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The right to life – some roman perspectives in modern law

Abstract
One of the fundamental questions related to legal universalism is the proclamation and protection of the right to life. In relation to the therein proclaimed right to life, there is another heavily contested right today and namely "the right to being born", i.e. the right to life of the human embryo. It is a clear manifestation of universal regulation of this basic human right on the one hand and of its framework in terms of a particular problem which, however, bears significant social, moral and legal consequences – for the protection of pregnant women and the children in their wombs, the recognition of paternity and parental rights, respectively the right to child support for the unborn, the right to abortion, assisted reproduction, surrogacy, cloning, etc. The fundamental theoretical legal question is what comes to the fore about the moment when the legal person starts its existence, respectively from the moment when law recognizes the presence of life, i.e. of a living creature, and to what extent this reflects upon the status of the mother, etc. The article presents the main texts of the Roman law, which relate to such problems as the basis of modern legislation and its improvement.

Keywords: right to life, right to being born, human embryo, Roman law, *nasciturus.*

1. The right to life- the right to being born

The studies in recent years are dedicated to the universal nature of law. It can be studied in a legal-dogmatic and legal-historical perspective drawing comparisons on a broader or narrower scale. Legal universalism is conceptualized as a common intellectual framework within which an emphasis is laid on the spiritual unity of

humankind perceived as an integral spiritual community. This topic is particularly significant nowadays when different political or academic projects struggle to define the basic principles and rules for the purposes of legal systems approximation, at least to some extent, which on its part shall facilitate not only social contacts but also economic activity and international communication on a community, regional and world level.

One of the areas where legal universalism is most prominent is that of the protection of the fundamental human rights. The current 2018 is the year celebrating the 70^{ieth} anniversary since the adoption of the Universal Declaration on Human Rights by the United Nation's General Assembly on 10th December 1948. It is the first significant achievement of the world organization of nations in this field in the time after the Second World War and the first act of world record of rights whose holders are all human beings. Its basic provisions are further developed by subsequent international treaties, regional instruments for the protection of human rights, national constitutions and laws (Steiner, Alston, 2000; Tanchev, 2002, p. 9 ss.). Along with the Universal Declaration on 7th November 1950 the European Council member-states governments adopt the European Convention on the protection of human rights and fundamental freedoms which comes into force in 1953 and creates inalienable rights and freedoms for everyone binding the States Parties of the Convention to guarantee these rights to every person within their jurisdiction.

The Universal Declaration embodies moral principles and core values whose origin dates back to legislative acts and political manifestos of ancient times (Novkirishka-Stoyanova, 2016, p/100ss.). As early as the Preamble of the Code of Hammurabi, the king of Babylone, from the 18thcentury BC, in laws from Egypt, Mesopotamia, and the ancient East a tradition can be traced which later had been integrated into Greek philosophy and in the Roman legal concept of *ius naturale* for the protection of the human being and the basic values in his or her life. The basic human rights formulated during the Enlightenment and underpinning the national and international legislative acts of the contemporary world are built upon the genetic foundation of the ancient concept of a human being.

This is a ubiquitous research topic fraught with challenges that has much too often been a subject of discussions spanning over centuries especially if one seeks to find the historical origins and the philosophic argumentation for the protection of human rights in Antiquity. The definition and the special terminology of "human rights" in the Greek-Roman Antiquity, anachronistic though it may seem, have been

discussed in many different ways which are not entirely unknown to us. If we take a deeper look into the ancient laws we will observe a fairly detailed legal framework of people's rights depending on their citizenship, sex, age, religion, ethnical affiliation, etc. (Amunátegui Perelló, 2014, pp. 15-26; Burnyeat, 1994, pp. 1 – 11).

One of the fundamental questions related to legal universalism is the proclamation and protection of the right to life. This right is invariably connected both with human existence and with various philosophical concepts as well as with a considerable legal framework in general and in specific terms (Fernández de Buján, 2017, pp. 1-14). It is defined in a different way historically too and enjoys an interesting evolution. Thus, on the one hand, regardless of how real it is or is not, but the ancient rulers or the national assemblies in their legislative activity determine human life as a core value in society which needs to be protected. This is the reason why murder or deadly bodily harm is prohibited and respectively most severely punished.

Precisely in this respect the Preamble of the US Declaration of Independence of 1776 states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." It was adopted in 1948 and under art.3 of Universal Declaration of Human Rights "Everyone has the right to life, liberty and security of person ".

The prohibition of *homicidium* (Berger, 1953, p. 487), however, does not refer to causing death in war time, crushing civil mutinies and insurrections, legal self-defence or capital punishment execution.

This is explicitly laid down in 1950 with the adoption of the European Convention on Human Rights by the European Council where article 2 provides that:

„Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The right is enshrined in Article 6.1 of the International Covenanton Civil and Political Rights: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

One very specific aspect of the protection of human life concerning children is stated under article 6 of The United Nation Convention on the Rights of the Child of 1989: "1. States Parties recognize that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child."This Convention is a human rights treaty which sets out the civil, political, economic, social, health and cultural rights of children. The Convention defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation..

In relation to the therein proclaimed right to life, there is another heavily contested right today and namely "the right to being born", i.e. the right to life of the human embryo. It is a clear manifestation of universal regulation of this basic human right on the one hand and of its framework in terms of a particular problem which, however, bears significant social, moral and legal consequences – for the protection of pregnant women and the children in their wombs, the recognition of paternity and parental rights, respectively the right to child support for the unborn, the right to abortion, assisted reproduction, surrogacy, cloning, etc. The fundamental theoretical legal question is what comes to the fore about the moment when the legal person starts its existence, respectively from the moment when law recognizes the presence of life, i.e. of a living creature, and to what extent this reflects upon the status of the mother, etc. Modern-day research even mentions "pre-life" or *pre vita*.

2. Nasciturus in the Roman law

Many of these topics are unknown for the world of Antiquity, but one thing is undisputable – in their theory and practice Roman jurists create a universal rule for the protection of human life from the moment of its creation which in a lot of respects is more humane and more pragmatic bearing in mind the entire protection of the mother and the child by a number of rules in contemporary codifications. And because this is one equally ancient and modern topic, it is worth looking at the Roman jurisprudence which in this case too amazes us with its modernity.

Philosophically speaking, the question comes down to this if the soul appears from the moment of conception (i.e. the fusion of the gametes and the formation

of a zygote) or from the moment when the formation of the main organs of the embryo is complete and mostly that of the heart (i.e. after the 9th week of gestation when organogenesis comes to an end, despite the fact that further development and settlement of the organs in their functional slots is still to follow) (Ovcharov, Takeva, 2015, p. 167 ss .).

First, I would like to remind you that in Geek philosophy, life is directly linked with the existence of a soul. According to the followers of Pythagoreanism, the soul is placed into the body at the moment of conception as it is of devine origin and is immortal, whereas the concrete body just temporarily shelters it. Aristotle argues that every living creature is endowed with a soul determining its essence and this applies equally to plants, animals and humans. The idea of the vegetative state of the soul within the embryo is developed by Neoplatonists. Stoicism in turn accepts that the soul is inspired into the body at the point of birth when the air taken in by the newborn is actually the vital spirit that animates the body. By this time the embryo is part of the mother's body and its existence is vegetative, regardless of the sensual perceptions which she has for it. There are also authors (e.g. Diogenes) who entirely reject the existence of a foetus as a living creature as far as it does not breathe independently (Bernard, Deleury, Dion, Gaudette,1989, pp. 180-182).

In the Christian religion the human being and life are considered to be the most amazing creations of God ("God saw all that he had made, and it was very good." (Genesis 1:31). As far as conception is concerned the so-called "duality" of the person is revealed, i.e. as made up of body and soul ("Then the LORD God formed a man from the dust of the ground and breathed into his nostrils the breath of life, and the man became a living being." (Genesis 2:7). Psalms describe life in the womb as created and known by God whereas in many places in the Biblical texts a differentiation exists between the visible and the spiritual world (Psalm 138:13-16; Ecclesiastes 12:7, Zechariah 12:1.).

There is a very significant difference in the ancient and modern perception of human life and the right to life established in the respective legal system and influenced by religious beliefs as well. In modern legislatures, generally, birth is a juridical fact related to the occurrence of a human personality, respectively this is the beginning of a physical person's legal capacity, of their recognition as a legal subject and their right to legal protection. In addition, there is a number of rules regulating the embryo's status and lending significance to its existence related to: abortion, assisted reproduction, surrogate motherhood, embryo donation,

paternity acknowledgement, newborn abandonment and murder, and others. The Christian religion, assuming the embryo is also God's making, condemns abortions and the murders of pregnant women which are interpreted as an act of killing two human beings and this is reflected in modern legislatures.

In Antiquity, however, there are not any such abstract categories as "a right to life" and status of a person who is not visible and really perceptible in the shape of a human. Birth results in legal consequences only in so far as the child's existence is acknowledged by the father or by society. Therefore, abortion, murder or abandonment of the newborn are sanctioned as crimes only if they are contrary to the father's will who is entitled with "the right to life and death" (*ius vitae necisque* in Rome).

Romans look at the right to life of the human embryo from a different perspective. From an entirely pragmatic standpoint jurists discuss the rights of the conceived but unborn child, especially when, if at the time of his or her birth, the child would have had the status of an inheritor. Romans considered the issue of right to succession over family property, the cult of the family and the deference towards ancestors as the basis for a large part of the legal framework related to the status of persons, i.e. both personal and property status. In this respect, a system of rules is developed which protects the life of the foetus as an independent being albeit not separated from the mother's body as well as that of the mother as a bearer and keeper of this being. The social significance of this issue is not to be underestimated either in so far as the demographic problems concerning the stability of the Roman people, the continuation of the Roman tradition and the entire material and spiritual world created by the Romans are of foremost concern for the state and its authorities, institutions and law.

In a terminological aspect Roman jurists do not use the term "a legal subject" but an equivalent one – "*persona*". It denotes a human face, but also a religious or theatrical mask, whereas in the legal compositions – a physical person (Catalano,1990, p. 216 ss. ; Lubrano, 2002, p. 3 ss.). From this point of view, the unborn child for whom there is not a visible perception neither his face is known, could not have possibly been considered a persona. Despite this fact, however, the Roman iurisprudentes admit that there is a great number of cases where the rights of the conceived but unborn child have to be taken into account as well as those of the newborn or the child born after the death of his or her father. Thus, the special terms "*nasciturus*" and "*postumus*" are created. And if in the second instance we already have a born child both live and viable and despite his or her

early age, he or she can acquire rights and obligations on an equal par with other children as a legal subject with an equal standing, in the first instance with the yet unborn child, referred to as *nasciturus*, what we are talking about is an "invisible" legal subject, rather using the sensual perceptions of the pregnant woman than the outward manifestations of the life existing within her womb.

Most authors emphasize the creation in Roman law of a fiction about nasciturus by virtue of which the foetus is thought of as being born (*pro nato habetur*), not that it is a real persona. This, however, is a much more complex problem which on the one hand is related to the reason for accepting such a resolution concerning the conceived but unborn child, and on the other hand, poses the question to what extent and how in practice his or her rights are protected.

First it should be noted that in the Roman jurists' texts on the topic there is a reference to natural law and correspondingly to the natural legal position of *nasciturus (*Fontana, 1994; Baccari, 2006). One of the fundamental texts where Ulpian defines natural law, mentions that it refers to family relations such as marriage and the creation, upbringing and education of children. (*D. 1.1.1.3.)* Related to this concept is the development of the views about the pregnant woman and her expected child considered as an entirely natural being and therefore "nurtured" by law (*D.1.5.26)* .

Obviously Romans withhold from recognising the unborn as a child due to the rule that the *liber* status occurs at the moment of birth and the status of the mother and the father determines what freedom, citizenship and family dependence the person will enjoy. Nevertheless, Julian argues that irrespective of the "invisible" existence of the one "that is in the mother's womb", thez are entirely subject to the rules of the Roman Civil Law, and i.e. they are considered to be an existing Roman citizen. The inference of the rule from the natural law poses a lot of questions regarding the relation between *ius naturale* and *ius civile,* a subject of separate and in-depth research (Ferreti, 1999, p. 97-127). The applicability of civil law, however, is a requisite for the solution of a number of other problems, such as: to what extent abortion or stillbirth by fault of the obstetrician are deemed murder; what rights the newborn has if the father has died during the mother's pregnancy or a divorce has taken place; what the liability is for murder or injury to a pregnant woman, etc.

The basic framework of these issues is in Title 5 of Book I of the Digests dedicated to the status of the persons *(De statu hominum*). It puts first the principle that the recognition of specific legal personality of nasciturus is justified only in so far as

this can be in his or her favour (*commodum*) – *D.1.5.7***.** The logic behind this legal framework is to protect the property interest of the conceived but unborn child in case there is a conviction against one of the parents. The principle is later developed in *D.1.5.26* where two cases are studied – an enslaved pregnant woman and theft of a pregnant slave. In both instances the child follows the more favourable status that would have been granted to him or her – the right to restitution of the status (postliminium), despite the fact that he or she was born during the period of his or her mother's slavery, respectively the child is also regarded as a stolen property in exactly the same way as the pregnant slave and the acquisition of ownership over him or her is not permitted on the grounds of a limitation period.

Apart from this hypothesis with the pregnant slave to which the civil legal concept is applied about the right to ownership over slaves, in other cases it is expressly stipulated that the child of a slave is a *partus* and not a *fructus* in *D. 22.1.28.1.* (Di Nisio, 2016, p. 141-153).

The autonomous existence of the foetus is also confirmed in the general title about the meanings of the different terms and definitions used in Roman law (*D.50.16. De verborum significatione*). Thus, in *D.50.16.153* Clementius deems that the fruit is also reckoned dead if it has been left in the womb of a dead woman, i.e. it is treated as a separate person. Following the same logic, the burial of a pregnant woman is prohibited unless the fruit has been removed from her womb (*qui in utero est partus*), correspondingly it was to be buried separately (*D.11.8.2*).

The right to life of the unborn child is protected explicitly in Title 8 of Book 48 of the Digests containing a commentary on Sulla's law of 81 BC on the sanctions for murder and poisoning (*Ad legem Corneliam des sicariis et veneficis*). It envisages a significant punishment for a woman who has voluntarily aborted – loss of *status* (or the so-called civil death) and exile (*D.48.8.8).*

The negative attitude to abortion is expressed in other places in the Digests as well. In the time of the Principate as a general rule, abortion is not prohibited but strict sanctions are put in place in cases of intentional abortion aimed at harming the interests of the unborn child. Tryphonius in *D.48.19.39* refers to rules dating back to the time of the Republic by quoting Cicero's speech „*Pro Caelio*" (*D.48.19.39).*

If the interests of the mother and the fruit are significant and contrary by virtue of criminal liability the mother is sent in exile and this applies not only to Roman women but to all women on the territory of the Empire regardless of their local legislation (*qui in orbe romano sunt) (D.47.11.4).*

Again in relation to the interests of the unborn there are a number of provisions regarding hi or her status. Thus, for example, if he is the posthumous son of a senator, the same rank is granted to him. The same rule applies if the father has been demoted from the senate before the birth but the child has been conceived within a valid Roman marriage and the wife is pregnant at the moment of the demotion in question. Ulpian's opinion on this issue is based on the practice of the Republican jurists adopted and described by Labeo and Pegasus whose purpose is to strengthen the senators' rank after Sulla's proscriptions and the civil wars. The principle for granting the father's status to the conceived within a legal Roman marriage and that of the mother in the event of an extramarital conception is applied unconditionally and if less favourable circumstances occur during the marriage, they are not taken into consideration.

The final determination of a child's status, however, is left in a pending condition (*in pendente conditione*) until the moment of birth, respectively until the moment when the child is liveborn and viable. There are not explicit rules concerning a newborn life expectancy in case he or she has any injuries or malformations. Obviously in these rare cases the issue is resolved pragmatically in view of the parents' social and economic status, the perspectives for normal development of a damaged child and so forth.

The right to life of the human foetus is related not only to providing the opportunity for the child to be born – for this purpose the special figure of the curatorventris has been introduced who assumes care for supplying food, shelter, clothing and everything necessary for the pregnant woman – but also an argument for the creation of this protectionist regime is mostly the care for the child and his or her interests, and subsidiarily – to his or her mother. From a more distant perspective, this regime is an expression of the social attitude to birthrate, family, social development and the overcoming of demographic problems. This is the reason why researchers of the issues relating to *nasciturus* look at it from three different positions: the interests of the conceived, but yet unborn, the mother's interests and the interests of society as a whole.

3. Conclusion

Roman law demonstrates an incredibly in-depth legal thinking for the distance of its epoch. Indeed, the rights of the conceived but yet unborn child are settled in view of protecting his or her property interests. However, along with this, his or her existence is also protected by means of being deemed not

so much a separate part from the mother as it is actually biologically, but rather a separate legal "component".

In the discussion on the exact way of determining *nasciturus* Roman jurists base their arguments on the tripartite division of the private legal issues, i.e. into persons, objects and actions. Apparently the child, given that he or she is conceived by free parents, cannot be possibly regarded as an object, this is not permissible even for the child of a slave mother. The explicit declaration of the child's person, however, is not at all in line with the Roman concept of this term. Thus, after a long row of explanations, fictions and analogies the rights of the nasciturus are seen as dependent on the future birth and health condition of the newborn.

The study of the Roman legal framework related to the right to life of the human embryo reveals a pragmatic approach to this issue but also a deeply humane attitude and legal norms creation of a universal nature concerning pregnant women regardless of their status, citizenship, etc. and their children to be born. This spirit of Roman law has permeated modern legislations which despite the fact that in most cases determine the moment of birth as the time of occurrence of legal subjectivity, take into consideration many of the Roman law solutions on the topic. A particularly attractive and ambitious task is to make an overview of modern legislation in order to observe what part of it is a replica of the Roman legal framework. Yet the perception of the human embryo as a living creature with its respective rights and interests is part of that great legal heritage left to us by the Romans which we specify and enrich but, at the same time, retain as a foundation of modern law.

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