

THE RELATIONSHIP BETWEEN THE CONCEPT OF A PERSON IN THE PHILOSOPHICAL- ANTHROPOLOGICAL SENSE AND A LEGAL SUBJECT AS A HOLDER OF PERSONALITY AND HUMAN RIGHTS

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Abstract

The legal status of human beings has been the subject of discussion by numerous theoreticians in the history of philosophy and law, from Kelsen and Fuller, to Dewey and Arendt, natural law and positive law theoreticians. Throughout history, the legal status of a person has been an interesting mixture of reality and abstraction, naturalistic and legal-technical perspectives. Different theoretical interpretations have always resulted in different practices. The paper aims to offer a more detailed picture of approaches to the legal status of a natural person as a holder of human and personality rights as well as to point out the importance and reasons for the recognition of legal subjectivity of each human being.

Keywords: legal subjectivity, human being, human rights, personality rights

1. Introduction

The category of legal subject is identified in such a way that A is included in the legal system X, which prescribes the rights and obligations of A, from which it follows that A is the legal entity of that system.¹ The concept of a legal subject is a complex concept. The complexity of the concept is „the reason why changes in the scope of

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¹ Cf. Ludvig BECKMAN: Personhood and Legal Status: Reflections on the Democratic Rights of Corporations. *Netherlands Journal of Legal Philosophy*, vol. 47. no. 13. (2018) 20.

defined subjects are rare, since they require drastic changes in the system.⁴² Most legal systems do not have a consolidated basic law that would determine the legal personality of a human being, and „different areas of law, with various approaches to legal personality, prescribe different determinants and parameters of legal subjectivity.“⁴³ Law is an expression of culture, and therefore legal subjectivity. The prevailing ethical theory in a community reflects the attitude of whether some people are morally more important than others, which is why it is also decisive for the legal status of every human being.

Without exaggeration, we can claim that determining the content of the concept of a natural person, and then the legal status of every human being, is „one of the most important in every legal era.“⁴⁴ The fight over the definition of a person „represents a fight over basic social values“, according to Nelkin.⁵ The philosophical, and then also the legal concept of a person is the subject of different interpretations and radical tensions in some societies. Strong metaphysical disagreements exist especially in the context of determining whether persons, and then legal subjects, are all human beings. Although it is clear that every person is a legal subject and holder of human and personality rights, legal and moral theory and practice sometimes leaves open the question whether the human beings in so-called ‘borderline situations’, such as human embryos and fetuses, people in coma and mental patients, have legal personality.

2. Historical development of the legal subjectivity of a natural person

Concepts can be properly understood, including the concept of a legal subject, only when they are placed in an appropriate socio-historical perspective.⁶ In this way, it is possible to determine the content of the definition and its interpretation. The legal status of human beings has been the subject of discussion by numerous theoreticians

² Phillippe DUCOR: The Legal Status of Human Materials. *Drake Law Review*, vol. 44. no. 2. (1996) 198–200.; James CRAWFORD–John BELL: *International human rights and humanitarian law*. Cambridge, Cambridge University Press, 1st edition, 2002. 16. They claim that international law faced problems when it had to give subjectivity to entities other than states.

³ Lisette TEN HAAF: Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction. *Open Access Journal*, vol. 5. no. 1. (2016) 23. See also: Zoë ROBINSON: Constitutional personhood. *George Washington Law Review*, vol. 84. no. 3. (2016) 608. Courts lack a framework for analyzing legal personality because there is no coherent doctrine on this issue.

⁴ Cf. Britta VAN BEERS: The Changing Nature of Law’s Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person. *German Law Journal*, vol. 18. no. 3. (2017) 560. Likewise Dorothy NELKIN: The Problem of Personhood: Biomedical, Social, Legal, and Policy Views. *Health and Society*, vol. 61. no. 1. (1983) 110.

⁵ Jens DAVID OHLIN: Is the concept of the person necessary for human rights?. *Columbia Law Review*, vol. 105. no. 1. (2005) 212–214., 224.

⁶ See also: Paul BAUMGARDNER: Legal Right and Personhood in Hegel’s Phenomenology of Spirit. *Birkbeck Law Review*, vol. 4. no. 1. (2016) 16.

in the history of philosophy and law, from Kelsen and Fuller, to Dewey and Arendt, natural law and positive law theoreticians. Throughout history, the legal status of a person has been an interesting mixture of reality and abstraction, naturalistic and legal-technical perspectives. The later concepts only supplemented the earlier ones, while the core remained the same.⁷ Different theoretical interpretations have always resulted in different practices.

In the history of legal theory, two fundamental approaches to the legal status of a natural person crystallized. According to the first, the legal status of a natural person is understood as a philosophical-anthropological concept, while according to the second, the legal status of a natural person is exclusively a 'technical', abstract status.⁸ The first one was inherited from the Greeks and implies the connection of legal status with the essential and universally inherent nature of a natural person, while the second approach to the legal status of a natural person is technical, defined according to the consequences arising from its content.

In Roman law, the legal subject was understood as a technical concept. According to Mussawira and Connal, „a natural person in Roman law was only one of the legal operations with a legal purpose.“⁹ Baumgardner finds one of the reasons for the technical concept of a person in Ancient Rome in „a wide geographical area in which no deeper meaning was attached to the concept of a citizen so the technical definition of a legal person meant - an empty social self.“¹⁰ The disconnection of a legal subject from corporeal human beings meant that neither the birth nor the death of a human being, as a biological category, necessarily coincided with the moments of emergence and cessation of legal subjectivity.¹¹

The Romans used the term *persona* for a person, which was broader than a legal subject because it also included slaves.¹² According to Roman law, not all people were legal subjects, nor did they have equal rights within the framework of legal capacity, which consisted exclusively of property rights. „The term *capitis deminutio maxima* denoted a case in which an individual for certain reasons lost the status of a free man, status *libertatis*, and became a slave, that is, ceased to be a legal subject and became a legal object, *res*.“¹³ The reasons for this were sociological-economic and political -social relations, such as class and social affiliation, religion and sex. It can be concluded that the legal subjectivity of slaves was conditioned by changing

⁷ Cf. VAN BEERS op. cit. 569–570.

⁸ Cf. Miguel VATTER–Marc DE LEEUW: Human rights, legal personhood and the impersonality of embodied life. *Law, Culture and the Humanities*, vol. 1. (2019) 2–5.

⁹ Edward MUSSAWIRA–Connal PARSLEY: The law of persons today: at the margins of jurisprudence. *Law and Humanities*, vol. 11. no. 1. (2017) 53.

¹⁰ BAUMGARDNER op. cit. 16.

¹¹ Cf. VAN BEERS op. cit. 573. Thus, an individual could simultaneously represent different *personae*, depending on the legal and social situation (*pater familias*, owner, employee), by which the legal person was separated from the metaphysical connotations associated with the human individual.

¹² Cf. William J. CURRAN: An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women. *Health and Society*, vol. 61. no. 1. (1983) 59.

¹³ Marko PETRAK: Ex nihilo nihil fit. *Novi Informator*, vol. 3. (2017).

social circumstances, more precisely, economic goals. The fundamental purpose of a legal entity in Roman law was to resolve property-legal relations. The Roman-legal concept of a legal subject also includes Roman-legal circumstances (use of slaves for economic gains, a wide geographical area, etc.), as well as the purpose of the concept, which is fundamentally focused on property-legal relations.

3. The relationship between the concept of a person in the philosophical-anthropological sense and a legal subject

Subjective non-property rights are part of the rights within legal capacity. Precisely because of these personality rights, immeasurable rights, it is necessary to analyse whether a natural person in the legal sense is the same as the concept of a person in a philosophical sense, that is, whether the concept of a legal subject with legal capacity that also includes personality rights can be a technical category. Related to this is the question of whether there is a difference between the subject of human rights and personality rights.

The notion of a legal subject is at the centre of the struggle between legal positivism and natural-law theory, more precisely, the exclusively positivist understanding of the legal status of a natural person as fictional and technical on the one hand, and the natural-law understanding of a legal subject that is equal to the philosophical-anthropological understanding of a person, on the other. But should the legal subjectivity of a natural person be an 'either – or concept'? Given that the scope of legal capacity includes both personality and property rights, we can claim that the status of a legal subject requires both approaches. Such is the point of view of numerous other theoreticians who more or less agree with the position that there is a difference between a legal subject and a person in a philosophical-anthropological sense, but these are not completely separate concepts. Finnis as well proposes an approach that encompasses both understandings.¹⁴ Dewey believes that the concept of a legal subject is practical, in contrast to the concept of a physical person in the philosophical-anthropological sense, which is not.¹⁵ Kelsen claims that „law does not define man in totality, but with individual acts that belong to the community, and man as a naturalized subject is only an auxiliary concept of legal expertise that regulates the behaviour of many people.“¹⁶ Beckman believes similarly and claims that although legal subjectivity of a natural person is pragmatically determined by law, she remains a person in the philosophical sense.¹⁷ Coughlan believes that legal status is determined by purpose, so he concludes that the legal definition of

¹⁴ Cf. John FINNIS: *Philosophy of Law*. Oxford, Oxford University Press, 1st edition, 2011. 168.

¹⁵ Cf. John DEWEY: The Historic Background of Corporate Legal Personality. *The Yale Law Journal*, vol. 35. no. 6. (1926) 658–661. Dewey concludes that the concept of a natural person is dependent on non-legal considerations, such as historical, political, moral, philosophical, metaphysical, theological, which require heavy philosophical analysis.

¹⁶ Hans KELSEN: *Čista teorija prava*. Zagreb, Naklada Breza, 1st edition, 2012. 49.

¹⁷ BECKMAN op. cit. 23.

a person should be more restrictive than what a person naturally means.¹⁸ Olivia Little advocates a political, pragmatic concept of legal status, as separate from the natural.¹⁹ Grear believes that there is a deep and inseparable connection between a legal subject and a human being, although it is clear that legal subjects „are not just people“.²⁰ Van Beers sees the legal subject as a mask, the already mentioned *persona*, which represents „the roles that subjects play on the legal stage, while the naturalistic conception of *personae* is necessary in the regulation of bioethical issues.“²¹ Mussawira and Parsley consider it necessary to separate the „functional and pragmatic, Roman concept of the person, from the philosophical, which has far-reaching theological, philosophical and political dimensions.“²² Ten Haaf distinguishes between naturalistic and constructivist approaches to legal personality, whereby the naturalistic approach implies the determination of the philosophical-anthropological status of a person, while constructivism would imply the creation of legal subjectivity, thus, its separation from the philosophical-anthropological status.²³ We can conclude that the majority of theoreticians relate the legal and philosophical notion of person, with the fact that legal includes entities other than human beings, while on the other hand, man is more than a legal definition.

The legal status of a natural person is a question of positive law, but when it includes subjective non-property rights arising from the nature of things, then it is necessary to connect the rights of personality with the natural, philosophical-anthropological status of a person. That is why the legal status of a human being as a fiction is appropriate in the field of property rights, but not in the protection of fundamental rights to life and liberty. Companies represent legal fictions that arise from the fulfilment of presumptions and their legal personality does not imply a subjective non-property right to life, while a human being is a legal subject *ipso iure*, with personality rights. Many theoreticians agree with this statement. Vatter and De Leeuw warn that an exclusively fictional conception of the legal status of a physical person leads to „functionality generating disembodiedness, which leaves human life unprotected“.²⁴ Legal fiction can create „dangerous and alarming legislation“, Aljalian

¹⁸ Cf. Michael J. COUGHLAN: *The Vatican, the Law and the Human Embryo*. London, Macmillan, 1st edition, 1992. 62.

¹⁹ Cf. Margaret Olivia LITTLE: Abortion and the Margins of Personhood. *Rutgers Law Journal*, vol. 39. no. 2. (2008) 347.

²⁰ Cf. Anna GREAR: Human rights – human bodies? Some reflections on corporate human rights distortion, the legal subject, embodiment and human rights theory law critique. *Law Critique*, vol. 17. no. 2. (2006) 179.

²¹ VAN BEERS op. cit. 579.

²² MUSSAWIRA–PARSLEY op. cit. 53.

²³ Cf. TEN HAAF op. cit. 5–10. The naturalistic approach sees a legal person as a reflection of a human being in real life, and consists of a biological and ontological substrate. In constructivist approaches, a legal person is not defined as a reflection of a human being in everyday life, but as a legal construct that can be anything and is the product of a legislative decision.

²⁴ VATTER–DE LEEUW op. cit. 2–4.

argues.²⁵ Van Beers concludes similarly. She sees legal fiction as a „striking example and possibility of law for distorting the truth in order to achieve some purpose“.²⁶ The legal subjectivity of a natural person, understood exclusively as a technical one, unrelated to the philosophical concept of a person, makes it possible to reduce man to a means. In today’s postmodern society, biotechnological development causes changes in everyday life, which in various dimensions bring the possibility of improving human life and nature, but at the same time carry the danger of dehumanization and denaturalization of human beings, in which postmodernist and poststructuralist philosophy plays a significant role. „Dignity is oppressed by postmodern efforts to subjugate man as a means to realize an uncontrolled will to dominate“.²⁷ Thus, the legal subjectivity of a physical person, a human being, understood exclusively as a fiction, could be a legal tool for the implementation of biotechnological goals while denying personality rights, fundamental human rights.

4. Difference between human and personality rights

4.1. What is human right?

The content of the term ‘human right’ is undefined and does not satisfy one of the basic rules of definition, the prohibition of circularity. The circularity of the definition of human rights is inevitable, if we take into account „that the inherent nature of a right is human, *differentia specifica*, in relation to other, ‘ordinary rights’, *genus proximum*, which are also human.“²⁸ Not every right that a human being has is a ‘human right’.²⁹ It is not easy to explain the difference between positive right that is not human and ‘human right’, even though determination of the difference is important, especially in the context of the discussion about fundamental human rights, which exist as natural rights regardless of their recognition in a particular positive legal system.

The creation of a norm, that is, a human right, implies a procedure that includes three levels: the first level implies the establishment of an object that is considered suitable for „identification as a human right“, the second level implies „the creation of a binding norm“.³⁰ In the third phase, it is necessary to make the norm enforceable,

²⁵ Natasha N. ALJALIAN: Fourteenth amendment personhood: Fact or fiction. *St. John’s Law Review*, vol. 73. no. 2. (1999) 499.

²⁶ VAN BEERS op. cit. 580.

²⁷ Dubravka HRABAR: Postmoderno doba kao predvorje negacije dječjih prava. *Zbornik radova Pravnog fakulteta u Splitu*, vol. 57. no. 3. (2020) 668.

²⁸ Gregori GRAOVAC: Geneza i važnost prava na osobnu slobodu. *Zagrebačka pravna revija*, vol. 2. no. 2. (2013) 240–241. Likewise: James GRIFFIN: Human rights: questions of aim and approach. In: Ernst GERHARD –Jan-Christoph HEILINGER (ed.): *The Philosophy of Human Rights Contemporary Controversies*. Stuttgart, De Gruyter, 1st edition, 2012. 6.

²⁹ Cf. Christian TOMUSCHAT: *Human rights: Between Idealism and Realism*. Oxford, Oxford University Press, 1st edition, 2003. 3.

³⁰ Cf. *Ibid.* 31.

that is, to ensure its effectiveness through mechanisms and procedures.³¹ While the last two levels are clear and imply the usual procedure of creating and executing a norm, the first level is complex. The complexity is manifested in the fact that determining the object of human rights opens up a complex area of power struggle over the definition of human rights. In order to determine the object of human rights, it is necessary to know the source of human rights. Scientific discussions do not reach a consensus on this fundamental question. Although there are several schools and definitions of human rights, we can divide them into two main ones. On the one hand, there are advocates of human rights who find their basis in human nature, that is, natural law, while on the other hand there are advocates of the political concept of human rights. The first concept implies that human rights derive from human nature, its foundation is in the dignity of the human being. The second concept implies a functional approach, which to some extent can be identified with the United Nation's working definition of human rights in global politics.³²

4.2. Personality rights

Each personality right is a subjective civil right, but a non-property right, which is why it is more difficult to define, considering that as a non-property category it encompasses the field of philosophy. In terms of their content, personality rights represent a mixture of „many contents of public and private law, law and morality“.³³ The root of the modern concept of personality rights (as well as human rights) is found in natural law and the concept of inalienable personal rights with which every person is born and which represent the reason for existence and the basis of legal personality. Such rights are the right to life and liberty.³⁴

Radolović defines the personality rights as a branch of law that

„by using the means of civil law protects the personality, the totality of the psycho-social state of a person.“³⁵ Gavella defines personality rights as „goods that belong to a person as a biological being, such as life, body, health and as those that are in each legal order recognized to every person as a spiritual and social being, such as freedom, honor, reputation, name, image, privacy.“³⁶

³¹ Ibid.

³² Cf. GRIFFIN op. cit. 12–13.

³³ Aldo RADOLOVIĆ: Specifični postupovnopравни problemi u zaštiti prava osobnosti. *Zbornik Pravnog fakulteta Sveučilišta u Zagrebu*, vol. 63. no. 3–4. (2013) 712.

³⁴ Cf. Nikola GAVELLA: *Osobna prava*. Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 1st edition, 2000. 13–15.

³⁵ Aldo RADOLOVIĆ: Pravo osobnosti u novom Zakonu o obveznim odnosima. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 27. no. 1. (2006) 133.

³⁶ GAVELLA (2000) op. cit. 31.

„Personality rights are private rights, not public rights, and they grant the legal subject absolute power over his personal, non-property assets“.³⁷ Their positive aspect consists in the authorization to dispose of and decide on personal property, while the negative aspect of personality rights refers to the fact that others should respect it and refrain from harming it. Personality rights are not absolute rights, but can be limited. Private rights are limited by natural laws, acquired characteristics of individuals, social circumstances and the law, and in legal relations everyone is obliged to refrain from anything that would injure someone's person, things or subjective rights.³⁸

4.3. The distinction between personality rights and human rights

The distinction between personality rights and human rights is a complex legal issue. In German constitutional theory, the aforementioned issue is designated as the „problem of foundation“ which „consists in the fact that the *Grundgesetz* recognizes a supra-positive, i.e. natural right, by which it is itself bound, which is contrary to the understanding that fundamental rights are granted by the Constitution, and that that is the only way they can be realized.³⁹ The mechanism by which human rights would become subjective civil rights is unclear.⁴⁰ McHugh starts from the fact that the difference can be found in „discovering the nature of human rights, that is, their root.“⁴¹ The natural law theory interprets that an individual has inalienable, intrinsic rights, even if he loses his political status in the community, which is why he is a subject of human rights regardless of the perception of a particular government. These are fundamental, natural rights that precede the state regulation of the legal system. Theoreticians such as Aramini, Ten Haaf, Orend and Goodale advocate the existence of inalienable rights, independent of any government.⁴² This was also concluded in an early decision of the Bavarian Constitutional Court, which argued

³⁷ Ibid. 27.

³⁸ Nikola GAVELLA: *Privatno pravo*. Zagreb, Narodne novine, 1st edition, 2019. 21. Limitations of personal rights are general and special. The general ones stem from the fact that every person is a social being who needs to respect the rules of the community, while the special ones represent cases when a person is limited, for example, in the right to bodily integrity (for example, when someone is forced to give a blood sample).

³⁹ As cited in Siniša RODIN: Osnovne značajke prava na slobodno razvijanje osobnosti u njemačkom ustavnom pravu. *Politička misao*, vol. 34. no. 1. (1997) 115.

⁴⁰ Likewise Alain DE BENOIST: *Beyond human rights: Defending Freedoms*. London, Arktos, 1st edition, 2011. 26. De Benoist concludes that the procedure by which human rights are recognized and declared is unclear. See also: Aldo RADOLOVIĆ: Ljudska prava i građansko pravo. *Vladavina prava*, vol. 1. (1997) 42.

⁴¹ James T. MCHUGH: What Is the Difference between a “Person” and a “Human Being” within the Law. *The Review of Politics*, vol. 54. no. 3. (1992) 456.

⁴² Michele ARAMINI: *Uvod u bioetiku*. Zagreb, Kršćanska sadašnjost, 1st edition, 2009. 88.; Mark GOODALE: *Human rights: An anthropological Reader*. New Jersey, Wiley – Blackwell, 1st edition,

that the Constitution recognizes the existence of natural rights.⁴³ Natural right as a pre-state, human right, should not be derogated by the positive law, in accordance with the conclusions of the Nürnberg process. However, not all constitutional rights, that is, human rights, are at the same time personality rights in the sense of civil law, but only those constitutional rights that can be constructed as subjective civil rights pass into civil law.⁴⁴ In order for a constitutional, human right to be a personality right, it should be „constructed as subjective and absolute in the sense of civil law, because without passing through that ‘filter’ it does not exist, and therefore personality rights are not the right to work, the right to an apartment (getting an apartment) or the right to social protection.“⁴⁵ Therefore, only rights that are enforceable can be considered subjective rights of personality. But can human rights be conditioned by the fact that they are recognized primarily as constitutional rights, and then as civil rights? Rodin believes that „by entering the community, the rights of the individual are limited, as well as the freedoms that they enjoyed until then, therefore the constitutional guarantees of fundamental freedoms and rights must necessarily be interpreted in the described context, because rights and freedoms are primarily positive rights and freedoms that arise from social contract and it is not possible to determine or realize them without it“.⁴⁶ Rodin talks about the mutual intertwining of the natural-legal foundation and positive-legal guarantees in such a way that „the constitutional status of fundamental rights cannot be understood as a mere recognition of the pre-state and pre-legal, ‘natural’ freedom and equality that is independent of the state and positive law, rather they exist only to the extent that they can be actualized.“⁴⁷ But can the actualization of rights condition their existence? It is dependent on the nature of rights. If it’s about basic human rights, like the right to life and liberty, the answer is no. But we can question the subjective-legal significance of the right to work, if the state cannot be sued for not providing it to every individual. Human rights, mainly of the first generation, due to their foundation in human nature, are constituted as subjective rights and are guaranteed in the civil law sphere, and enforced. Other human rights, such as the right to work, due to their dependence on social circumstances, that is, their expressed positive-legal aspect, are not subjective civil rights. Therefore, the right to life for example, is both a human right and a personality right, but even when its civil law significance is denied, it remains a pre-positive right.

2009. 4.; Brian OREND, *Human rights*, Ontario, Broadview Press, 1st edition, 2002. 75.;TEN HAAF op. cit. 8.

⁴³ As cited in RODIN op. cit. 115.

⁴⁴ Cf. RADOLOVIĆ (2013) op. cit. 703.

⁴⁵ RADOLOVIĆ (2006) op. cit. 142.

⁴⁶ RODIN op. cit. 113.

⁴⁷ Ibid. 117.

4.4. Legal subject and a human being

Is there a difference between a legal subject and a human being as a subject of human rights, in line with the difference between human rights and personality rights? In the international legal framework, human rights are guaranteed to every person. Constitutional rights, i.e. fundamental human rights, belong to all human beings, who are also legal subjects, but with different personality rights. The above interpretation is in accordance with the egalitarian principles of the natural-law school. Radolović believes that „with some views, the school of natural law even harmed learning about the personality rights, because according to natural law all people are equal, and for the school of personality rights they are different, because unlike the school of natural law, which forces mere egalitarianism, the school of personality rights stimulates differences, personality, talents, abilities, intelligence.“⁴⁸ The above is true if we are talking about personality rights that depend on the personality itself, but it does not apply to rights for which the personality is not determined, unless we want to return to racism and similar *-isms*. De Benoist believes that „the abstract equality of human beings is contradictory to the proclamation of individuality of the subject because the unique value of the individual cannot be recognized without specifying what makes him different from others, which then implies that we are not equal.“⁴⁹ De Benoist ignores that the ascertainment of equality in human nature, and then fundamental rights, represents the minimum protection of fundamental rights for human beings and does not imply the denial of uniqueness, and then personal diversity. Every person is equal to another person in dignity and fundamental rights, such as the right to life and liberty. In contrast, the regulation of certain rights, such as the political right to vote, will depend on the personality of the individual person (for example, a person with a severe mental disorder will not have the right to vote). That is why every human being is a subject of human rights by virtue of being human, but as a legal subject he can have a limited number of rights based on legal capacity that depend on personality. Differences in personality rights that exist between individuals belong to the field of the social relations regulated by the state and does not apply to pre-state inalienable rights.

The constitutions of national states prescribe fundamental human rights to human beings by the fact of human equality, which are ascertained and not conditioned by allocation, while on the other hand, personality rights that depend on the individual characteristics of a person and differ depending on the personality of individuals, are guaranteed to each person depending on possessing those characteristics. That is why the concept of a legal subject is partly equal to what it means to be a human being, especially in the area of personality rights, which are substantively equated with human rights arising from human nature, while in some cases it can be fictional, technical, as in the area of property relations. That is why the legal concept of the subject is both a natural-legal and a social concept. Only the „natural-legal and

⁴⁸ RADOLOVIĆ (2006) op. cit. 138.

⁴⁹ DE BENOIST op. cit. 82.

technical“ approach to the legal personality of a natural person enables „the provision of minimum protection and equality in the status of all human beings, both slaves and embryos, who exist as subjects independent of human decision.“⁵⁰

5. Interpretations of the legal subject as a means of excluding human beings from subjectivity

The legal framework of a community determines when and to whom it will grant legal personality. If the legal status of a natural person in a community is interpreted as dependent on social circumstances, then it enables „social negation, that is, *de facto* exploitation and creation of subordinate groups of human beings.“⁵¹ The concept of a legal subject becomes „an arsenal and a dialectical weapon with which a social existence can be negated to a group of people.“⁵² What criteria have been used historically, and are still used today, to distinguish between different groups of people in order to treat them differently in terms of basic human rights? After the Second World War, anthropologists analysed how, based on human differences, such as race, language and culture, the definition of a person narrows or expands, so depending on socio-economic circumstances, some groups or individuals are placed below the line of social acceptability, thereby excluding them from legal system of fundamental rights protection. So often „people with disabilities, women, children, the sick and the elderly are qualified as not-fully human beings“.⁵³ Social practice, historically labelled as immoral, also excluded slaves, Jews, and the indigenous population from legal subjectivity. Hart, quoting Plato, describes the legal exclusion of human beings from the community in such a way that „the demand for equality is exceeded by something that society considers of greater value, and since some human beings have not developed essential human qualities, they naturally enter the classes of slaves, not free human beings“.⁵⁴ Analysing the genocide of African Americans in South Africa, Jews in Nazi camps, kulaks in Stalinist Russia, intellectuals killed in Cambodia, minorities and religious groups around the world, Goodale concludes that „the rationalization of some ideas leads to dehumanization, which constitutes the dominant strategy by which certain groups or individuals are isolated, after which

⁵⁰ FINNIS op. cit. 168.

⁵¹ Karen E. BRAVO: On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking. *Northern Illinois University Law Review*, vol. 31. (2011) 471–473.

⁵² TOMUSCHAT op. cit. 79. Tomuschat states that history testifies that entire classes of people were not recognized as legal persons, therefore the exclusion of people from the category of persons is not new. Likewise VAN BEERS op. cit. 580.; DEWEY op. cit. 664–665.

⁵³ See also: GOODALE op. cit. 118. See also: DUCOR op. cit. 200–202. Ducor states that until 1855, France had the institution of civil death, which meant depriving the natural persons who were convicted of crimes from the status of subject of law.

⁵⁴ Herbert Lionel ADOLPHUS HART: *The Concept of Law*. Oxford, Oxford University Press, 3rd edition, 2012. 162–163., 175.

murders and massacres follow“.⁵⁵ Similarly, Grear believes that the psychology of mass violations of basic human rights is almost always the same, it begins with the denigration of humanity (which is opened up by the linguistic and conceptual ambiguity of the legal subject and the human being) and ends up with the destruction of social sensibility towards the group of human beings.⁵⁶ The presentation of some examples follows:

Primitive societies, especially those of a nomadic, hunting character, conditioned belonging to the tribe by the fact that the individual had to accept the rules of the group.⁵⁷ In such societies, children with deformities were not considered worthy of recognition even at the level of an animal.

Basic human rights were systematically denied to natives. The Spanish and Portuguese invaders did not recognize the natives they found in America. In order to deny Indians human rights, especially the right to own material goods, it was denied that they were normal and reasonable human beings, and they were considered weak-minded and insane.⁵⁸ According to Solinger, it was a „biological interpretation of Indians as inferior.“⁵⁹ Indians were seen as enemies who were inferior, bad and unworthy of life, and the same was true for the Aborigines in Australia. In colonial states, there are numerous other examples of the existence of categorization of human beings into citizens on the one hand and subjects who lost their legal status on the other.⁶⁰

The criterion of the circumstances of birth was a condition for obtaining status throughout the entire history of the slavery system.⁶¹ Slaves were not subjects of law in Ancient Rome. In Ancient Rome, there was a division of the slave society into freemen and slaves, and the different social and legal position of slaves depended on the material conditions of life.⁶² Slaves were treated as property and belonged to the category of things called *res mancipi*, like animals (such as horses and mules), and were the basic means of labour in the peasant economy.⁶³ Only when slavery became unprofitable at the end of the classical era in Ancient Rome was freedom declared the

⁵⁵ GOODALE op. cit. 113. Goodale cites examples such as Eskimo children who are not yet human according to the community's internal classification and may die from neglect; a victim of Boren hunters, who consider everything beyond their borders to be inhuman beings, etc.

⁵⁶ Cf. GREAR op. cit. 173–175.

⁵⁷ Cf. CURRAN op. cit. 58–75.

⁵⁸ See also: Marijan BIŠKUP: *Ljudska prava: povijesno-teološki osvrt*. Zagreb, Kršćanska sadašnjost, 1st edition, 2010. 49.

⁵⁹ Rickie SOLINGER: *Pregnancy and power*. New York/London, New York University Press, 1st edition, 2005. 29.

⁶⁰ For more details see: Michael IGNATIEFF: *Ljudska prava kao politika i idolopoklonstvo*. Beograd, Službeni glasnik, 1st edition, 2006. 105–106.

⁶¹ Cf. Junius P. RODRIGUEZ: *Slavery in the United States*. Oxford, Abc–Clio, 1st edition, 2007. 78.

⁶² Cf. Michele GEORGE: Slavery and Roman material culture. In: Keith BRADLEY – Paul CARTLEDGE (ed.): *The Cambridge world history of Slavery*. Cambridge, Cambridge University Press, 1st edition, 2011. 387.

⁶³ Cf. Jane F. GARDNER: Slavery and Roman Law. Ibid. 415–417.

state of nature, and slavery *contra naturam*.⁶⁴ The system of slavery placed economic interest before the interest of human beings.

The United States of America was founded as a democracy even though the system of slavery was widely practiced at that time. Thomas Jefferson claimed the existence of the inferior mental capacity of African Americans and the superior sensibility of whites (he himself was the owner of a large number of slaves).⁶⁵ The judgment of the US Supreme Court from 1857, *Dred Scott v. John Sandford* is significant. In that judgment, the judge did not consider it arguable that Mr. Dred Scott was a human being, but there was doubt about whether he was a person, and then a full member of society. It was decided by the majority opinion that Mr. Scott is not a citizen and therefore has no rights and privileges.⁶⁶ Throughout history, slave status has been defined on the basis of social interests, not the essence of a human being.

Another example is Jews in World War II. The Nazi extermination of Jews began by portraying them as monsters, taking away their legal status, excluding them from the world, putting them in ghettos and concentration camps.⁶⁷ Jews were declared non-human, and the process of their dehumanization formed the central strategy of the genocide.⁶⁸ Also, in Nazi Germany, laws and decrees institutionalized the 'T4 project', which referred to the killing of disabled people as well as the so called 'mercy killing' of the mentally retarded.⁶⁹

Communist regimes are another example of how violence against human beings is carried out by denying legal personality. Communist regimes were and are brutal authoritarian idolatries in the name of workers' welfare.⁷⁰ Kulaks were considered non-human in the Stalinist regime.⁷¹ In early 1929, Stalin led a campaign for the

⁶⁴ Cf. Marijan HORVAT: *Rimsko pravo*. Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 12th edition, 2020. 102.; Cf. Cam GREY: Slavery in the Late Roman World. *Ibid.* 482–483.

⁶⁵ Cf. Eva FEDER KITTAY: At the Margins of Moral Personhood. *The University of Chicago Press*, vol. 116. no. 1. (2005) 119.; BIŠKUP, op. cit. 38. Biškup states that the supporters of the conquest took over Aristotle's teaching that some people are by nature slaves, i.e. those for whom it is better to serve because they are not able to be owners of goods since they are not intelligent enough.

⁶⁶ Cf. Gregory J RODEN: Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence. *St. Thomas Law Review*, vol. 16. (2003) 213. According to Judge Taney, the framers of the Constitution did not originally intended to include African Americans in the word „citizen“. See also: Henry L. CHAMBERS: Dred scott: Tiered citizenship and tiered personhood. *Chicago-Kent Law Review*, vol. 82. no. 1. (2007) 213., 219. African Americans were considered inferior, with fewer rights than others, and their status Taney compared to the status of Indians, another historically disadvantaged group.

⁶⁷ Cf. BIŠKUP op. cit. 49.

⁶⁸ Cf. GREAR op. cit. 173–175. Grear states that the Nazis declared the Jews to be subhuman and nonhuman, and the process of dehumanization formed the central strategy of the genocide.

⁶⁹ Cf. FEDER KITTAY op. cit. 120. On the first day when Hiter was appointed chancellor, 30 January 1933, acts on the sterilization of „inferior“ human beings were passed.

⁷⁰ See also: GOODALE op. cit. 226. Goodale states that Stalin ordered killing of all who threatened his rule, during which millions were imprisoned and killed. Likewise GREAR op. cit. 173., 175.

⁷¹ Cf. Andreas LAUN: *Pitanje moralne teologije danas*. Vienna, Herder and CO, 1st edition, 1992. 9. Laun compares kulaks and unborn human beings.

liquidation of the kulaks as a class of people, considering them a cheap tool and a pure means of the industrial process.⁷² According to Slavoj Žižek, Stalin's labor camps represented objective, anonymous and systematic violence embedded in the normal state of affairs.⁷³ A conservative estimate of the death rate of the kulaks is at least 6 million, and the mass killing was made possible, again, by the dehumanization of the victims, which is evident from the records of Stalin's gulag, where neither the word people (*liudi*) nor life (*zhizn'*) is mentioned in the context of the prisoners.⁷⁴

In postmodern society, the humanity and personality of human embryo and fetus is being questioned. There are numerous medical and philosophical criteria of theoreticians with which the personality and subjectivity of the human embryo and fetus is denied from the moment of fertilization.

Almost all violations of fundamental human rights involved dehumanization, denying the human being that he is a person, and putting economic interests and the interests of political power ahead of the individual. Today, it is established as a moral fact that anti-Semitic, racist and communist systems are profoundly unjust and cruel. The fact is that the existence of an individual, a person, that is, a human being, does not depend on human choice, any of the worldviews within the framework of pluralism and social recognition. By recognizing the personal rights of every human being, it is prevented from being treated as thing or animal and reduced to a means to achieve class and social, and sometimes individual goal. When a human being is deprived of its legal personality, it becomes a thing from a legal point of view. Therefore, we should legitimately ask ourselves with Cazor, what reasons allow us to treat some human beings, for example, human embryo and fetus, as less than human persons again, without being remembered as another epoch that exploited the weak.⁷⁵

6. Conclusion

Every human being is a legal subject and holder of personality rights, and the reason for this is that every human being is a member of human nature, which contains intrinsic dignity. The status of a legal subject is important, while it allows every person to be the holder of the right of personality. The concept of a legal subject is partly equal to what it means to be a human being, especially in the area of personality rights, which are substantively equated with human rights arising from human nature, while in some cases it can be fictional, technical, as in the area of property relations. That is why the legal concept of the subject is both a natural-legal and a social concept. The fictional legal subjectivity of a human being can be problematic in the

⁷² Cf. Golfo ALEXOPOULOS: *Illness and Inhumanity in Stalin's Gulag*. London, Yale University Press, 1st edition, 2017. 16.

⁷³ Ibid. 5.

⁷⁴ Cf. Ibid. 62. In *Gulag Archipelago*, Solzhenitsyn, describing the dehumanization of prisoners, stated that the authorities saw prisoners as things (*tovar*) to be used to the maximum level and then discarded as waste.

⁷⁵ Cf. Christopher KACZOR: *The Ethics of abortion: Women's rights, human life and the question of justice*. New York/London, Routledge, 1st edition, 2011. 102.

part that regulates subjective non-property (and not property) rights, if it conditions fundamental rights or is used for the purpose of achieving some goals that imply the denial of fundamental human rights. In today's postmodern society, biotechnological development causes changes in everyday life, which in various dimensions bring the possibility of improving human life and nature, but at the same time bring the danger of dehumanization and denaturalization of human beings, in which postmodernist and poststructuralist philosophy plays a significant role.

