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Exploring the Enforcement of the Right to Resist in the 19th Century Natural Law Theory

ABSTRACT: Studies on natural law carrying the more moderate spirit of the Enlightenment promoted the establishment of civil society, humanity, and equity, and by the turn of the 18th and 19th centuries, created a synthesis of the views of Pufendorf, Leibniz, Thomasius, Wolff, and Kant, which reflected the state and legal systems. Although the sovereignty of the state and the nature of its *maxima societas* remains unquestionable, governance can be subject to criticism. Executive power can only be exercised under the law, and if not, citizens may use various means of their right to resistance, observing the principle of gradation and proportionality. This study demonstrates the applicability of these tools to the interpretation of natural law in the 19th century.

KEYWORDS: natural law, Hungarian natural-law literature, citizen's and public authority's rights and obligations, enforcing rights, form of rights to resist, principles of gradation and proportionality, tyrannical exercise of State power.

1. Nature Law Literature in Hungary in the 19th Century

The changes in the Faculty of Law at the University of Vienna during the first decade of the 19th century led to a change in attitude towards Hungarian studies in natural law. Thereafter, studies in natural law no longer referred exclusively to the works of Karl Anton Martini but sought to make it possible to accept the new rationalist aspect represented by Franz von Zeiller and Franz von Egger (Martini's successors in the department) based on Immanuel Kant's concepts. By the turn of the 18th and 19th centuries natural law studies promoted the establishment of civil society, humanity, and justice with a more moderate spirit of the Enlightenment; and by the turn of 18th and 19th centuries it synthesised the views of Pufendorf, Leibniz, Thomasius, Wolff and later Kant on the state and the law of

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societies. In the spirit of the old Aristotelian scholasticism, the principles of natural law, practised as part of philosophy, underwent a reform in legal education and thus became a terrain for the adoption of new ideas, in which oddly enough the governments of the Enlightenment absolutist states played a catalytic. State support for legal education had its reasons, it was in line with the educational goals of Karl Anton Martini and Joseph Sonnenfels. These objectives were based on the Wolffian thesis that the purpose of the State is to ensure the public good and prosperity of its citizens; consequently, the ruler, as the representative of the State, is entitled to and obligated to regulate all matters of the State, including education, in a sovereign manner.[332] This type of mindset, as well as the reorganisation of legal education, resulted in the establishment of a separate department for instructing on natural law. The heads of the department – Martini and his successor Zeiller – implemented natural law into the service of Austrian private law codification, thus making theoretical considerations of natural law useful in practice. Martini attempted to rationalise nearly six decades of preparatory work for the Austrian Civil Code from a natural law perspective, however, the final version of the Code also carried the conceptual features of natural law, owing to Franz Zeiller's reworking of the Kantian spirit.[333]

Mihály Szibenliszt was the first to represent and establish this aspect of natural law in Hungary, and Imre Csatskó and István Bánó used his two-volume natural law in institutions.

It was officially adopted in academic circles by Antal Virozsil, and at the end of the 19th century, Tivadar Pauler's works[334] represented contemporary literature on natural law.[335]

2. Rights and Obligations under the Concept of Natural Law

Nineteenth-century natural law based its grasp on law on the essence of human nature, asserting that the principles of natural law could only be applied in relation to humans and human communities. According to this view, humans as both rational and free.[336] Therefore, the principles of

[332] Kornis, 1927, p. 4.
[333] Hamza, 2002, p. 40.
[334] Szabadfalvi, 2010, p. 343.
[335] Szabadfalvi, 2011, pp. 479-480.
[336] Virozsil, 1833, p. 1.

natural law can be revealed with knowledge of human nature and the invocation of pure reason. It is necessary to identify ways of thinking that allow people to distinguish between lawful and unlawful.[337] According to this conception, law is the sum of the conditions under which one person's will is reconciled with that of another through the general laws of freedom and to which the power of compulsion is related. Every law carries within itself the possibility of coercion, that is, the possibility of preventing violations through legal means.[338]

According to natural law to acquire a clearer understanding of the law, it is necessary to clarify the essence of a legal obligation, which should be understood as the free formation of an external act that conforms to a legal obligation. The legal obligation can arise from another person's right, and it is simply the necessity to conduct a determined external action; for example, from the right of a creditor, the obligation to fulfil arises for the debtor.[339] In social coexistence, it is not possible to possess 'rights' without considering the freely expressed external actions of others, therefore, it is necessary to consider both rights and obligations.[340] The essence of a legal obligation (i.e. an obligation correlatable to a right) is explained by natural law as follows:

- Originally, all legal obligations have a negative content, aiming to not disturb others in their exercise of rights.
- This only applies to external acts, as internal acts are not suitable for limiting others' freedom of activity.
- Compliance with legal obligations can be encouraged by applying coercion to prevent someone who does not fulfil a legal obligation from exercising the right to resist its fulfilment.[341]

3. The Possibilities for Exercising the Right of Resistance

Natural law theories distinguish between a state of nature (*status naturalis*) and a civil relationship (*civilis nexus*), where the civil relationship denotes a social relationship between people organised as a state. Individuals are entitled to rights in their naturalistic state in which they are characterised by

[337] Zeiller, 1819, p. 1.
[338] Szibenliszt, 1820, pp. 12-13.
[339] Szibenliszt, 1820, pp. 13-14., and see more Zeiller, 1819, p. 7-8.
[340] Szibenliszt, 1820, p. 12.
[341] Szibenliszt, 1820, p. 15.

a system of relations based on individual rights and obligations.[342] In such a state, individuals are independent, free, and equal, characterised by rational thinking, which implies that they are capable of formulating their own will and making decisions.[343] Thus, natural law not only describes, analyses, and explains the rights of people living within the state framework (*in civitate*) but also presents the rights entitled to people in their condition of nature, that is, those rights which the individual has independent of all state formations (*ius extrasociale*). This emphasises that all rights in civil society are derived from rights which originally belonged to the individual.[344] However, for the safe exercise of these rights and accompanying obligations, such social formation based on a consensual agreement (social contract) is required, which aims to ensure the aforementioned. This social formation is the state (*civitas*) in which individuals unite in common strength for a common purpose and, by their common will, organise themselves into a state to achieve this goal.[345] The theory of natural law holds that all types of states are based on consensus and must have at least three content elements: 1) union (*pactum unionis*), 2) determination of the state form (*pactum constitutionis formae*), and 3) submission to state power (*pactum subiectionis*), which, either separately or collectively constitute the treaties that create the state. All contract elements create mutual rights and obligations between the contracting parties. The contracting persons, now citizens, determine the form of government they have selected and its subject, to whom they submit themselves to in order, to ensure that their rights are entrusted to them as representatives of public power.[346]

The exerciser of public power and the now subjects of state[347], thus established mutual rights and obligations, and it was also recognised that the subjects had the right to form an opinion on the measures of public power and, in the last resort, to express their dissatisfaction through pressure, i. e. through methods of force (*coactione*). This right reserved for the citizens stems from the principle of '*ius resistendi*', and the means of enforcing this

[342] Szibenliszt, 1820, p. 23.
[343] Szibenliszt, 1820, p. 2.
[344] Szibenliszt, 1820, p. 24-25.
[345] Szibenliszt, 1821, p. 46.
[346] Szibenliszt, 1820, p. 57; Zeiller and Egger, 1810, Geistinger Band 2. pp. 2-3;Martini, 1795, p. 13.
[347] In natural law terms, the Latin word '*persona*' refers to an individual within a private legal context, focusing on their autonomy. Conversely, the term '*subjectum*' is used in public law to describe the individual and express their public subordination as a citizen.

right are accurately determined by the natural law. It presents a logical system of legal means by which citizens can legally oppose the state's power holder - typically the 19th-century monarch - in the case of conflict.

Under the concept of '*ius resistendi*', a wide range of measures can be undertaken, from simple civil disobedience (*ab obligatione obediendi immunes declarari*) to the right to armed resistance (*ius armorum*). The legality of the current means of expressing dissatisfaction depends on the availability of alternative options to the citizens[348] The choice of appropriate means can be considered as a method that guides the interpreter through this process according to an algorithm.

In possible applications between the two extreme points of the toolset, the current and legally usable tools must be selected according to two conjunctive principles. First, adhering to the principles of proportionality and graduality, no harsher measures may be used if milder measures are available in a reasonable manner. Second, efforts should always be made to uncover the real cause of injury.[349]

To select appropriate legal instruments, the natural law of the 19th century built additional filters into the process. It must be examined whether the demand for enforcement is expressed through individual or collective (*ius concivium*) application. In the case of individual enforcement, it must be clarified whether an injury is a consequence of a public or a private act of exercising public power. In the latter case, citizens cannot be denied the right to protest. However, the right to assess the legality of state acts has been transferred to the exerciser of state power by the *pactum subiectionis*, therefore, its assessment is within his scope.[350] The possibility of exercising the right to resist as a community must be interpreted differently. It should be examined whether the offence stems from the violation of constitutional rights or, although it does not violate them, allows for the inference of a form of governance contrary to the state's goals. In cases of constitutional grievances, a distinction must be made between whether the fundamental laws are laid down specifically in positive laws or take shape only in natural laws.[351] When constitutional rights are not violated, but the direction of public affairs appears to be contrary to the state's goals for some reason, citizens, by their duty of obedience, do not have the right to resist, since,

[348] Szibenliszt, 1821, pp. 280-281.
[349] Szibenliszt, 1821, p. 281; Zeiller and Egger, 1810, p. 394.
[350] Szibenliszt, 1821, p. 280; and see more Zeiller and Egger, 1810, p. 394.
[351] Szibenliszt, 1821, p. 281; and see more Zeiller and Egger, 1810, p. 394.

under the terms of *pactum subiectionis* the citizens have transferred decision-making power over such matters to the exerciser of state power, therefore, in such a situation, they have waived their right to resist. Otherwise, all the people would have transferred state power to the ruler on the condition that it could only be exercised if the people judged it to be well governed. According to some authors, such a stipulation would not be valid, as it would mean that the people who undertake the obligation of obedience in *pactum subiectionis* could unilaterally dissolve this obligation themselves.[352] Therefore, the actual situation is that the ruler reserves the right to act in the affairs of the state according to his judgement, while the people declare their obedience. Therefore, if an unfortunate situation or human weakness results in a bad government, it is primarily the right and duty of the ruler to take action against it.[353]

When citizens protest against the state's measures of public authority concerning the violation of the constitution (*laesio Constitutionis*), and this is considered a violation of laws that are laid down in basic laws, they act legitimately against the exerciser of public power. At this point, it must be examined whether the violation of the statute is only assumed or factually occurred. Until it is doubtful that this has occurred, all subjects are obliged to comply with the public authority's orders. The good faith of public authority in the exercise of state power can only be questioned by considering its inherent right to good reputation.[354]

However, the people are entitled to pre-submission rights (*ius proponendi*), according to which they can present the basis on which they judge that a constitutional injury has been committed. Moreover, they have the right to propose alternatives to the actions they consider to be unlawful. The right to express an opinion (*ius iudicandi*) on this is also granted to the people under the term 'Treaty of Submission' (*pactum subiectionis*).[355]

If it becomes clear that basic law has been breached, it must be examined whether the exerciser of public power did so arbitrarily or out of necessity, and if done out of necessity, citizens have the right to be informed about the necessity itself so that they can comply with the basic agreements. Indeed, fundamental law was created to serve the public good, to provide a more secure and solid instrument for the attainment of the state's purpose,

[352] Szibenliszt, 1821, p. 282., and see more: Zeiller and Egger, 1810, p. 396.
[353] Szibenliszt, 1821, p. 283., see more Zeiller and Egger, 1810, pp. 397-398.
[354] Szibenliszt, 1821, p. 284., see more Zeiller and Egger, 1810, p. 398.
[355] Szibenliszt, 1821, p. 284., Zeiller and Egger, 1810, p. 398.

and not to impede it. Thus, if the constitution conflicts with the welfare of the state, its validity is suspended in such a situation by the tacit consent of the people in the interest of the state, and the exerciser of state power has, out of necessity, violated the constitution or a passage of the constitution which has impeded the achievement of the state's purpose.[356]

When no situation necessarily leads to a violation of the constitution, citizens are entitled to the right of explanation and reckoning as to whether the provisions of the fundamental law have been fulfilled (*ius repraesentandi et ex eadem rationem postulandi*). If this legal tool is insufficient, then the people have the right to refuse obedience to the rule, contrary to the Constitution.[357] Nevertheless, if a public authority forces citizens to act according to the unconstitutional provision, it should be examined whether the exerciser of state power is attempting to enforce civic obedience through internal or external forces.[358] If coercion is backed by internal forces, and all citizens, or at least the majority, do not obey, the right to resist reaches its goal, as the majority will enforce the solution. If only a small section of citizens deny obedience, then the right to resist must be rejected not only based on the *pactum subiectionis* but also because the majority of the fellow citizens do not wish to exercise it, as well as from the treaties that define the union (*pactum unionis*) and the form of government (*pactum constitutionis formae*).[359]

In the case of a fundamental law which is not regulated by statutes but only manifested in natural law, such as when freedom of conscience, the so called to freedom of religion is violated, the rights to the aggrieved community must be examined. In such cases, the essence of the violation must be determined precisely, for examples, what appears to them as a religious ethical obligation and what type of injury they suffered in this regard if the aforementioned right is violated. In this determination, whether state regulations violate a facultative or compulsorily prescribed religious rule must be considered. Permission for facultative religious acts by the state always depends on certain conditions, the assessment of which is the state's right; therefore, citizens are obliged to obey state regulations. If a state act prescribes the violation of a mandatory religious-moral act, such as the requirement that citizens do not practice any religion, thereby denying

[356] Szibenliszt, 1821, p. 285., and see more Zeiller and Egger, 1810, pp. 398-399.
[357] Szibenliszt, 1821, p. 285., Zeiller and Egger, 1810, pp. 398-399.
[358] Szibenliszt, 1821, p. 286., Zeiller and Egger, 1810, p. 399.
[359] Szibenliszt, 1821, p. 286., Zeiller and Egger, 1810, pp. 398-399.

their humanity and allowing them to be treated as objects, they rightly refuse to comply with such a ruling. Moreover, disobedience against such sanctions is allowed even if the public authority invokes a state of emergency, as citizens cannot be treated as objects.[360] However, those who cite the violation of the freedom of religion demonstrate disobedience or open resistance against the act of the State that is not considered illegal, commit the same offences as, for example, lèse-majesté or rebellion.[361]

4. Resistance against the Tyrannical Exercise of Power

Natural law considers the legal instruments provided for the protection of citizens' rights when a tyrant violates the laws of nature. It defines a tyrant as an exerciser of state power who intentionally uses means openly and suitably directed towards the detriment of civil society.
Consequently, those who violate citizens privately or cause damage to the state without malevolent intent are not tyrants.[362]

According to some natural law views, people are even allowed to take up arms against a tyrannical ruler since the interpretation of the *pactum subiectionis* cannot be forbid the people to act in defence of their inherent rights while their destruction is deliberately attempted. This right to resistance is further supported by the fact that those who exercise power in a tyrannical manner may be assumed to have been tacitly deprived of the right to govern the state because the intention to destroy the state is incompatible with governance.[363] Armed resistance to the ruler can, therefore, legally be exercised under two conjunctive conditions: first, if, of the subjects see, the ruler as truly a tyrant and, in judging it, there is consensus among all the people or at least the overwhelming majority; and second, if this is the only means to restrain the tyrannical rule. Further consideration is required if the tyrant resorts to external assistance, because in such cases, the right of force can be exercised only against external helpers while respecting the state's order. However, the principle of gradation must continue to be applied here; it is primarily advisable to resort to disobedience towards the tyrant when the subjects or the overwhelming majority agree to do so. Consequently, the

[360] Szibenliszt, 1821, p. 288; Zeiller and Egger, 1810, pp. 403-404.
[361] Szibenliszt, 1821, p. 288; Zeiller and Egger, 1810, p. 405.
[362] Szibenliszt, 1821, pp. 288-289. , and see more Zeiller and Egger, 1810, p. 406; Martini, 1795, p. 131.
[363] Szibenliszt, 1821, p. 298; Zeiller and Egger, 1810, p. 406.

tyrannical ruler, together with the loyal minority, will no longer be able to enforce his despotic provisions. If he were to call upon foreigners for help, neither the *pactum unionis* nor the *pactum subiectionis* would impose any obligation on the people that would prevent them from exercising their right to resist foreigners. After all, the people have not entered into any type of agreement with foreigners and are not subject to tyrannical rule.[364]

While exercising the right to resist as the legitimate defence of the people, milder means should always be preferred. For example, the secure custody of the ruler (*secura custodia Imperanti*) considered a tyrant or his removal from public life and ultimately from the state (*remotio a Civitate*). The enforcement of the right to punishment is not directly vested in the people as a state prerogative. Therefore, citizens can never exercise the right of arms against the ruler (*ius armorum in personam Regis*) because his person is sacred and inviolable.

Armed resistance is forbidden from being demonstrated against the ruler as long as he has both personal and real state power. However, if he has already been deprived of these and the subjects act against him, he can be considered simply as a subject, like anyone else. From that point on, he can be subjected to the enforcement of both *ius puniendi* and *ius armorum*.[365]

5. Conclusion

Although state authority is unquestionable due to its sovereignty and the nature of *maxima societas*, governance can be subject to the citizens' criticisms. Executive power can only be exercised in accordance with laws. Otherwise, citizens can resort to various means of resistance, considering the principles of gradualism and proportionality.

First, non-public law acts, that is, the private acts of rulers that offend certain citizens, can be highlighted, against which citizens undeniably have the right to resist, which they can enforce by turning to court. Regarding public law acts, citizens have the right to complain about alleged or actual

[364] Szibenliszt, 1821, p. 298., and see more Zeiller and Egger, 1810, pp. 408-409.

[365] "Imperanti itaque judicio relinquitur, quid e re sit Civitatis, et in eo se popululs imperium transferens adquiescere velle declarat. Quod si male regimini praeest, fortunae id adversae, humanae imbecillitati, difficilliom Rectoris numeri tribui, ac patienter ferri debet." Szibenliszt, 1821, p. 283., and see more Zeiller and Egger, 1810, pp. 397-398.

injury (*ius proponendi*), form an opinion, and judge the acts of the public authority (*ius iudicandi*).

This is related to people's right to receive information (*communicetur*) about the situation of necessity that has justified the offending, restricting acts. This is where it is necessary to mention the citizens' rights to explanation and to enquire whether or not the provisions of the fundamental treaty were fulfilled (*ius repraesentandi et ex eadem rationem postulandi*). Finally, individuals can use civil disobedience as a form of pressure.

However, this peaceful pressure can only be applied if the subjects, or at least majority of them, have consented to its application. This already implies such a demonstration of force, so that further disobedience becomes unnecessary. Therefore, the right to arms (*ius armorum*) is lawful only against a tyrant, however, the principles of gradualism and proportionality also apply.

Bibliography

[1] Martini, C. A. (1795) *De lege naturali positiones, Positiones de iure civitatis.* Buda.

[2] Molnár, A. (1881) *A közoktatás története Magyarországon a XVIII. században*. Budapest: Magyar Tudományos Akadémia.

[3] Kornis, Gy. (1927) *A magyar művelődés eszményei 1777-1848*. Vol. I., Budapest: Királyi Magyar Egyetemi Nyomda.

[4] Hamza, G. (2002) *Az európai magánjog fejlődése*, Budapest: Nemzeti Tankönyvkiadó.

[5] Pauler, T. (1878) *Adalékok a hazai jogtudomány történetéhez.* Budapest: A Magyar Tudományos Akadémia Könyvkiadó Vállalata.

[6] Szabadfalvi, J. (2011) *A magyar jogbölcseleti gondolkodás kezdetei, Werbőczy Istvántól Somló Bódogig.* Budapest: Gondolat Kiadó.

[7] Szabadfalvi, J. (2010) The Beginnings of Hungarian Legal Philosophical Thinking, *ARSP: Archiv für Rechts- und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy*, 96(3).

[8] Virozsil, A. (1833) *Jus naturae privatum, methodo critica deductum ab Antonio Virozsil.* Pesthini.

[9] Zeiller, F. N. (1819) *Jus naturae privatum*. Viennae: Editio Germanica tertia Latine reddita a Francisco Nobili de Egger.

[10] Szibenliszt, M. (1820) *Institutiones juris naturalis conscriptae per Michaelem Szibenliszt, Tomus I. Jus naturae extrasociale complectens*. Jaurini.

[11] Szibenliszt, M. (1821) *Institutiones juris naturalis conscriptae per Michaelem Szibenliszt, Tomus II.* Jaurini.

[12] Zeiller, F., Egger, F. (1810) *Das natürliche öffentliche Recht, nach den Lehrsätzen des seligen Freyhern C. A. von Martini vom Staatsrechte, mit bestän. diger Rücksicht auf das natürliche Privat-Recht.* Wien und Triest.