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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