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MATRIMONY AS A BASIC POINT FOR SUBSTAINING THE STATE BY THE DOCTRINE OF REASON

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1. Law of Reason School as a new version of Natural Law

From the end of the 18th century, the most sophisticated version of Natural Law considered as the Kant type of Doctrine of Reason (School of Reason) was increasingly getting accepted in Hungarian Legal Philosophical Thinking. The expansion of initially "hated" Kantian thoughts[1] started with a change of approach ongoing in Austria, when the Karl Anton Martini's concept favored in royal circles was officially replaced by views of Franz Zeiller and Franz Egger accepting Kantian doctrine at the University of Vienna.[2] This new critical theory of reason was firstly adopted within the Natural Law by Mihály Szibenliszt, so that he could give a way to such philosophers as inter alia Antal Virozsil, Imre Csatskó, István Bánó.[3]

At the end of the 19th century the theoretical summary of Law of Reason can be found in several works of Tivadar Pauler, who himself shared its principles but dealt with Law of Reason mainly in a historical way.[4] The same approach may also be recognized in views of Ferenc Deák and József Eötvös on State.[5] The Doctrine of Reason based on Kantian philosophy of law and relying on not infallible, but correctable pure reason tends to explore the rights and obligations of both the individual and its community. The former ones are deduced from the dignity of a person, the latter ones are defined within the framework of a society *(societas)* formed by persons *sui iuris* to achieve a common goal. The private-law institutions and relations based on Roman law, but reinterpreted by Natural Law provide a framework for the public-law relations, whose precise development was due to the appearance of the modern State's concept devised by Natural Law.[6]

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1 SZABADFALVI, József: *A magyar jogbölcseleti gondolkodás kezdetei, Werbőczy Istvántól Somló Bódogig* [The Beginnings of Hungarian Legal Philosophical Thinking, from István Werbőczy to Bódog Somló]. Gondolat Kiadó, Budapest, 2011, 33.

2 SZABÓ, Imre: *A burzsoá állam- és jogbölcselet Magyarországon* [The Bourgeois State and Legal Philosophy in Hungary]. Akadémia Kiadó, Budapest, 1980, 43.

3 PAULER, Tivadar: *Adalékok a hazai jogtudomány történetéhez* [Contributions to the History of Hungarian Jurisprudence]. Magyar Tudományos Akadémia, Budapest, 1878, 113.

4 SZABADFALVI, József: Pauler Tivadar, az észjogtudomány utolsó nagy alakja [Tivadar Pauler, The Last Great Figure of Law of Reason School]. *Zempléni Múzsa*. epa.oszk.hu/02900/02940/00054/pdf/EPA02940_zmimuzsa_2014_2_012-018.pdf (Downloaded: 05. 10. 2016)

5 PETRASOVSZKY, Anna: Eötvös József a Szibenliszt tanítvány [József Eötvös as a disciple of Szibenliszt]. In: VARGA Norbert (szerk.): *VI. Szegedi Jogtörténeti Napok: báró Eötvös József születésének 200 évfordulója alkalmából*. Szeged, 2014, 151.

6 POKOL, Béla: *Középkori és újkori jogtudomány*. *Az európai jogi gondolkodás fejlődése* [Medieval and Modern Jurisprudence, The Development of European Legal Thought]. Institutiones Juris Dialóg Campus Szakkönyvek. Dialóg Campus Kiadó, Budapest–Pécs, 2008, 139.

2. New interpretation of *societal domestic*

From the social theoretical point of view amongst the societies the society of man's house *(societal domestic),* in the proper sense the family *(familiar)* and the State *(civitas)* were highlighted by the Doctrine of Reason as an Academic Discipline of its time, like those emerged as a result of reasonableness given by nature, and they can be found in every human community as the universal formations.[7] Apart from the fact that the establishment of State was based on the individuals by Doctrine of Reason – on the contrary, formerly the role of heads of families was emphasized when contracting the State Treaty[8] – in respect of the State a meaningful importance was attributed to the family communities. The family was regarded as an essential point in the field of establishment and sustenance of the State. According to its general view, the Natural Law contains rules explorable by Pure Reason also regarding the terrain of family, which could be transposed into Positive Law created by the State. Its consequence is that the secular legislation regarding family and in particular the rules on marriage – owing to the universal characteristic feature of Natural Law – can be put on the basis of Natural Law. Besides it from the point of view of the State the legislation based on canonical or other religious beliefs could be no more but complementary.

The abstraction of Law of Reason is also predominated when interpreting the family as *society*, thus its establishment – as would normally be the case of all societies – was founded on individuals. The Kantian formal and material defining approach was applied by the conception of Law of Reason.[9] From a formal viewpoint relationship between spouses was basically understood by a family community *(societas coniugalis)*, from which later the relationship between parents and their children *(societas parentalis)* can be descended. In the material sense the unity of these persons is understood by the family community, to which the relation between masters and servants *(societas herilis)* do not belong according to a newer concept in particular in Mihály Szinbenliszt and István Bánó's interpretations. This last relationship was not considered to be a real *societas* by certain Natural Law Philosophers, since it lacked the common goal as one of the basic and coherent elements of *societas.*[10]

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[7] *Institutiones juris naturalis conscriptae per Michaelem Szibenliszt* [Institutes of Natural Law Summed up by Michael Szibenliszt]. Tomus II. Jus naturae sociale complectens. Eger, 1821, 15. §, 18. VIROZSIL, Antal: *Epitome juris naturae seu universae doctrinae juris philosophicae* [Epitome of Natural Law i. e. Universal Doctrine of Jurisprudence]. Pest, Typis Josephi Beimel, 1839. Pars I. Liber I, Sectio II, 74. §, 148. BÁNÓ, István: *Elementa Jurisprudentiae naturalis secundum vestigia celeberrimorum Franc. nob. de Zeiller, ac de Egger aliorumque de jurisprudentia meritissimorum virorum conscripta a Stephano Bano* [Elements of Natural Law Jurisprudence based on F. Zeiller and F. Egger… summed up by Stephanus Banó]. Claudiopoli Typis Lycei Regii, 1836, 213. §, 206.

[8] cf. MARTINI, Carl Anton: *Positiones de iure civitatis in usum auditorii Vindobonensis* [Propositions on State Law for use of University Lecture of Vienna]. Vindobonae, Typis Ioann. Thom. nobilis de Trattern, 1779, 2–5. and GIERKE, Otto Friderich: *Natural law and the theory of society 1500 to 1800.* University Press, Cambridge, England, 1950, 292.

[9] cf. Kant's distinction between formal and material principles in WOOD, Allen W.: *Kant's Ethical Thought. Modern European Philosophy.* Yale University, Cambridge University Press, 1999, 111.

[10] „[…] haec relatio societas sensu stricto dici nequit." SZIBENLISZT, 36. §, 42. BÁNÓ, 213. §, 206. According to Szibenliszt the relationship between masters and servants *(societas herilis)* cannot be considered to be a real society, because such relationship lacks a common goal. In his opinion such relationship is governed by a work agreement *(locatio conductio operarum),* and thereby the author excludes the issues of servitude and slavery from the realm of Natural Law. Szibenliszt's

3. Conjugal Partnership (societas coniugalis, matrimonium)

The Law of Reason approach views the community of spouses from the perspective of equality. This improved version of Natural Law does not already deals with matrimony in a context that would lead to the conclusion of assessing the institution of marriage exclusively on a theological basis. In both cases of societies referring to State and marriage it is emphasised that they are based on the treaty of equal persons possessing free will and choice.

From the doctrine of Natural Law, according to which the State is considered to be *maxima societas* – by the explanation of which the most underlined principle is that all societies established in State ought to be recognised by the State – results, that State claims the recognition of marriage without contesting certain rights of clergy.[11] The fact that the marriage is considered to be a shared life of a man and a woman is also deduced from the legal attribute of State, according to which it is regarded as *perennial* or *immortal* in the legal sense (the State is not terminated by extinction of each generation).[12] Therefore, the marital cohabitation can be defined as a contract *(pactum matrimoniale),* according to which two persons of different sexes declare their intention to undertake mutual rights and obligation for achieving a common and a durable goal.[13]

The further requirements deriving from the character of matrimony as *society* are the mutual consent *(verus consensus)* and that the fulfillment arising from rights and obligations shall tend to possible services *(possibilitas praestationis).*[14] Rights and obligations of spouses can be revealed from the purpose and function of marriage, however, taking the framework of a marital contract into consideration. Therefore the spouses are mutually entitled to freedom of action, according to which either party can do anything in accordance with achieving the purpose of marriage. Consequently, all the actions should be ignored, which are incompatible with the intended function of the wedding. As regards the enforcing rights mutual obligations arise between spouses, against which any marital partner act, then his or her action can be interpreted in a broader sense as a treachery or faithlessness *(perfidia),* ad absurdum as adultery *(adulterium).*[15]

There exist certain rights and obligations, even their violation listed by Natural Law Doctrine of Reason, as follows:

- right and obligation of cohabitation *(ius et officium conhabitandi),* the action against it is interpreted as desertion *(desertio)* and from which a legitimate demand arises to fulfil this obligation, that is to return
- right and obligation, under which we abandon ourselves to our spouse *(monogamia),* and violation of which manifests itself as polygamy *(polygamia)*
- right and obligation of faithfulness towards the spouse *(ius et officium ad fidem coniugalem),* that is the ignoration of any kinds of relationship with another

statements suggest that he considers subordination as a characteristic of Public Law and not a Privat Law, an in the realm of the latter equality of rights must prevail.

[11] SZIBENLISZT, 39. §, 46; VIROZSIL, 115. §, 257.

[12] SZIBENLISZT, 16. §, 18; VIROZSIL, 76. §, 149; BÁNÓ, 214. §, 207–209. Francisci Nobilis de Zeiller: *Jus naturae privatum* [Natural Private Law]. Editio Germanica tertia Latine reddita a Francisco Nobili de Egger, Viennae, apud Car, Ferdinandum Beck, MDCCCXIX, 189.

[13] ZEILLER–EGGER, 186; SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §, 211; VIROZSIL, 78. §, 153.

[14] ZEILLER–EGGER, 186; SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §, 211; VIROZSIL, 78. §, 153.

[15] SZIBENLISZT, 20. §, 25; BÁNÓ, 217. §. 211; VIROZSIL, 78. §, 153.

partner offending the existence of their marriage, whoes violation is in a strict sense regarded as adultery *(adulterium).*[16]

The institution of marriage is supposed to be a confidential, intimate relationship, under which by the unification of two natural persons the so-called "moral person" comes into existence. Therefore it refers to both partners, they act not on their own, but as an entity, and they may mutually exercise each other's competence.[17]

4. The Power of Making Decision in Matrimony

The following question emerges whether the marriage is based on equal or unequal society, as well as according to which who is entitled to directing the family? The answer to it, in the light of the facts discussed above, cannot, therefore be as if the marital agreement fails to include a rule about the direction of family, then as a general rule the direction is considered to be the most equitable if it aims at the purpose and function of the family into full account.[18]

Some Natural Law theorists state the view that such family direction proves to be the best for the purpose of the family, in which either party may exercise the right which can be fulfilled better than the other one. Consequently, as long as there is no reason to apply a different rule, either one or the other party is entitled to the decision-making power over family matters.[19] Regarding the forming of decision-making power the School of Reason in a general sense refers to characteristics of *societies*, when it is declared that any association in case of doubt is to be regarded as egalitarian. The family matters should be arranged on the model of an egalitarian society until the achievement of the family goal is threatened.[20] The husband, however, should not take the decision-making power against the wife' will,[21] but if the wife does not contradict the infringer, then the power as a result of her long-term tolerance which – in this case – shall be taken as an implicit acceptance, is legally considered to be conferred on him. However, the wife exercises the right of contradiction, then it might as well result in the termination of marriage, thus as the lack of mutual consent constitutes a reason for the termination of any society.[22]

5. Law of Reason Concept on the Terminating Marriage

In this context, the question of dissolution of marriage and divorce arises, in respect of which the Law of Reason recognizes the right to divorce in case of distress, despite the fact that it emphasizes the lifetime nature of marriage. In accordance with natural reason such a decision may be taken if sustaining the marital community of life would cause much more damage than its termination.[23] The Law of Reason provides the answer – avoiding the notion of "nullity" – enumerates the reasons grouped together, which lead to the dissolution of marriage in the most typical way. According to it, the mutual end of consent *(mutuus dissensus)* needed for sustaining

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[16] ZEILLER–EGGER, 161. §, 192–193; SZIBENLISZT, 24. §, 32; BÁNÓ, 217. §, 212–213; VIROZSIL, 78. §, 153–154.
[17] SZIBENLISZT, 21. §, 27.
[18] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214.
[19] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214–215.
[20] SZIBENLISZT, 23. §, 30; BÁNÓ, 219. §, 214–215; VIROZSIL, 76. §, 151.
[21] SZIBENLISZT, 30, footnote; BÁNÓ, 219. §, 215.
[22] ZEILLER–EGGER, footnote, 193.
[23] ZEILLER–EGGER, 162. §, 194; SZIBENLISZT, 24. §, 31–32.

the marital community of life may even lead to divorce,[24] provided the rights of third parties are not violated. Therefore, in the event of divorce, the efforts should be made to protect the rights of children as mush as possible. The consequence of agreement of both parties to get divorced results in fact, that no right or obligation derived from matrimony exists between parties any longer. The consensus on the dissolution of marriage, however, may not affect the children. Accordingly, certain natural law theorists in possession of a great deal of frequent experience claim if the compliance with obligation regarding children becomes impossible on account of divorce, the expulsion of wife should not be permitted.[25]

The other cause leading to divorce, the Law of Reason noted, the incurable impotence *(impotentia)* emerging prior to contracting marriage, which precludes the achieving the aim of marrige. Conversely, if it occurs after contracting marriage, it cannot cause the termination of marriage.[26]

The faithlessness *(perfidia)* also may result in the termination of marriage, which can be committed in several ways. The most obvious way proves to be the adultery or unfaithfulness towards the other spouse *(adulterium),* but the same problem emerges, if either party denies the marital obligation *(denegatio officii coniugalis)* manifested by the absolute and permanent refusal of the obligation *(ex absoluta aversatio promanente),* even with the mailicious evasion from it. Undoubtedly, the anti-life act *(insidiis vitae structis)* is considered to be the most serious case of marital infidelity.[27] The further version of infidelity is regarded as the sexual deviances, as follows: the onanism *(onania),* the pederasty *(paederastia)* and sodomy *(Sodomia).*[28] According to the explanation of Law of Reason the use of genital organs for their sake, besides the abuse of nature, is opposed to the right of the other spouse, therefore it proves to be a type of breaches of contract. Eventually, the termination of marriage is also caused by death, because the marital rights and obligations relate to personality, in every respect.[29]

6. Apprehension of engagement by the Law of Reason

The apprehension of engagement *(sponsalia)* preceding marriage also refers to the issue of mutual consent, which is regarded as the basis of wedding. According to this interpretation the engagement, taking the nature of marriage into account is considered to be an undesired practice by the Law of Reason.[30] As explained by the Law of Reason the legal criteria applied for contracts prevail concerning engagement, as well. In case, the parties get engaged the consequence results in the fact that both parties must give up any act leading to the termination of marriage or remending the fulfillment of it. This fact may, ultimately, restrict the free will which appears to be the most significant element of contracting a future marriage.[31]

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[24] ZEILLER–EGGER, 159. §, 191–192; SZIBENLISZT, 23. §, 30; BÁNÓ, 221. §, 218.

[25] SZIBENLISZT, 24. §, 32; BÁNÓ, 221. §, 218.

[26] SZIBENLISZT, 24. §, 32; BÁNÓ, 221. §, 218.

[27] ZEILLER–EGGER, 159. §, 191–192; SZIBENLISZT, 23. §, 30; BÁNÓ, 221. §, 218; VIROZSIL, 79. §, 154–155.

[28] „*Procul dubio etiam per Onaniam, Paederastiam, Sodomiam, ab uno conjuge commissam, matrimonium solvitur. Quia usu membrorum genitalium contra finem naturae est abusus, juri alterius conjugis contrarius, igitur violatio pacti conjugalis.*" SZIBENLISZT, 32, footnote; cf. BÁNÓ, 221. §, 218; ZEILLER–EGGER, 159. §, 191–192; VIROZSIL, 79. §, 154–155.

[29] „…cum conjugum jura sint personalissima" SZIBENLISZT, 24. §, 32; VIROZSIL, 79. §, 154–155.

[30] SZIBENLISZT, 32; ZEILLER–EGGER, 195; BÁNÓ, 222. §, 219.

[31] „sponsalia […] voluntatis libertatem, quae in matrimonio ineundo maximi momenti est, quoddammodo limitare videtur" SZIBENLISZT, 24. §, 32. and ZEILLER–EGGER, 195; BÁNÓ, 222. §, 219; VIROZSIL, 77. §, 153.

7. Conclusion

In the concept of Natural Law the legitimacy of matrimony interpreted as a civil-law contract by pure reason demands the recognition of the State. It is considered not to be an option possible for the future spouses by Doctrine of Law of Reason. From a legal aspect besides the consent between the parties, the institution of marriage is validated by the act recognized by the State. Overall, the marriage is not apprehended as a sanctity by the Law of Reason contrary to Canon Law, but as a contract recognized by the State, belonging typically to the State competence. This is also shown by the fact, that the Doctrine of the Law of Reason in the question relating to the termination of marriage focuses on its contractual nature, but not the dissolution based on fault, so the disintegration of consensus appears to be the crucial aspect of this issue.