not be punished on such a basis. In this case, moreover, the Court contradicted to its earlier decision (BVerfGE 73, 206), and ruled that a sit-in blockade could not be considered an act of violence. A significant number of Christian Democrat politicians repeatedly protested, as in May 1995, against the Constitutional Court's decision to 'acquit' the leaders of the secret service of the German Democratic Republic (GDR), which did not pass without comment (2 BvL 19/91). Referring to

[74] Wesel, *Der Gang nach Karlsruhe,* 310.
[75] Lamprecht, *Das Bundesverfassungsgericht,* 242.
[76] Grimm, *'Ich bin ein Freund der Verfassung',* 147.

the principle of proportionality, the BVerfG also annulled a number of court decisions sentencing several former GDR secret service leaders to serve terms of imprisonment.

Although the details of that case and the decision are not particularly relevant in this context, the reception of the decision is all the more so: CDU politicians had repeatedly made serious criticisms of Karlsruhe judges. Finally, another decision once again negatively affected the leader of the Bavarian Christian Socialists, as well as Chancellor Kohl's Minister of Finance: In June 1995, the BVerfG declared unconstitutional the provisions of the law on inheritance, gift and property taxes, as amended in September 1994, under the leadership of Waigel (CSU), the Minister for Finance (2 BvL 37/91).[77] It should be recalled that the *Crucifix* decision was made public in early August 1995, and that in the summer of 1994 a number of decisions had been made in the First or Second Senate of the BVerfG, or in one or other of the Senate chambers, which had enraged Christian Democrats and Christian Socialist politicians. In other words, the *Crucifix* decision can be seen as the straw that broke the camel's back, and one of a series of decisions that strongly hindered right-wing politicians from achieving their goals.[78]

The decisions of the BVerfG that preceded the *Crucifix* decision undoubtedly strained the relationship between right-wing politicians and the Court. However, in addition to these rulings, other factors contributed to the escalation of political and social reactions after the *Crucifix* decision as well. As we have seen above, since 1994 there had been several decisions in which only a narrow majority of one or the other Senate prevailed, and not only were the voting behaviour made public but judges also issued dissenting opinions on some decisions. The *Crucifix* decision itself was one of the few decisions to be accompanied by a dissenting opinion of the judges who disagreed with the majority decision. What is more, three dissenting opinions were published at once, which made it clear to those interested in the case that the narrowest possible majority (5 : 3) had delivered the verdict.[79]

Since 1971 (when the institution of dissenting opinions was introduced), it had been very rare for a dissenting opinion to be attached to a majority decision. Consequently, dissenting opinions were of much greater significance than in constitutional courts of other countries where it had become more or less a common practice. Critics of the *Crucifix* decision stressed not only that it was not possible to make an appropriate decision on such an important issue based on such a narrow majority, but were also furnished with credible arguments as presented in the dissenting opinions. The disclosure of a very sharp fault-line within the court in this case did not reassure the

[77] Lamprecht, *Das Bundesverfassungsgericht,* 247.

[78] The *'Soldaten sind Mörder'* case was finally concluded in October 1995 by a decision of the First Senate (1 BvR 1476), which in fact upheld the decision of the Third Chamber of the First Senate (in other cases) and annulled ordinary court decisions that convicted someone for the slogan *'Soldaten sind Mörder'*.

[79] In the event of a tie vote, no decision will be taken according to the German Constitutional Court procedure, that is, the reviewed legislation will remain in force.

mood but rather helped critics of the majority decision not only to challenge it but even reject it entirely, that is, to ignore the decision of the majority.

Third, in addition to political actors, there was a very strong and deeply embedded social organisation in Bavaria that disagreed with the BVerfG's decision to the utmost: The embeddedness and mobilising power of the Catholic Church in Bavaria certainly contributed greatly to the fierce criticism of the Court's decision and the outcome that a significant proportion of Bavarian voters did not punish but instead supported the Bavarian parliamentary majority that effectively overruled the Court's decision. As we have seen above, the Catholic Church was actively involved in collecting signatures against the decision, and the leaders of the Bavarian Catholic Church often made statements in various public forums such as in the press, on television and even at the Munich demonstration attended by Cardinal Wetter.

The Catholic Church and the Lutheran Church, each with roughly 25 million members, were among the largest social organisations in Germany, even though their active membership was much lower, and their number of politically active members had already certainly shrunk by several orders of magnitude by the 1990s.[80] However, their material and mobilising power cannot be underestimated, and in 1993 (following German reunification) the German Catholic Church launched a wide-ranging consultation on the challenges German society had to face, in view of the new political and social situation.[81] In the 1990s, the overall proportion of Catholic believers in Germany fell sharply, largely due to the accession of new provinces in the East which were (traditionally Lutheran, but due to the decades of Communist rule) mostly religiously non-committed. Consequently, the Church sought new channels through which, after the German unification, they could initiate a public debate on the most important social issues.

The Lutheran Church also joined this initiative, meaning that, in socio-political terms, the churches were very active in the mid-1990s.[82] The growing social activity of the Catholic Church was also fostered by the fact that, although secularisation has undoubtedly not escaped the always eccentric Bavaria, Catholic identity still massively defined the Bavarian electorate in the 1990s. All this make it clear why the Bavarian electorate was outraged en masse at the BVerfG's decision.[83] In the

[80] Ulrich Willems, 'Kirchen', in Thomas von Winter and Ulrich Willems (eds), *Interessenverbände in Deutschland* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007), 317.

[81] Antonius Liedhegener, 'Veränderte politische Optionen? Kirche und Katholizismus im politischen System der Bundesrepublik Deutschland seit 1989/90', in Manfred Brocker, Hartmut Behr and Mathias Hildebrandt (eds), *Religion – Staat – Politik: Zur Rolle der Religion in der nationalen und internationalen Politik. Politik und Religion* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2003), 243; Antonius Liedhegener, 'Plural und politisch. Der Katholizismus in der Bundesrepublik Deutschland seit 1989/90', *Jahrbuch für Christliche Sozialwissenschaften* 44 (2003), 53–72, 63.

[82] Antonius Liedhegener, *Macht, Moral und Mehrheiten: der politische Katholizismus der der Bundesrepublik Deutschland und den USA seit 1960* (Baden-Baden: Nomos, 2006).

[83] Maier, 'Das Kreuz', 38.

1990s, the relationship between the CDU/CSU and the churches and believers was still relatively close;[84] the relationship between the Christian Democratic parties and the churches and believers only loosened somewhat in the early 2000s, when the parties realised that the traditional voter groups would no longer be enough to bring the Christian Democrats to power, so the religious theme (at least for a time) somewhat lost its appeal in the eyes of Christian Democrat politicians.[85]

Fourth, it should not be overlooked that the *Crucifix* decision had a federalist dimension as well: Since education was a purely state competence, some critics, relying on the dissenting opinions to the *Crucifix* decision, argued that the BVerfG had in fact decided in a case that was clearly and exclusively an area of state competence *(Länderkompetenz).*[86] This argument cites the principle outlined in Paragraph 72 of the Grundgesetz that federal bodies may not intervene in education matters even when upholding the principle of uniformity, since education is entirely a state competence.[87] Bavarian identity, based on special (and especially strong) traditions and, last but not least, on Catholicism, strongly shaped Bavarian political culture in the 1990s, even as secularisation progressed.[88]

This regional political culture and identity, based on Catholicism and tradition, and the fact that the management of educational issues was regarded as an exclusively state (hence regional) competence in Germany, certainly contributed to the opposition of the one-party Christian Socialist majority in the Bavarian Parliament to the BVerfG's decision. Even so, historically, it cannot be said that the Bavarian political elite or the Bavarian political institutions were in constant conflict with the Federal Constitutional Court, as there were periods (especially in the 1970s, when the Social Democrats ruled at the federal level) when the Bavarian Christian Socialists could also rely on the Federal Constitutional Court.[89] Moreover, it cannot be clearly stated that the BVerfG has always and consistently favoured the Federal

[84] Marcus Gerngroß, '(K)eine Bindung auf ewig – die CSU und die Kirchen', in Gerhard Hopp, Martin Sebaldt and Benjamin Zeitler (eds), *Die CSU: Strukturwandel, Modernisierung und Herausforderungen einer Volkspartei* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2010), 91.

[85] Liedhegener, 'Plural und politisch', 66.

[86] See 1 BvR 1087/91 dissenting opinions of judges Seidl, Söllner, Haas; Collings, *Democracy's Guardians*, 261.

[87] Otwin Massing, 'Anmerkungen zu einigen Voraussetzungen und (nichtintendierten) Folgen der Kruzifix-Entscheidung des Bundesverfassungsgerichts', *Politische Vierteljahresschrift* 36, no 4 (1995), 719–731, 723.

[88] Michael Weigl, 'Tradition und Modernität als Merkmale politischer Kultur', in Nikolaus Werz and Martin Koschkar (eds), *Regionale politische Kultur in Deutschland: Fallbeispiele und vergleichende Aspekte* (Wiesbaden: Springer Fachmedien, 2016), 124; Manuela Glaab and Michael Weigl, 'Politik und Regieren in Bayern: Rahmenbedingungen, Strukturmerkmale, Entwicklungen', in Manuela Glaab and Michael Weigl (eds), *Politik und Regieren in Bayern* (Wiesbaden: Springer Fachmedien, 2013), 75.

[89] Alexander Wegmaier, 'Beziehungen zum Bund', 2018.

Government in matters concerning federalism.[90] What is certain, however, is that in the 1990s, the relationship between the Bavarian parliamentary majority and the BVerfG was not exactly harmonious.[91] In this regard, the identities and allegiances of the opposing sides were very clear: On the one side, a Bavarian parliamentary majority with a one-party, stable and committed voter base, backed by the Bavarian Constitutional Court, the Catholic (and partly even the Lutheran) church and the Bavarian electorate (who, quite exceptionally in the history of the BVerfG, expressed their dissatisfaction with the *Crucifix* decision in the form of petitions and demonstrations) and, on the other side, the BVerfG. This institutional and social coalition against the Federal Constitutional Court proved strong enough to constitute an incendiary mixture that prompted the Bavarian parliamentary majority to override the decision of the Federal Constitutional Court.

Finally, the *Crucifix* case is also interesting because the parliamentary majority did not 'hide' from the public that it was trying to sabotage the decision of the BVerfG but 'rewrote' it by harnessing public opinion. While it is undoubtedly true that the decisions of the Federal Constitutional Court were generally respected by the political actors, in some cases new regulations were adopted, which effectively circumvented the decisions of the BVerfG. These cases are also interesting because typically members of the public with some interest in politics were more in favour of the BVerfG in these matters.

As a result, the previous cases of covert non-compliance had not resulted in a more serious *loss of prestige* for the BVerfG, although in principle these were matters of public interest, such as the issue of party funding, the pension of civil servants, the consultancy contracts of Members of the Bundestag, or even the inheritance tax. These cases were already at the forefront of public interest before the Constitutional Court's decision, but in general a coalition of political interests was formed, which led the big parties on the same platform to decide to circumvent, overwrite or simply sabotage the decisions of the Federal Constitutional Court. Because the fault-lines in these cases did not overlap as clearly as in the *Crucifix* case, it was also much easier for political actors to manoeuvre between interests while trying to under-thematise or avoid the issue as much as possible in public.

VII Conclusions

The Bavarian *Crucifix* case sparked the BVerfG's greatest crisis since the Adenauer era, which also temporarily led to a decline in the social support for the institution. Although contemporaries perceived that, after the *Crucifix* case, nothing would be as was before

[90] Stefan Korioth, 'Die Rechtsprechung des Bundesverfassungsgerichts zum Bundesstaat', in Robert C van Ooyen and Martin HW Möllers (eds), *Das Bundesverfassungsgericht im politischen System* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2015).

[91] Wegmaier, 'Beziehungen zum Bund'.

and confidence in the BVerfG was so shaken that radical changes would be needed, time eventually worked in favour of the Federal Constitutional Court. A few years after the *Crucifix* case, the confidence index recovered, its diffuse public support returned to its usual very high level, and the court recovered from its second-largest crisis, regaining the confidence of the electorate. At the same time, exploring the causes of the crisis can provide many lessons for the practice of constitutional adjudication. This is because the rational choice model, which is widespread in the international literature, was not able to predict or explain in retrospect why and how this serious crisis situation could have developed. Both the BVerfG and the Bavarian parliamentary majority behaved in a deviant way – if the norm is that suggested by hypotheses based on rational choice theory. Although the explanations based on the strategic model can account for the deviant case, they do not address the reasons leading to it, as these models usually formulate general principles (more precisely, output probability) based on a large number of case studies. Exploring the causes of deviant cases thus requires a case study. This paper undertook this task when it argued that the BVerfG's decision in the *Crucifix* case could be explained, not by the rational choice theory but rather by the role model (and partly a modified version of the attitude model) of judicial behaviour.

Judges of the BVerfG did not think strategically in the *Crucifix* case but were more concerned with putting their arguments to their colleagues and the legal community, trying to demonstrate the consistency and theoretical soundness of their decision. At the same time, we also saw that the Bavarian parliamentary majority also behaved in a deviant way, and the decision of the highly respected BVerfG was quite simply circumvented, sabotaged and overwritten. The 'courage' of the Bavarian Christian Socialists is only partly explained by the fact that it is a deeply embedded party with committed believers. Dissenting opinions, a narrow majority at the court, the activity of the Catholic Church, the federal dimension of the case, and the direct antecedents of the *Crucifix* case all enshrined the fact that, at the end of the process, the Bavarian parliamentary majority passed an amendment that ultimately did ensure that the Crucifix could remain hanging in the classrooms in Bavaria.

The BVerfG lost the battle; the Bavarian parliamentary majority did not defer to its will. However, the court did not suffer such deep wounds that it would bleed out. In the spring of 2020, the German constitutional judges showed defiance not to a state government, but to the European Central Bank and the Court of Justice of the European Union in connection with the European bond purchase programme. This case does not suggest that German judges were afraid of another (now European-scale) constitutional crisis. Just as the BVerfG's confidence index recovered within a few years, it also seems that the court's (second) biggest crisis did not actually leave deep traces in the Court's case law.

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Confectionery Excellence in the Flow of Religion and Politics

Cakes and Constitutional Rights before the British and American Supreme Courts

András Koltay

I Introduction: Christianity and freedom of speech

The expression of religious belief is simultaneously protected by the right to freedom of religion and the right to free expression. Both rights are relied on, for example, by those who protest against the banning of full-face covering Muslim headscarves by certain states.[1] Both rights were similarly invoked by applicants whose employers had prohibited the wearing of a crucifix in their workplace.[2] Furthermore, freedom of expression also includes the right to remain silent; that is by default, no one can be compelled to express their opinion or the views of others. The question has also been raised before the courts of the United Kingdom and the United States as to whether making a cake constitutes speech and whether the baker may refuse it on the grounds of freedom of religion. The problem that arises is complex and, in addition to freedom of religion and expression, it also raises issues related to ensuring equal treatment for all and even to protecting human dignity. This paper will review these cases and the decisions taken (section II) and analyse them from the points of view of freedom of expression (section III), non-discrimination (section IV), protection of human dignity (section V) and freedom of religion (section VI). It will then briefly address the specific situation of legal entities (section VII) and provide a summary before arriving at conclusions (section VIII).

[1] *Dakir v Belgium* no 4619/12; *SAS v France* no 43855/11; *Dahlab v Switzerland* no 42393/98, admissibility decision; *Sahin v Turkey* no 44774/98.

[2] *Eweida and Others v the United Kingdom* nos 48420/10 and 59842/10.

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II The facts of the cake cases and the decisions of the Supreme Courts

A Masterpiece Cakeshop, Ltd and Others v Colorado Civil Rights Commission[3]

A United States case involved Mr Jack Phillips, the owner and operator of a Colorado-based company called Masterpiece Cakeshop Ltd, who is a master baker and a committed Christian. In 2012, Phillips told a same-sex couple that he was not prepared to make them a wedding cake for their wedding, because he was religiously opposed to same-sex marriage, which was not recognised in Colorado at the time, but that he would be prepared to make other types of cakes, for them, such as a birthday cake. The couple lodged a complaint with the Colorado Civil Rights Commission on the basis of the Colorado Anti-Discrimination Act (CADA), pursuant to the provisions of the act prohibiting businesses selling goods or providing services to the public from discriminating on the basis of sexual orientation. The Commission instituted administrative court proceedings, and the justice hearing the case ruled in favour of the couple. In the proceedings, the justice rejected Phillips's argument based on the First Amendment that it would violate his right to free speech if he were obliged to make a wedding cake for the marriage of a same-sex couple, as he would have to use his artistic skills to convey a message with which he disagreed, and which would also violate his right to practice his religion freely. The Commission and the Colorado Court of Appeals upheld the decision of the court of first instance.

According to the decision of the US Supreme Court, delivered on 4 June 2018, the Commission's proceedings in the case violated the right to the free practice of religion. According to the majority opinion of the Court, written by Justice Anthony Kennedy, the Constitution and various laws can, and in some cases must, ensure the free exercise of rights for gays and gay couples, while at the same time opposing gay marriage on religious or philosophical grounds qualifies as a protected opinion and in some cases as a protected expression of opinion. While it is not surprising that Colorado law provides for gays to have access to goods and services on equal terms with other members of the population, the law must be applied in a religion-neutral manner. Phillips argued that for him his right to freedom of speech under the First Amendment, on the one hand, and his deep and sincere religious convictions when he uses his artistic abilities and his own unique inspiration when making a statement – in this case a wedding greeting – on the other hand, are of particular importance. The dilemma that arose was understandable in 2012, when the state of Colorado had not yet recognised the validity of gay marriages in the state. In the light of the State's position at that time, Phillips's argument that he considered his own decision to be lawful on reasonable grounds is not entirely unfounded.

[3] *Masterpiece Cakeshop, Ltd and Others v Colorado Civil Rights Commission* 138 SCt 1719 (2018) [or: 584 US ___ (2018)].

The legislation of the State of Colorado at the time allowed traders a degree of discretion as to whether they could refuse to formulate certain messages that they found offensive. This is underpinned by the fact that, during the proceedings in question, the Colorado Civil Rights Division, which had acted prior to the Commission's proceedings, found in at least three other cases that a baker had acted lawfully in refusing to make cakes decorated with ornaments *insulting* gays or gay marriages. Phillips was also entitled to have his allegations considered in a neutral and respectful manner, taking all the circumstances of the case into account.[4] (As the Civil Rights Division found the complaint in the *Phillips* case to be well-founded, it referred the matter to the Commission for a decision.)

The Commission's conduct in the *Phillips* case, however, in which there were clear and unacceptable signs of hostility to his religious beliefs in support of his protest, was incompatible with such a neutral assessment. According to the available documents, during a formal and public meeting of the Commission, some members supported the view that religious belief could not legitimately appear in the public sector or in commerce, denigrated Phillips's faith and described it as superficial, and likened his reference to true religious beliefs to a defence of slavery or the Holocaust. No Commissioner objected to such comments, nor were these comments addressed in the subsequent judgment of the national court or in the documents submitted to this Court. These comments call into question the fairness and impartiality of the Commission's conduct in the *Phillips* case.

Another sign of hostility is that the *Phillips* case was treated differently from the cases of other bakers who had previously been successful before the Commission in protesting against anti-gay messages. The Commission ruled against Phillips, in part, on the theoretical basis that any message on the wedding cake that had been ordered could not be attributed to the baker but to the customer. However, this consideration did not arise in other cases heard by the Civil Rights Division concerning orders for cakes bearing symbols of gay marriage. The Civil Rights Division also noted that the other bakeries were willing to sell other products to prospective customers, while the Commission considered Phillips's willingness to do the same to be irrelevant. Concerns raised by Phillips about the State's practice of rejecting a religious protest are not addressed by the circumstance that the Court of Appeal of the State of Colorado briefly addressed the differences in treatment that arose.[5]

For the above reasons, the Commission's procedure in the *Phillips* case infringed the State's obligation under the First Amendment to refrain from applying legislation or regulations based on religion or hostility to religious views. The state may not, in accordance with the constitutional guarantees of the free exercise of rights, make regulations hostile to the religious beliefs of the citizens concerned, nor act in a manner that condemns or presupposes the illegality of religious beliefs

[4] Ibid. 1727–1729.
[5] Ibid. 1729–1731.

or practices.[6] Factors relevant to an assessment of the State's neutrality include 'the historical background to the contested decision, the specific sequence of events leading to the adoption of the legislation in question or official policy, and the legislative and administrative background, including contemporary statements by members of the decision-making body'.[7] On the basis of these factors, the available documents show that the Commission's conduct was neither tolerant nor respectful of the religious beliefs of the person concerned. The state cannot take – or even suggest – a position on whether the religious basis of Phillips's conscience-based protest is legitimate or unjust.

It follows, therefore, that Phillips's religion-based protest was not examined with the neutrality required by the rules on the exercise of freedom of justice. It would have been possible to weigh the interests of the State against Phillips's genuine religious protest in such a way as to meet the requirement of strictly applicable religious neutrality. The blatantly anti-religious statements in certain Commissioners' remarks do not meet this requirement, however, and a similar conclusion can be drawn from the fact that the Commission acted differently in the *Phillips* case than it did in those connected with other bakers.[8]

B Lee v Ashers Baking Company Ltd and Others[9]

A similar case from the United Kingdom involved Mr Daniel McArthur and his wife, Amy – the owners of a bakery in Northern Ireland called Ashers – who are Christians and whose religious belief is that only a marriage between a man and a woman is in line with the teaching of the Bible and the will of God. The cake-making service of Ashers allows customers to ask for a picture or caption to be placed on the cake made for them. In May 2014, a homosexual man, Mr Gareth Lee, wanted to take a cake to an event hosted by supporters of same-sex marriage in Northern Ireland. Lee therefore ordered a cake from Ashers featuring the puppet figures Bert and Ernie and requested that the phrase 'Support gay marriage' be displayed on the cake. Mrs McArthur accepted the order, but later informed Lee that she could not make such a cake with a clear conscience and refunded the amount already paid.

Lee filed a lawsuit against the McArthurs and Ashers Bakery for direct and indirect discrimination based on religious beliefs or political opinions prohibited under the Northern Ireland laws on equality[10] and sexual orientation, as well as

6 *Church of Lukumi Babalu Aye, Inc. v Hialeah* 508 US 520.
7 Ibid. 540.
8 *Masterpiece* (n 3) 1731–1732.
9 *Lee v Ashers Baking Company Ltd and Others* [2018] UKSC 49.
10 Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (hereinafter: SORs).

on the right to fair treatment.[11] The action was also supported by the Equality Commission for Northern Ireland. The acting district court found that the refusal to fulfil the order constituted direct discrimination on all three grounds. The McArthur couple appealed to the Court of Appeal, arguing that the provisions of the Fair Employment and Treatment Order (FETO) and Equality Act (Sexual Orientation) Regulations (SORs) were incompatible with their rights under the European Convention on Human Rights. The Attorney General also intervened in the proceedings. On 24 October 2016, the Court of Appeal dismissed the appeal and found that Lee had been directly discriminated against on the basis of his sexual orientation, on the one hand, and that there was no need to interpret the provisions of the SORs to take into account McArthurs' rights under the European Convention on Human Rights, on the other hand.

The Supreme Court unanimously held that it had jurisdiction to hear an appeal against any part of the judgment of the Court of Appeal. The Supreme Court allowed the plaintiffs to file an appeal and found that neither the SORs nor the FETO gave rise to civil law liability on the part of the appellants for refusing to express a political opinion contrary to their religious beliefs. The discriminatory part of the judgment was drafted by Lady Brenda Hale, and the jurisdictional part was presented by Lord Jonathan Mance. According to the district court, the appellants did not refuse to fulfil the order because of Lee's perceived or actual sexual orientation. Their protest was against the message expressed on the cake, rather than focusing on the personal qualities of the messaging party[12] or another person related to him.[13] The message was not inseparable from the client's sexual orientation, as support for gay marriage is not necessarily inherent in any particular sexual orientation.[14] The benefits of the message can be enjoyed not only by gays and bisexuals but also by their families, friends and members of the public who recognise the social benefits of such a commitment.[15] There was therefore no discrimination on grounds of sexual orientation in this case.

In Northern Ireland, protection against direct discrimination based on religious beliefs or political opinions rests on constitutional grounds.[16] Discrimination must be based on the religion or belief of a person other than the person accused of discrimination.[17] Since the appellants' protest was not against Lee but against the promotion of the message to be placed on the cake, the situation is not the same as a refusal to establish an employment relationship or to provide a service based solely

11 Fair Employment and Treatment (Northern Ireland) Order 1998 (hereinafter: FETO).
12 *Ashers* (n 9) para 22.
13 Ibid. paras 33 and 34.
14 Ibid. para 25.
15 Ibid. para 33.
16 Ibid. para 37.
17 Ibid. paras 43–45.

on the religious beliefs of the person concerned; rather, that message was an integral part of Lee's political opinion. It was therefore necessary to examine the effect of Mr and Mrs McArthur's rights under the European Convention on Human Rights on the interpretation and scope of FETO.[18]

The case clearly concerned the right to freedom of thought, conscience and religion (Article 9) and to freedom of expression (Article 10).[19] These rights include guarantees that no one should be obliged to express a belief that he or she does not profess.[20] While the McArthurs would not have been permitted to refuse to sell their product to Lee because of his homosexuality or gay marriage, the situation in this case is different since the couple were being asked to make a cake that displays a message they have fundamentally rejected.[21] FETO cannot be interpreted or enforced in such a way as to oblige them to do so without due cause, as in the present case.[22]

III Issues of freedom of expression

A Cakes as opinions

The categories of speaking and action are, in a sense, inseparable. Almost all our actions carry expressive content: Through an action we can express a certain statement or opinion, and this does not necessarily require either verbal or written text. Certain signs and symbols may in themselves constitute speech in terms of the protection of freedom of expression. An action itself may also be speech, but the boundary must be drawn somewhere for the purposes of granting protection. Even so, we cannot state clearly, for example, that an assassination attempt on a politician is the exercise of free speech, although it undoubtedly carries a message.

Several ways of setting a boundary are possible. We can examine whether the act promoted an interest that can be accepted as a justification for free speech. Has it contributed to democratic decision-making or to the exercise of individual autonomy? We can also examine the act specifically from the perspective of its executor. Did he intend to express something with his action? We may assess the significance of the effect the expression may have; is it necessary for its defence for someone to understand the opinion expressed by the action, or at least to identify it as 'speech'? In one case, a US district court, for example, did not accept the defendant's argument that parking a wrecked car in front of his own house was not illegal because he wanted to express his protest against the police proceedings that had caused the

[18] Ibid. para 48.
[19] Ibid. para 49.
[20] Ibid. para 52.
[21] Ibid. para 55.
[22] Ibid. paras 56 and 62.

damage to the car. According to the court, not many people would interpret this act as an expression of opinion.[23] Damage to a public monument may be inflicted as a political expression of opinion, but still be banned by a legal system on valid grounds. Furthermore, it can be argued, as Robert Post has, that speech is not valuable in itself and can only be granted legal protection if it has some constitutional value (be it the service of democracy or the autonomy of the individual).[24]

In the *United States v O'Brien* case,[25] the US Supreme Court ruled that burning a military draft notice, although it may undoubtedly be considered an expression of opinion, violates the state interest in the order and integrity of recruitment. Therefore, the rule that the destruction or damage to draft papers may be sanctioned, and under which Mr David O'Brien was convicted, is not specifically aimed at restricting the freedom of expression but protects other legitimate public interests, hence the verdict was legitimate and the underlying law was not unconstitutional.

In the *Tinker v Des Moines School District* case,[26] the Supreme Court found that punishing high school students for wearing black armbands at school in protest against the Vietnam War was not constitutionally permissible because their actions did not interfere with education and did not conflict with the rights of other students. The denigration or burning of the national flag may also constitute speech, which may be covered by the protection of freedom of expression.[27] The boundaries of symbolic speech, that is, the expression of opinion without spoken, published words or images, have been extended in recent decades. The increasingly broad interpretation of free speech is well illustrated by the practice of the US Supreme Court, which referred to the striptease presented in night bars and other dances with naked ladies as belonging to the conceptual scope of free speech.[28] Theoretical support for this interpretation – although members of the court drew their inspiration from elsewhere – can surprisingly be found in the works of John Milton, who wrote that if censorship was to be reinstated, '[t]here must be licencing dancers, that no gesture, motion, or deportment be taught our youth but what by their allowance shall be thought honest'.[29] Naked dance is just one example of the type of actions which may be included in the scope of free speech. In another case, for example, the Supreme Court found that sleeping in a park *en masse* for demonstrative purposes is also 'speech', although another issue is that the interest of maintaining the cleanliness and orderliness of the park is stronger.[30] In the *Hurley v Irish American Gay, Lesbian,*

[23] *Davis v Norman* 555 F2d 189 (8th Cir, 1977).

[24] Robert C Post, 'Recuperating First Amendment Doctrine', *Stanford Law Review* 47, no 6 (1995), 1249.

[25] *The United States v O'Brien* 391 US 367 (1968).

[26] *Tinker v Des Moines School District* 393 US 503 (1969).

[27] *Street v New York* 394 US 576 (1969); *Texas v Johnson* 491 US 397 (1989); *the United States v Eichman* 486 US 310 (1990).

[28] *Barnes v Glen Theatre* 501 US 560 (1991); *City of Erie v Pap's AM* 529 US 277 (2000).

[29] John Milton, *Areopagitica*. Ed. by Edward Arber (London: Edward Arber, 1868), 50.

[30] *Clark v Community for Creative Non-Violence* 468 US 268 (1984).

and Bisexual Group of Boston case,[31] the ruling mentioned that abstract works of art such as Jackson Pollock's paintings or Arnold Schönberg's atonal musical works, as well as Lewis Carroll's playfully meaningless poems, also fall within the scope of free speech.[32] Baking a cake may therefore, in principle, stand a chance of being considered speech in certain circumstances.

In the *Masterpiece Cakeshop* case, Justice Clarence Thomas argued in his concurrent opinion that the wedding cake constitutes speech.[33] In his view, if an average person enters a room and sees a white, multi-storey cake, he will know immediately that he has arrived for a wedding. The message of the cake is celebration, and the expressive behaviour of making the cake deserves constitutional protection. In the course of the procedure, the opinion was expressed that making a special wedding cake is akin to traditional sculpture, only with different ingredients.[34] Phillips's legal representative also argued during the proceedings that the cakes made by his client were his artistic expressions, through which he communicated. The cake expresses that we are at a wedding, the couple's relationship is 'marriage', and that it all constitutes a reason to celebrate.[35]

The question, of course, is that even if we accept that, in the specific situation of the example, the cake is speech, whose speech do we think it is? Is it the speech of the cake's maker, or rather that of the couple getting married? (This issue also arises in the next section.) Furthermore, acknowledging the speech nature of the cake raises another difficult issue in the wedding context, the problem of drawing boundaries. If the cake is a speech at a wedding, is a chocolate fountain or an ice sculpture a speech? Does a flower arrangement also constitute speech, or a limousine service with music, or the wording of a greeting?

Another question is whether, in order for a wedding cake to carry a message, it is necessary for someone (anyone) present to understand that message or to view the cake as 'speech'. In other words, most guests – or an acquaintance looking at photographs of the event later – do not think of the wedding cake as an expression of opinion. Is it necessary for the audience to perceive expressive behaviour as speech, and thus as conveying an opinion, in order to recognise its speech nature? If the answer is in the affirmative, this implies that speech is only what its audience – or at least a part of it – considers as such. That is, if an expressive act is not perceived as an opinion by its audience, it cannot claim protection as free speech. In this case, it is also irrelevant whether the

[31] *Hurley v Irish American Gay, Lesbian, and Bisexual Group of Boston* 515 US 557 (1995).

[32] Ibid. 569. See Mark V Tushnet, Alan K Chen and Joseph Blocher, *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (New York: New York University Press, 2017).

[33] *Masterpiece* (n 3) 1742.

[34] Richard F Duncan, 'A Piece of Cake or Religious Expression: *Masterpiece Cakeshop* and the First Amendment', *Nebraska Law Review Bulletin* (7 January 2019), 9.

[35] Ibid. 10.

audience understands it or, in accordance with the communicator's intentions, how it evaluates the content of the speech.

Pollock's paintings are little understood, but many recognise that they should be valued as works of art in terms of 'speech' and in terms of freedom of speech. If we were to expect the audience to understand the meaning of a given behaviour in order to recognise its speech nature, we would exclude abstract art or instrumental music from the scope of free speech in general. Evaluating a cake as speech is a borderline case, and one that is difficult to decide on. In this specific case, the works of the master baker Phillips represented the artistic level of gastronomy. However, on the basis of objective criteria, it cannot be judged whether we consider this to actually be 'art' – and Phillips as the 'Bernini of buttercream'[36] – or rather as the work of a master with a skilful hand who is truly creative but whose work cannot be valued as art. It may also be possible that even less is enough to acknowledge its nature as speech; that is, it is not necessary for the audience to view expressive behaviour as speech: The intention of the creator is sufficient.

If the cake ordered but ultimately not completed in this case constitutes speech, we face additional demarcation issues. According to Justice Neil Gorsuch's concurrent opinion, joined by Justice Samuel Alito, it would be irrational to distinguish between cakes with and without text inscriptions. The wedding cake carries a message without any additional text.[37] This message is presumably identical to the message conveyed by wedding cakes which do bear texts and is related to the acknowledgment and approval of the marriage. Nevertheless, there may certainly be a difference between cakes in other respects as well – which also affects issues of the scope of free speech. The intention of the author and the circumstances of use, that is, the context of the speech, determine its meaning and the content of the speech.[38] The statement of reasons in the *Masterpiece Cakeshop* decision notes that a refusal to make a cake with an inscription celebrating a wedding may be subject to a different assessment than if the baker generally refuses to sell his cakes to same-sex couples.[39]

If a cake constitutes speech, it is considered to be speech regardless of whether it has any actual textual content on it. In the case of a text, which qualifies as a political opinion in the *Ashers* cake case, the speech nature of the cake bearing that text can be convincingly argued for. A cake with and without text will be similarly judged, that is, it falls within the scope of free speech (and the protection of free speech either extends to it or not, but that is another matter). However, if the cake is a 'work of art' and the baker is its creator, then not only the wedding cake but also the birthday

[36] Steve Sanders, 'Even the Bernini of Buttercream has to Serve Gay Couples', *NY Times*, 2 December 2017.

[37] *Masterpiece* (n 3) 1738.

[38] James Hart, 'When the First Amendment Compels an Offensive Result: *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Commission*', *Louisiana Law Review* 79, no 2 (2018), 419, 429.

[39] *Masterpiece* (n 3) 1723.

cake he makes is a speech, also regardless of its possible textual content. We can go even further: If the cake as a special work of art *generally* constitutes speech, then any cake, regardless of the occasion it is made for or if it is intended for general use, may be speech, and the refusal to sell it – construed within the meaning of the right to free speech as the voluntary silence of its maker – must be treated similarly.

From the reference in the *Masterpiece* decision, we can conclude that the court saw this differently, but did not have to make a general statement on the speech nature of the cake based on the facts of the particular case. If we argue that not all cakes constitute speech, then it is necessary to judge under what circumstances the cakes ordered and completed are considered speech, and what design of cakes are considered speech. (Is a homemade cake for a Sunday lunch considered speech? After all, it carries a message: It expresses something about the value of the family table and togetherness.) In any case, if we argue in favour of extending the scope of free speech, it is hardly possible to draw the line consistently on cakes with a wedding-related message or an explicitly political message.

Due to the peculiarities of law enforcement, it would probably be reasonable to conclude that a cake cannot be considered speech, no matter how artistically designed, and no matter how special or unique the occasion it was made for. In addition, this approach is supported by the fact that a cake, including a wedding cake, is typically not interpreted by those present at the event as speech, and that in this way we can avoid almost unmanageable border-drawing problems. Because even if only cakes made for the said purpose and in the way mentioned are considered speech, we cannot justify in a reassuring way why other, similarly creative activities – from the bouquet of flowers to the ice sculpture – do not qualify as such. And if they do qualify as speech, we will also include activities in the scope of free speech, even outside the context of gay marriage that may ultimately devalue the protection of behaviours that truly constitute speech. If all expressive behaviour is to be regarded as speech, the protection of manifestations that are important to the democratic public sphere will inevitably be jeopardised, because it would not be possible to maintain strict protection for all acts falling within the scope thus extended to freedom of expression. However, the question of the cake as speech is only the starting point; its judgment alone does not decide the judgment of the specific case and similar ones. If the cake – the specific bakery product in the cases reviewed – is considered to be speech, the next question is whether it would infringe the prohibition on compelled speech if an authority or court obliges the baker to make it.

B Compelled speech

Under the freedom of expression, an individual has the right to refrain from expressing an opinion. Cases of compelled speech in violation of this right, when an individual is required to express an opinion, have been encountered by the

US Supreme Court on several occasions. In the *West Virginia State Board of Education v Barnette* case,[40] the Board ruled that the requirement that children in public school regularly saluted and pledged allegiance to the US flag was unconstitutional. The rule was challenged by Jehovah's Witnesses, who argued that it required students to express opinions, and, in some cases, opinions that did not conform to their conscience. In another case, the obligatory oath of allegiance to federal and state constitutions imposed on state employees, as well as to distance themselves from the Communist Party and other 'destructive' organisations, was similarly declared unconstitutional by the court.[41]

The Supreme Court ruling in the *Hurley* case mentioned above is seen as a milestone in the area of freedom of expression and, in particular, in the field of rights to define the messages conveyed to the public by the activities of groups.[42] The Court ruled that organisers of private events were permitted to exclude groups advertising the opposite of the message the event organisers intended to convey, even if such public demonstrations had been organised and authorised. With regard to the specific issues of the case, the Court found that even if the State's aim was to prevent discrimination, citizens organising a public demonstration could not be obliged by the State to include groups conveying a message that the organisers did not wish to display at the demonstration. In the *Wooley v Maynard* case, the Supreme Court ruled that New Hampshire cannot constitutionally force its citizens to place the state motto ('Live free or die') on the licence plate of their car, if it is contrary to their individual moral convictions.[43]

The compelled speech that appears in US practice can be divided into two types. One group includes cases in which an individual is required to communicate messages required by the state (the Government), such as in the *Wooley* and the *West Virginia State Board of Education* cases, and the other type involves cases in which the government does not specify the content of the message but obliges the speaker to accept and transmit the speech of another speaker, such as in the *Hurley* case. If a wedding cake is considered a speech act and the baker is obliged to make it, and if all this is considered to be compelled speech, then this requirement falls into the second category, as it is private parties who order the cake with a text they have specified or even without any text. The outcomes of the *Masterpiece* and the *Ashers* cases did not, in fact, depend primarily on the assessment of the prohibition on compelled speech, but it featured in the statement of reasons and its application may arise in other similar situations in addition to the specific facts.

The prohibition of compelled speech may be raised by those who, in the case of the cakes in these cases, should have been considered a speaker. The prohibition

40 *West Virginia State Board of Education v Barnette* 319 US 624 (1943).
41 *Keyishian v Board of Regents* 385 US 589 (1967).
42 *Hurley* (n 31).
43 *Wooley v Maynard* 430 US 705 (1977).

of compelled speech could, of course, have been limited to the baker, but would festive cakes really have appeared to the public as the baker's speech? If a cake displays an exhortation to 'Support gay marriage', to whom does the audience attribute this message? To the customer who ordered it or to the maker of the cake? Even if the customer is the primary speaker in this case, if the cake – its preparation and delivery to the customer – is considered speech then the baker must also be considered a speaker. Compelled speech may not be prohibited only if the audience that perceives the speech identifies the speaker with the speech, that is, thinks that the speaker agrees with or supports the content of the speech.[44] Freedom of speech may also be violated if the speaker is not linked to the content of the speech and the speaker does not appear in front of the audience, as in the case of the baker; the compelled 'utterance' of words alone – in this case, making the cake – may also be offensive. Even if a disclaimer statement made by the baker appears next to the cake, in which he distances himself from the message of the cake he made – which is not a very realistic prospect at a wedding – it does not alleviate the harm caused by the compelled speech. It is unacceptable that, while he is compelled by the law to state a message, the content of which he rejects, he may seek to remedy his grievance by giving him an opportunity to distance himself from it immediately.[45]

The decision in the *Ashers* case suggests that, regardless of the content of the message in a particular order, the baker may have the right to refuse the order to convey any message whose content he does not agree with.[46] In the case of the inscription requested in the specific case ('Support gay marriage'), it may be said that the baker refused to make cakes with this message in general, that is not in view of the identity of the specific customers. But what happens when a Muslim customer asks for a cake bearing the message 'Happy birthday'? The reference in the *Ashers* decision may also be interpreted as meaning that the baker has the right to reject the order in this case, too. If the cake qualifies as speech, on what basis do we differentiate between these two cases? Nevertheless, it seems clear that, in the case of such a 'Muslim birthday cake', the reference to the baker's freedom of speech would hardly be a strong enough argument in court.[47]

One possible answer to the problem of differentiation is to consider none of the cases to be manifestations of free speech. Another approach is that we may find more compelling arguments in favour of requiring the baker to make birthday cakes for all his customers than to make cakes in support of gay marriage.[48]

[44] *Ashers* (n 9) para 54.

[45] Rex Ahdar and Jessica Giles, 'The Supreme Courts' Icing on the Trans-Atlantic Cakes', *Oxford Journal of Law and Religion* 9, no 1 (2020), 212, 216; *Pacific Gas Electric Co. v Public Utilities Commission* 475 US 1, 16 (1986), quoted by Justice Thomas in the *Masterpiece* case.

[46] *Ashers* (n 9) para 55.

[47] James M Oleske, Jr, 'The "Mere Civility" of Equality Law and Compelled-Speech Quandaries', *Oxford Journal of Law and Religion* 9, no 2 (2020), 288, 301–302.

[48] Ibid. 302–303.

On the one hand, if someone is not served in a shop or by a service provider that is otherwise accessible to anyone, because they are Muslim or because they are gay, this is direct discrimination, which can be prohibited even at the expense of freedom of expression. However, if someone refuses to convey a particular message, regardless of the identity of the customer, and his decision is closely linked to his religious beliefs, and the message in question clearly violates it, it is more difficult to argue that the customer's right to represent his religious beliefs is stronger than the interest of ensuring equal treatment for all. That is, no stronger argument can be made for refusing to make cakes in general with a message 'Happy birthday' than can be made for specifically refusing to make birthday cakes for Muslims.

Distinguishing between different cakes may still be difficult. The first question is that of which cakes are considered 'speech'. The cases of an obligation to make cakes with a caption bearing a political message is most easily classified in the category of compelled speech. However, if a cake with no text on it (such as the one in the *Masterpiece* case) is also considered speech – as a work of art – it may also be covered by the prohibition of compelled speech. And if we consider such cakes made for birthdays and not just for festive occasions, the baker's options for refusal are further expanded. In this case, we are again faced with issues related to discrimination. It is a question of whether, in such a case, the baker can select from among the customers he serves. If each cake is 'speech', then their maker and their seller, can in principle choose when he wants to 'speak' and when he does not. That is, he can say that he does not sell any cakes to gay couples but he does to straight ones. He may not sell birthday cakes to black people, but does to whites. Or simply he does not serve any Asian customers with any cakes. If all cakes are speech, then obligations regarding the general, non-discriminatory sale of goods and services do not apply to bakeries. If only the works of certain bakers are considered speech, anti-discrimination rules do not apply in places that sell their products. And if we apply the possibility of refusal only to certain types of cake, such as wedding cakes or cakes with a political message, judges would have to distinguish between some cakes and others in such cases, based on their message, quality and context of use (consumption).

It is important, however, to note that even if cakes or certain cakes are considered speech, and thus their compulsory sale is classified as compelled speech, it is not certain that this obligation constitutes a violation of freedom of expression. Compelled speech is permissible within the framework of the doctrine of restriction of freedom of speech. That is to say, it must be determined whether discrimination occurred when a baker refused an order and, if so, whether the application of the rules on the obligation of equal treatment in a particular life situation is more important than the baker's freedom of expression. If cakes are not considered speech at all, this consideration is devoid of purpose and the baker must find another good reason for refusing to bake certain cakes.

IV Discrimination based on sexual orientation or political opinion

Judge Hale's opinion in the *Ashers* case suggests that a general, universal refusal to make cakes with a specific message and the refusal of an order from specific individuals because of their characteristics should be judged differently.[49] In the former case, the refusal may be permissible in the light of the rules on non-discrimination, but not in the latter case. That is, had the cake in the *Ashers* been ordered for the wedding of a gay couple, the outcome of the case could have been different, provided that the reason for the refusal was justifiably the sexual orientation of the customers.[50]

The prohibition of discrimination, also known as the requirement of equal treatment, prohibits both direct and indirect discrimination. Direct discrimination is when someone is treated less favourably than others in a similar situation, typically because of their racial or ethnic origin, religion or belief, disability, age or sexual orientation. Indirect discrimination occurs when a regulation or practice is universal, that is, it applies equally to a member of any social community, but the restriction affects the members of some groups in practice to a lesser extent than others. On that basis, in the *Ashers* case, at most, it is possible to posit the existence of indirect discrimination, since the baker in general would have refused to make a cake with the caption in question for anyone, regardless of their sexual preferences. At the same time, it can be argued that the restriction it applied put gays themselves at a disadvantage compared to others in terms of the provision of his services. However, given the widespread acceptance of gay marriage in the UK, it cannot be said that the sexual orientation of the person ordering the inscription is clearly visible from the content of the text.[51] The inscription in support of gay marriage is a political opinion. Bakeries and other similar service providers should not be obliged to provide a service to any customer with a political opinion, but if they serve a representative of a particular position, they should do so in a non-discriminatory manner, that is, in a way that is open to anyone.[52] Indirect discrimination is also prohibited as a general rule and is acceptable only if it can be justified by a legitimate purpose, such as the freedom of expression of a party who disregards the requirement of equal treatment.

The facts in the *Masterpiece* case are different. In the case of a gay couple ordering a cake for their wedding, direct discrimination can also be established, as the store sold the wedding cake to heterosexual couples without further ado. The violation of fundamental rights can also be brought about by the exercise of another fundamental right – freedom of religion and freedom of speech – but the US Supreme Court has

[49] *Ashers* (n 9) para 62.

[50] Andrew Hambler, 'Cake, Compelled Speech, and a Modest Step Forward for Religious Liberty: The Supreme Court Decision in *Lee v Ashers*', *Law & Justice – The Christian Law Review* 181 (2018), 156, 169.

[51] Eugenio Velasco Ibarra, '*Lee v Ashers Baking Company Ltd and Others:* The Inapplicability of Discrimination Law to an Illusory Conflict of Rights', *Modern Law Review* 83, no 1 (2020), 190, 196.

[52] Ibid. 199.

avoided answering the question as to whether non-discrimination or baker's rights should be given priority in a particular case.

V Protection of human dignity

In the cases discussed, both parties may also rely on the protection of human dignity. Refusal to provide a service may be assessed not only as discrimination, but also as a violation of the customer's human dignity. However, as Christopher McCrudden points out, the excessive extension of the protection of dignity, including the right to respect and dignity as respect, is an illiberal move that supports moral populism, compromising the protection of the rights of the individual who is accused of the violation of the dignity of another.[53] Protection against offensive manifestations alone cannot be guaranteed in a social system based on respect for individual rights.[54]

The baker also has human dignity. So far we have also identified two fundamental rights that may, in principle, be suitable for supporting his decision not to bake certain cakes. At some point, however, the protection of dignity may also play a role. Someone may think that an artistically made or labelled cake is 'speech', and that a cake presented to the public – served at a wedding or birthday – is not the baker's speech (because the wedding guests do not identify the cake with him; he is not present, no one but the customer knows him). In this case, the baker spoke in the solitude of his workshop when he made the cake (if the cake is speech, it is arguably the baker's speech during that time). In addition, it could be argued that the baker's solitary speech – and its avoidance, its silence, that is, his refusal to make the cake – is not protected by the freedom of expression, as this freedom only covers opinions disclosed and made public. Anyone may murmur whatever he wants to himself, and if he insults or slanders without an audience, he is not committing an offence. In this case, freedom of speech is in no hurry to protect the baker, but he can still rely on his human dignity. If a Christian baker is obliged, despite his convictions, to write a message in support of a gay marriage, making an artistic cake for such a wedding, his dignity would be violated, even if he makes it alone. However, this recognition has no particular practical use in recognising a violation of the baker's right to freedom of religion in the compelled performance of the order. In addition to a fundamental right with well-defined content, a separate reference to human dignity is unnecessary.

[53] Christopher McCrudden, 'The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in *Ashers*', *Oxford Journal of Law and Religion* 9, no 2 (2020), 238, 260.

[54] In the case of hate speech, too, the grievance must reach a degree of intensity that poses a danger or threat to members of the attacked community that justifies state action against that speech. See, for example, Section 5 of the British Public Order Act or the decision of the US Federal Supreme Court, *Brandenburg v Ohio* 395 US 444 (1969).

VI Protection of freedom of religion

In cases such as the one discussed, the baker may invoke the protection of his freedom of religion in addition to, or even instead of, the freedom of expression as a ground for refusing to make the cakes ordered from him. It is a widespread practice to refuse to provide certain services based on religious or conscientious beliefs. A Christian doctor is not required to perform any abortion surgery because he believes that human life begins with conception, so abortion is a murder. There is no question, however, that in the case of cakes, the connection between a religious belief and the act which is refused is much more distant, and more indirect.[55]

According to Richard Moon, the refusal to make cakes is more of a political or civic position for Christian bakers than a conscientious objection.[56] By baking a cake, no one is compelled to engage in any activity that he deems immoral. According to Moon, regulation can be neutral in terms of religious beliefs and practices; that is, it may allow a conscientious exception to the general obligation to perform a given activity if the beliefs or practices underlying it can be viewed as personal or communal on the part of the person concerned. But the baker's view that same-sex relationships are a sin and should not be given legal recognition is not simply a private or personal matter. This is a position on the morality of the actions of others, a view that is undercut at the level of the legal system and society, as such relations can be freely established and are supported by a significant part of society, and it seeks to soften the obligation of non-discrimination under this social position through individual exceptions.[57] McCrudden, on the other hand, points out that forcing the baker to bake a cake would oblige the baker to behave in a way that he rejects on religious or moral grounds. The maker of the cake would act as an agent for those who support same-sex marriage and be obliged to express an opinion that he rejects.[58]

If we accept that the right to refuse to bake a cake can be traced back to the right to freedom of religion then the scope of activities covered by freedom of religion must also be defined. Making a birthday cake ordered by a gay couple cannot be refused on the grounds of conscience because celebrating a birthday has nothing to do with religious beliefs. A baker cannot refuse to provide a service on the grounds of his general dislike of homosexuals. At the same time, to say that a cake to be made for a wedding is just like any other would be to ignore religious beliefs related to weddings and the institution of marriage.[59] Furthermore, if the refusal to bake a cake is not based on the protection of freedom of speech but on freedom of religion,

[55] McCrudden, 'The Gay Cake Case', 267.

[56] Richard Moon, 'Conscientious Objection and the Politics of Cake-Making', *Oxford Journal of Law and Religion* 9, no 2 (2020), 329, 331.

[57] Ibid. 334–335.

[58] McCrudden, 'The Gay Cake Case', 267.

[59] Opinions of Judges Gorsuch and Alito, *Masterpiece* (n 3) 1739–1740.

then similar undertakings providing services that are not necessarily expressive and which can be interpreted as an opinion may also claim the right to refuse to provide the service. In the case of same-sex couples' weddings and wedding receptions, the driver, taxi driver, waiter, porter, sound engineer and so on could in principle also refuse to work. We assume that, in these cases, the courts would find less grounds for their refusal to participate but, as outlined above, the line is not between expressive and non-expressive, but between behaviours that affect or do not affect religious beliefs.

VII Legal persons' freedom of opinion and religion

Moon questions that, since in the cases examined the parties are not litigating individuals (bakers) but legal persons (companies), is it at all possible to rely on freedom of opinion or religion in their case? Ashers Bakery Ltd had sixty-five employees at the time of the case. To what extent does placing a mechanically generated text message on a cake violate the owner's personal rights?[60] The issue of human rights for legal persons can indeed cause headaches. In the *Ashers* case, the Supreme Court made it clear that the company and the owners are alternatives to each other with regard to the present facts.[61] Legal persons should also be guaranteed the exercise of human rights if their refusal would violate the rights of the human person behind the legal person.[62] When we talk about a legal entity, we must not forget that it cannot exist without the humans behind it. Restrictions on the autonomy of a legal person affect the autonomy of the individuals behind it (owner, members or employees). An action brought by a legal person does not therefore in itself preclude it from relying on the protection of freedom of expression or religion.

VIII Conclusion

It is clearly unsatisfactory to suggest merely that the buyer could have received a cake to suit his taste in a number of other places. But, as Rex Ahdar and Jessica Giles note, there is something unrealistic about the fact that such an intense debate and long, complicated and expensive procedures have unfolded around a cake. The complainant (and frustrated cake buyer) did not, of course, want the cake, but used the procedure for political purposes, making his position public. This is no longer just a matter of law but a field of *Kulturkampf*.[63] The same is true of the other side: By refusing to fulfil the order for the cake, the baker is also sending a political

60 Moon, 'Conscientious Objection', 348.
61 *Asher* (n 9) para 57.
62 McCrudden, 'The Gay Cake Case', 258.
63 Ahdar and Giles, 'The Supreme Courts' Icing', 221–222.

message and expressing his opposition to gay marriage. The baker's speech is not really the cake itself (which the judgments did not oblige him to 'declare'), but this 'silence' (non-fulfilment of the order), which in this case is very eloquent.[64] The baker is also a participant in the *Kulturkampf*.

The question is whether there is a quibble from compliance with general, equal treatment laws by reference to the individual rights of the baker. Terri Day argues that, in the face of sincere religious beliefs, a compelled action (the obligation to make a cake) would be to compel political correctness, which is contrary to the First Amendment to the Constitution.[65] As she writes, public accommodation laws (laws ensuring equal access to services) became the new battlegrounds for religious conservatives after losing the battle over same-sex marriage.[66]

As we have seen, a completely ordinary life situation – ordering a cake for a festive occasion – raised extremely complex legal issues. In the following, we will try to give a clear overview of these, not only with regard to the two specific cases but also with regard to the general issues that arise. The first question to be clarified is which cakes in the table below should be considered speech and are any of them protected by the freedom of speech, that is, the refusal to make or sell of which is thus protected.

Table 1 Cakes as speech

	Political goal	Wedding	Birthday	Weekday
Artistic, captioned	*Masterpiece*	*Ashers*		
Captioned, not artistic				
Artistic, not captioned				
'Casual'				

Source: Compiled by the author

The table may be completed according to individual considerations for the sixteen possible cakes, depending on which cakes are considered to be covered by freedom of expression (the cakes in the two cases presented are listed in the table). I have argued before that none of the cakes should properly be considered speech, that is, the table should remain completely empty. This is without prejudice to the fact that making an inscription, regardless of its medium, be it a cake or otherwise, may be speech in itself. That is, in specific cases, I consider only the inscription assigned to the cake, but not the entire work speech.

However, if we consider a cake to be 'speech', additional questions arise. Is the protection of freedom of expression a strong enough counterweight to the rights of the

[64] Oleske, 'The "Mere Civility" of Equality Law', 304.

[65] Terri R Day, 'Revisiting *Masterpiece Cakeshop* – Free Speech and the First Amendment: Can Political Correctness be Compelled?', *Hofstra Law Review* 48, no 1 (2020), 47–80.

[66] Ibid. 79.

customer? Is it also strong enough that a baker refuses to provide services not only in general terms but also in the direction of individual customers? Does the protection of freedom of expression also justify direct discrimination? It can be argued that if a cake is a 'speech', then discrimination in connection with the preparation and sale of that cake is also allowed (due to the special protection of freedom of speech, the political nature of the speech and the easy availability of the cake elsewhere).

If the cake does not constitute speech, can any other argument justify the baker's rejection of the order? Is the reference to the protection of religious freedom strong enough? In that case, it is necessary to determine whether the protection of the latter right also gives rise to a refusal by the baker to provide services, not only in general terms but also directed towards individual customers. (That is, if one refuses to make or sell not only the captioned cake but any cake requested for a gay wedding.) In the case of a birthday cake for a gay customer, one certainly cannot rely on one's freedom of religion. It should also be clarified whether direct discrimination (that is, different treatment of gay and heterosexual couples) is also justified by the protection of religious freedom. I have argued above that if the cake is made for an occasion closely affected by religious freedom (such as a wedding or celebration of adoption), then yes, and the baker's freedom of religion overrides the right to equal treatment. However, in the case of gay couples, the same path should be followed.

It is difficult to establish universal approaches, and the courts have successfully avoided this. A number of serious fundamental rights issues need to be judged for this, and it is indeed more fortunate that decisions taken in specific cases will shape the applicable legal approach, provided that there is a coherent practice. Some general principles will crystallise out of this process, and this is what the present writing has tried to contribute to. These can be summarised as follows: The excessive extension of the scope of freedom of expression is dangerous precisely for the freedom of expression; the right to non-discrimination may be restricted in view of the direct effect of religious freedom and the protection of human dignity has no independent role in judging matters alongside these three fundamental rights. In both cases reviewed, it was clear that the baker's refusal was not directed against the buyers personally but against the nature of the event to be celebrated; furthermore, the buyers had easy access to the cake requested from elsewhere. This also raises an important question of principle in the protection of fundamental rights: To what extent is there scope for the recognition of their horizontal effect between private parties? In other words, if the satisfaction of the buyer's demand is not jeopardised by anything – due to its easy availability elsewhere – is state intervention in the relationship between the baker and the buyer justified at all?

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Index

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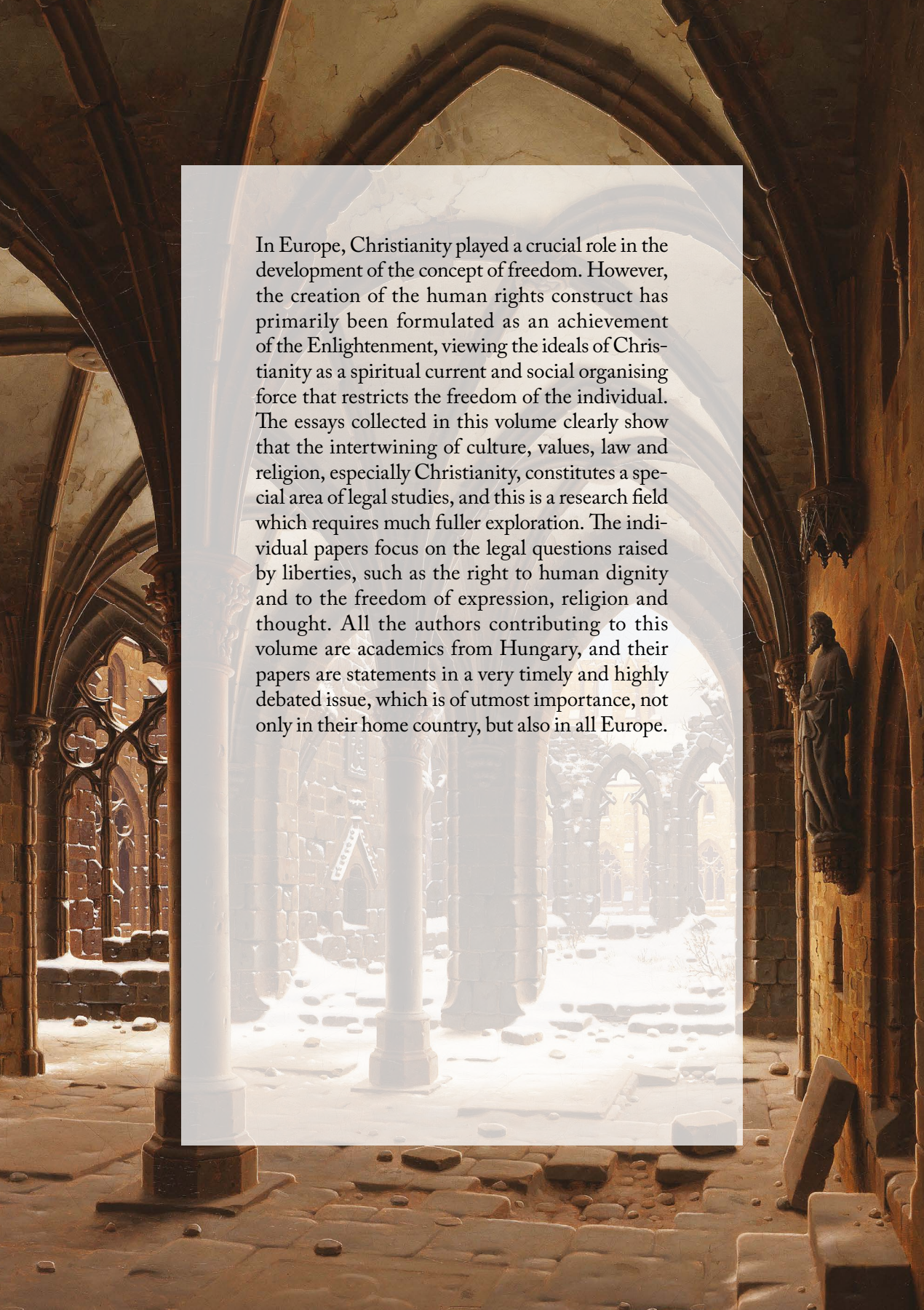

In Europe, Christianity played a crucial role in the development of the concept of freedom. However, the creation of the human rights construct has primarily been formulated as an achievement of the Enlightenment, viewing the ideals of Christianity as a spiritual current and social organising force that restricts the freedom of the individual. The essays collected in this volume clearly show that the intertwining of culture, values, law and religion, especially Christianity, constitutes a special area of legal studies, and this is a research field which requires much fuller exploration. The individual papers focus on the legal questions raised by liberties, such as the right to human dignity and to the freedom of expression, religion and thought. All the authors contributing to this volume are academics from Hungary, and their papers are statements in a very timely and highly debated issue, which is of utmost importance, not only in their home country, but also in all Europe.