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FROM THE IDEA OF STATE-CHURCH TO THE IDEA OF SEPARATING THE STATE AND CHURCH [*]

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1. Introduction

In Hungary of the 19th century, it was the customary laws that predominated. In addition, the relationship between the state authorities and the organised social groups was characterised by the incongruous mixture of "government ordinances, instructions, prohibitions, licences as well as *ad hoc* arrangements" generating "a diversity of administrative practices and insecurely held privileges".[1] In such circumstances, increasingly arose the need to create a type of civil society in which the individuals were to be subjects to a single legal order, and were to be endowed the same rights and duties. The reform of the church-state relation based on freedom of conscience and religion also formed an important part of the endeavour to establish a civil society. In this contradictory situation, the natural law movement declaring the ideals of freedom and equality before the law and the freedom of association marked a breakthrough. As a product of the natural law movements, Civil Codes were enacted in order to protect the individual and the social groups by laws. After about 40 years preparatory works the Civil Code of Austria was enacted. By codifying along the lines of natural law, its leading drafters, Karl Anton Freiherr von Martini and Franz von Zeiller, similar to a modern constitution, aimed to give protection to fundamental rights.[2] Both of them were representatives of the natural law theory that became accepted in Hungarian Legal Philosophy. The objective of the 19th century-natural law which was the creation of a legal order safeguarding the liberty of conscience and religious met the monarch's wide powers in religious matters being largely customary and

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[1] Péter LÁSZLÓ : Church-State Relations and Civil Society in Hungary: A Historical Perspective. *Hungarian Studies*, Vol. 10, No. 1, Akadémiai Kiadó, 1995, p. 4.

[2] Wilhelm BRAUNEDER: The "First" European Codification of Private Law: The ABGB. *Collected Papers of Zagreb Law Faculty*, Vol. 63, No. 5–6, 2013, p. 1023, https://hrcak.srce.hr/116252 (14/11/2019).

undefined. One of the natural law's essential tasks was to determine the framework of secular power in religious matters and this effort led to the idea of secularity.

2. Natural law and its concept in Hungary of the 19th century

The natural law of the 19th century appeared as a synthesis of interacting concepts going back to the 17th century. In this process, the natural law theory based on theological arguments had a significant impact. This tendency owing to its Reformation and Counter-Reformation Christian attitude, and based on rational perceptions, recognized the social reality of the state and developed the state-building principles of natural law. In the meantime, the mechanical concepts of natural law focusing on individual rights also became prevailing. They examined the universal principles that are regarded as decisive without the existence of God. By emphasizing the primacy of experiential knowledge, then it proclaimed the exclusivity of consensual social ethics directing the legal philosophy towards positivism. It was Immanuel Kant who, by his transcendental philosophy[3], was able to achieve the right balance between two competing dimensions heading for the crisis by the middle of the 18th century. This version of natural law recognized as Doctrine of Reason (School of Critical Reason) from the first decades of the 19th century[4] became more and more accepted in the Hungarian legal philosophy. Due to the change of approach in Austria[5] – where the concept of Karl Anton Martini[6] favored in royal circles was officially replaced by views of Franz Zeiller and Franz Egger[7] accepting Kantian doctrine at the University of Vienna – Mihály Szibenliszt[8]

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[3] Kant, contrary to epistemologies relying solely on experimental knowledge, makes us aware of the fact that man's cognitive ability also extends to unobservable phenomena, so "The mind, apart from the intellect, is capable of creating ideas that have no objective form, that is, they cannot be perceived (eg. God, soul, free will)." László TENGELYI: *Kant*. Kossuth Könyvkiadó, Budapest, 1988, p. 89.

[4] The name of School of Reason already appears at Adam Friedrich Glafey (1723), who was a follower of Thomasius, "but it has been used by Kant and it also characterizes the rational tendency of science in contrast to the Historical and Theological School of Jurisprudence". Tivadar PAULER: *Bevezetés az észjogtanba*. Pest, 1852, p. 6. and *History of the Philosophy of Law in the Civil Law Word 1600–1900*. Volumen 9, edit: Damiano CANALE–Paolo GROSSI–Hasso HOFMANN, Springer Science+Business Media, B. V. 2009, p. 23.

[5] József SZABADFALVI: *A magyar jogbölcseleti gondolkodás kezdetei, Werbőczy Istvántól Somló Bódogig*. Gondolat Kiadó, Budapest, 2011, p. 33.

[6] Karl Anton MARTINI: *Positiones de iure civitatis in usum auditorii Vindobonensis*. Vindobonae, Typis Ioann. Thom. nobilis de Trattern, 1779.

[7] Franz von ZEILLER, Franz von EGGER: Francisci Nobilis de ZEILLER: *Jus naturae privatum*. Editio Germanica tertia Latine reddita a Francisco Nobili de EGGER, Viennae, apud Car, Ferdinandum Beck, MDCCCXIX and Franz von ZEILLER, Franz von EGGER: *Das natürliche öffentliche Recht*, nach den Lehrsätzen des seligen Freyherrn C. A. von Martini vom Staatsrechte, mit beständiger Rücksicht auf das natürliche Privat-Recht des k. k. Hofrather Franz Edlen von ZEILLER, von Franz EGGER

[8] Mihály SZIBENLISZT: *Institutiones juris naturalis* conscriptae per Michaelem SZIBENLISZT, Tomus I. *Jus naturae extrasociale complectens*, Eger, 1820. and Mihály SZIBENLISZT: *Institutiones juris*

as forerunner tried to adopt this new critical theory of reason in Hungary. He was followed by Antal Virozsil,[9] Imre Csatskó,[10] István Bánó.[11] At the end of the 19th century, the theoretical summary of the Law of Reason can be found in several works of Tivadar Pauler,[12] who himself shared its principles but dealt with the Law of Reason mainly in a historical way.

3. Impacts on the traditional relationship between the state and Churches

The attitude of the state to Churches was clarified at a conceptual level by the modern natural law theory. Elaborating the individual rights and system of legal norms of public law derived from them and creating coherence between them, the concepts set out on the functions and nature of state power and last but not least, the institutions and categories of public law defined in the modern approach – all they contributed to the change brought about by natural law in this area.

The individual rights derived from the Right of Personality *(ius personalitatis)* expressing human dignity – such as the right to personal liberty *(ius personalis libertatis)*, the right to protect and improve physical and mental health *(ius conservandi et preficiendi corpus et animum)*, the freedom of expression and thought *(ius liberae cogitationis et liberae communicationis idearum)*, the freedom of conscience and religion *(libertas conscientiae seu ius in religionis juxta proprium arbitrium agendi)*, the inherent rights of disposal over things *(iura connata rerum)*, the freedom of contract *(libertas negotii contrahendi)* and the right of association[13] – by applying to social contract theory, they are considered in the system elaborated by natural law as a basis for institutions of public law. However, the theory of social contract founded not only the legitimacy of nation-states, but also *the raisons d'être* of various church denominations.

The interpretation of state as a *maxima societas* have prompted to reconsider the legal concept of Churches. On the one hand, an absolutist definition of the state was outlined demanding to coordinate the social life as a whole, on the other hand, an individualistic church concept emerged which tried to regard Churches as a

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naturalis conscriptae per Michaelem SZIBENLISZT Tomus II. *Jus naturae sociale complectens*, Eger, 1821.

9 Antal VIROZSIL: *Epitome juris naturae seu universae doctrinae juris philosophicae*. Pest, Typis Josephi Beimel, 1839. Pars I. Liber I. Sectio II.

10 Imre CSATSKO: *Bevezetés a' természeti jogba és a' tiszta általános természeti jog*. Győrött Streibig Lipóld' betűivel, 1839.

11 István BÁNÓ: *Elementa Jurisprudentiae naturalis secundum vestigia celeberrimorum* FRANC. nob. de ZEILLER, ac de EGGER aliorumque de jurisprudentia meritissimorum virorum conscripta a STEPHANO BANÓ, Claudiopoli Typis Lycei Regii, 1836.

12 Tivadar PAULER: *Bevezetés az észjogtanba*. Pest, 1852. *Az észjogtudomány fejlődése 's jelen állapotja*. Tudománytár, Buda, 1843. *Észjogi előtan*. Budapest, 1873. *Észjogi alaptan*. Pest, 1854. Cf József SZABADFALVI: Pauler Tivadar, az észjogtudomány utolsó nagy alakja. [Tivadar Pauler, The Last Great Figure of the Law of Reason School] *Zempléni Múzsa*, *epa.oszk.hu/02900/02940/00054/pdf/EPA02940_zmimuzsa_2014_2_012-018.pdf (Downloaded: 05. 10. 2016).*

13 SZIBENLISZT: *Jus naturae extrasociale…*, 50–51. Cf. ZEILLER–EGGER: *Jus naturae privatum…*, pp. 59–61.

society, i.e. association in the sense of private law. Natural law concept also attributed great importance to the authorities competing between two entities, for dissolution of which, as a secular science offered tools to the state bearing in mind the *salus rei publicae*, the well-being of its citizens, the general good.

4. New Church Concept

In the concept of modern natural law, the *pacta sunt servanda* principle and the theory of social contract based upon it are regarded as a basis of any form of society. Thus, it deals with the laws in detail by which every model of society is defined. As a result of the interaction of Protestantism and modern natural law, the legal concept of the Church was supplemented with new content, with a consensual issue. The idea, that Church is also established through the union of freedom-minded people, just like any other society, including the state, pushed the divine origin of power into the dimensions of theology.[14] The legal concept of the Church emphasizes the associational its nature, by which the Church itself at an early stage was also considered as a *societas aequalis*, i.e., as an equal society.[15] Consequently, the matters have to be arranged by the Church members communally. The full Government of a Church is entitled only to those, whom the community authorized it to. As a result of this authority transfer, the Church functions in an unequal form of society *(societas inaequalis)*. The full Church Government is entitled only to those whom the community authorized it to. This natural law concept aimed to justify the autonomy of Churches.

5. Natural-law Interpretation of Relationship between State and Churches

The new church concept provided secularism characterizing the modern states and the need for separation of Church and state generating many benefits for both entities. With the spread of the idea of a modern, sovereign country, the state already reserved the authority defined as the collective term *"ius circa negotia religionis seu ecclesiastica"* by which it determines the relationship between secular power and religion. In this concept, the state is regarded as an ultimate and supreme authority which such phrases as *suprema maiestas*, *maxima societas* refer to. According to it, the state has competence for all forms of social coexistence, for which it no longer recognizes any intermediate powers. Therefore, the state is undoubtedly entitled to political rights over holy matters, all the more so the state

[14] On the development of church concept and the difference of Catholic and Protestant church concept are detailed in Béla SZATMÁRY*: A Magyarországi Református Egyház szervezetének kialakulása és jelenlegi működése, különös tekintettel az egyházi bíráskodásra*. Habilitation dissertation.

[15] About modells of society cf. Otto Friedrich VON GIERKE: *Natural Law and the Theory of Society, 1500 to 1800*. Volume II. Cambridge at University Press, 1934, p. 380.

demands the regulation of all issues that may have a direct or indirect impact on the purpose of the state, which may be any obstacle to the purpose of the state.[16]

Conversely, the Churches enjoy great moral prestige, which the state is willing to put it into its service. The citizens of the state are often members of a Church, that as a society *(societas)* has certain authority to give directives *(potestas)* their members.[17] Therefore, in order to avoid the conflict of competence and any overlapping of it between the state and the Church, it is necessary to clarify to what extent the state is allowed to intervene in the affairs of the Church. Natural law considers the prerequisite of understanding the answer to this matter by defining certain concepts.

6. Definition of Churches, religions and religious acts, delimination of *ius in sacra* and *ius circa sacra*

Natural law defines the term of the Church as a society of natural persons sharing the same faith. Referring to its permeation, a Church may be universal *(universalis)*, which acts out as a community spreading worldwide, and it may be particular *(particularis)* if limited to a certain region.[18] Religion is meant by natural law, as our knowledge about God. The exercise of religion *(cultus Dei)* is characterized, as an activity encouraging to contemplate the perfection of God. They can be manifested in two ways: internally *(internus)* and externally *(externus)*.[19]

A difference is made between true *(vera religio)* and false religions *(falsa religio)*. Natural law considers true religion which meets the divine attributes, and a religion contradicting these attributes is considered to be a false one. Religions based on divine revelation *(religio positiva)* must be distinquished from religions of nature (natural religions) *(religio naturalis)* whose doctrines can be revealed by the inspiration of pure reason. A religion whose followers consider God as an existing and influencing the good fate and misfortune of people is recognized as a religion based on the senses *(religio sensualis)* and identified by natural law as pagan, i.e., not a Christian religions. Contrarily, a religion regarding God as the

[16] "Cum denique Imperanti jus in objecta, quae uti impedimenta, ita media promovendi finis Civitatis esse queunt." SZIBENLISZT: *Jus naturae sociale...*, op. cit. 194. Cf. MARTINI 71., ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 255. VIROZSIL 335.

[17] "Membra Civitatis sunt una membra ecclesiae, potestate instructae, ne igitur inter potestatem ecclesiasticam, et civilem collisiones eveniant: necessarium est determinare, an, et quatenus civile imperium semet in religionis negotia exserat." SZIBENLISZT: *Jus naturae sociale...*, op. cit. 191.

[18] "Ecclesia est societas personarum, eandem religionem profitentium; estque vel universalis, quae per terrarum loca quaecunque dispersa et, vel particularis, quae in certis quibusdam locis provincia pago vel vico existit." SZIBENLISZT: *Jus naturae sociale…,* op. cit. 191. Cf. MARTINI 71. ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 255.

[19] "Religio est cognitio Dei (Theoretica), et determinatus modus Deum colendi (Practica). Cultus Dei est complexus actionum, ad quas divinorum attributorum contemplatio nos impellit, et prout hae actiones sunt internae, vel externae." SZIBENLISZT: *Jus naturae sociale…*, op. cit. 191. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 255.

moral Legislator, Judge and Executor is defined as a moral religion *(religio moralis)* and the religion of Christians is considered to be of this character.[20]

Natural law distinguishes among authorities over Churches according to the fact whether they belong to the category of *ius in sacra* or *ius circa sacra*. Natural law uses the term *ius in sacra* for unlimited authorisation over holy things, considering the ultimate goal of which, they focus on the eternal life and refer to the essence of religion and the related matters. This involves the exercise of spiritual jurisdiction manifested by service and delivery of Sacrament of God. The *ius in sacra* is an autonomous power of Churches, which can only be subject to the coordinating supervision of state power. The *ius circa sacra* is focused on secular conditions and the worldly prosperity as the purpose of the state. It is considered to be an absolutely state authority that, according to Territorial Principle *(ius territoriale)*, it can be forced only a given state and in its territory. Its purpose is dual: on the one hand, to ensure the free practice of religion for the citizens, so as to follow their way of virtuous life in a safe condition. On the other hand, to secure the purpose of the state, which can be realized by separation between state and Church, the delimination of authorities of both entities. Its purpose, inter alia, is to ensure that the authority of the Church should not cause any conflicts with the aim of the state. Considering the facts stated above, the state's authority over the Churches should be exerted in two directions: a) the coordination of religious activities referring to *ius in sacra*; and b) the rights of the *ius circa sacra*. The principle is relevant for both cases according to which the state may exercise supervisory power to prevent acts hindering the purpose of the state and support the religious activities, promoting the aim of the state.

7. The natural-law reasons of the state's authorities over Churches and the question of freedom of conscience

Natural law regards religion as a suitable tool to achieve the purpose of the state. The activities of Churches can greatly contribute to the achievement of the state's goals. Its aptitude is manifested in the fact that a respected religion, by its own doctrines, encourages virtuous life, and teaches pure morality. The fact that God is respected as a Legislator, a Judge, and an Executor who, as the Omnipotent punishes and rewards regarding not only earthly life, has a much greater incentive for moral behavior of the citizens than the state itself can exert. Natural law justifies its necessity by the fact that as the legislation cannot provide a solution in most cases, religion can be used to resolve such situations as a beneficent help. The idea accepted as a dogma – that God witnesses everything, is present everywhere and also the witness of the most secretly committed misdeed and even recompenses

[20] SZIBENLISZT: *Jus naturae sociale..., op. cit.* 193. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…,* op. cit. 256.

them – is regarded as a powerful way to promote a law-abiding behavior, in particular, an abstain from the commission of crimes.[21]

The exercise of religion is embodied in various actions to which the state authority relates selectively. As regards the acts hindering the purposes of the state, the state has a supervisory power *(ius inspectionis)* over Churches. However, the state supports the activities of Churches *(ius advocatiae)* as an aptitude and necessary means for promoting the purpose of the state.[22]

To define the fact which religious acts the state power relates to, the nature of the various religious acts must be made clearfied. The exercise of religion – as pointed out above – means both external and internal types of acts. It can be said that both of them can relate to the essence of religion, but they may be irrelevant in this regard, and they may be compulsory or voluntary. For both internal and external acts, the natural law emphasizes that anyone who disagrees with one of these is not obliged to exercise them formally.[23] The state power over holy affairs cannot relate to the internal religious practice since they cannot be subjected to the state power anyway. These acts belong to the category where the intellectual way of thinking of citizens is getting shape. As the natural law recognizes the freedom of conscience, i.e., the freedom of thought and expression *(ius liberae cogitationis et liberae communicationis idearum)*.[24] Similarly, the dogmatic acts of the essence of religion are not within the competence of the state either, since according to the position of natural law, the citizens of the state did not intend to grant to state such

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[21] "Religio est medium aptum et necessarium ad facilius, perfectiusque assequendum finem Civitatis. Aptum ideo: quia religio venerabili sua doctrina ad virtutem nos erudit, puram moralitatem urget, Deumque, ut Legislatorem, Judicem, et Executorem praemiorum, et poenarum, sine restrictione ad terrestrem vitam proponit, motiva ad honos civiles mores invitantia suppeditat majora quam Imperans suppeditare valet. Necessarium; cum legislatio plurimis casibus destitutam se cerneret, nisi beneficam ei religio praeberet manum." SZIBENLISZT: *Jus naturae sociale...,* op. cit. 193. Cf. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 256.

[22] "Cum denique Imperanti jus in objecta, quae uti impedimenta, ita media promovendi finis Civitatis esset queunt (§ 119), proprium sit juris majestatici circa divisio in jus inspectionis, et advocatiae patet." SZIBENLISZT: *Jus naturae sociale…*, op. cit. 194. Andor CSIZMADIA provides an interesting concept about *ius advocatiae* in his monograph entitled *A magyar közigazgatás fejlődése a XVIII. századtól a tanácsrendszer létrejöttéig* (Akadémiai Press, Budapest, 1976.) on page 208–209. He takes the view that "it is not correct to classify *ius advocatiae* into the scope of *ius circa sacra*", whereas this is rather a duty for the state, namely „to promote the implementation of the acts of Church". However, according to natural law the sovereignties of the state cannot be assessed solely in terms of entitlements, since, on the basis of the principle that all rights at the same time are bound to duty, the sovereignties of the state are also accompanied by obligations. All sovereignties of the state by its own means must ensure any legal certainty for its citizens in the best possible way. Therefore, in accordance with natural law, the state's sovereignties cannot be interpreted without certain obligation of the state.

[23] SZIBENLISZT: *Jus naturae sociale…*, op. cit. 194. Cf. MARTINI: 72. ZEILLER–EGGER: *Das natürliche öffentliche Recht…*, op. cit. 59.

[24] SZIBENLISZT: *Jus naturae extrasociale…*, op. cit. 50–51. Cf. ZEILLER–EGGER: *Jus naturae privatum...*, op. cit. 59–61.

a profound right. The right to security does not include the right to determine the dogmas referring to salvation.[25]

Due to the freedom of conscience, natural law regards religious acts as being free of coercion. Whether they are basic dogmas manifested by internal and external acts or irrelevant to basic dogmas, they are generally indifferent to the state. Everyone is entitled to freedom of conscience, so everyone has the right to practice his religion voluntarily and freely.[26]

In addition, the natural law also relates to situations that may arise where the state cannot ignore certain religious activities. If any dispute arises relating to the question that whether a religiously motivated act affects the state or not, then the given Church has to take the decision of the state into account, since all circumstances relating to the state are clearly and exclusively within its competence.[27]

8. The state coordination over religious acts belonging to the category of *ius in sacra*

The state coordination practically relates to those dogmatic religious acts which the state has no right to interfere with. However, to achieve the state's purpose more effectively, the state has the right to exercise some coordinating activity.[28] In addition to the fact that the state is not basically entitled to intervene in the internal affair of the Church, natural law, in the interest of achieving the state's purpose, refers to the following state interventions by virtue of its supervisory power:

– it has the right to examine dogmata as the acts pertaining to the essence of the Church before they are proclaimed whether they are not contrary to the purpose of the state *(ius examinandi dogmata ante promulgationem)*;
– it has the right to prohibit the church denominations that are contrary to the constitutional system of the state, so as not to give a Church the right to operate which endangers the common good *(ius societatem ecclesiasticam civili statui contrariam excludendi)*;

[25] "Jus circa sacra religionis actus internos non respicit […]. Sed neque essentiales (dogmata) actus subsunt imperio civili eo sensu, acsi Imperans eadem determinare, et mutare posset." SZIBENLISZT: *Jus naturae sociale…*, op. cit. 195. Cf. MARTINI: 72. ZEILLER–EGGER: *Das natürliche öffentliche Recht....*, op. cit. 259.

[26] "Existunt itaque primo actus religionis coactionis expertes, utpote interni, et externi essentiales, imo etiam accidentales civiliter indiferentes (§ 72). Ex eo subditis competiti libertas conscientiae, seu jus in negotiis religionis juxta proprium arbitrium agendi." SZIBENLISZT: *Jus naturae sociale …*, op. cit. 191–196. MARTINI: 73.

[27] According to Mihály Szibenliszt from the point of view of the state, it cannot be indifferent that the members of a religious denomination join to another state with the aim of dealing with church affairs there, nor the demolishing temples serving the protection of the state, etc. SZIBENLISZT: *Jus naturae sociale…*, 195.

[28] "Etsi Imperanti civili jus essentialia religionis negotia determinandi non competat, jus tamen supremae inspectionis in eadem denegari non potest." SZIBENLISZT: *Jus naturae sociale…*, op. cit. 196.

- it ensures that the affairs of so-called true Churches are in accordance with the principles referring to the state welfare *(ius providendi, ut ecclesiae verae negotia cum salutate Civitatis consentiant)*, to which three more rights are attached, so the state pay a special attention to the followings:
  1. to prevent someone from abusing the gracious acts, and from making unjust gain from such acts;
  2. that no one should dare to refuse church services without reason to citizens who need it, and thus, endangers public peace;
  3. that the breakers, in the event of a disturbance by their operation, and if there is no other way to call them to order, they shall be banned from the territory of the state.[29]

The state power relating to the rights to advocacy *(ius advocatiae)*, must primarily ensure that its citizens are able to properly fulfill the requirements of the religion they choose. Otherwise, the benefits of the practice of religion for the state will not be manifested as much as the state could possibly use them.[30] In this context, state support should focus on the following:
- supporting theological education to provide a sufficient number of scholars to coordinate the religious life – without such support, anarchy would dominate over the practice of religion as a result of delusions;
- encouraging the spread of literacy among the priesthood, as they are in direct contact with the citizens whom they can pass their knowledge. It is desirable for the state that its citizens should be educated;
- giving the priesthood dignified material support to fulfill their pastoral responsibilities;
- support of the religious eagerness of citizens is desirable for achieving the state's purpose. In this field, however, the state cannot limit the external manifestations of religious practice until they disturb the peace of the state by their excessive formality.

Thus, the state for supporting religious life:
- might build churches, might declare religious holiday as official celebrations, might grant state recognition for establishing merciful congregations;
- may legally prohibit actions violating faith, as well as the spread of all other religious acts and belief that are contrary to good morals;
- may expect its citizens to participate in the practice of the religion which the state's Ruler participates in – that is to say, where a constitutional status of State Church is granted to a church denomination. Nevertheless, one can only be

[29] SZIBENLISZT: *Jus naturae sociale…, op. cit.* 195–197. Cf. MARTINI: 73–74. ZEILLER–EGGER: *Das natürliche öffentliche Recht...*, op. cit. 269–270.

[30] "Ex jure advocatiae respectu cultus interni fluit imprimis jus curandi, ut cives in officiis religionis, quam profitetur, rite instituantur, secus ex religione emolumentum, quod posset, in Civitatem non redundabit." SZIBENLISZT: *Jus naturae sociale…,* op. cit. 198.

forced to carry out a religious act, if it is allowed or prescribed by the doctrine of a certain religion so that one is not able to commit any scandalous activity among citizens by neglecting such acts and thus, the public good should not be harmed.[31]

8. Natural-law aspects of practicing *ius circa sacra*

All acts that do not belong to the essence of religion, but have a substantive effect on the fulfillment of the state's purpose, fall entirely within the competence of the state. Thus, based on the above-mentioned principle, according to which the state may regulate any issue that promotes or even impedes the purpose of the state, the *ius circa sacra* is considered to be a state power. Thus, the supervisory and the supportive power of the state also may be extended to this field.

In addition to the above classification, another aspect may be taken into account in this area, namely, the threefold powers of the state differentiated by natural law that are as follows: the legislative, the executive and the supervisory power. However, the supervisory power of the state can also be exercised in respect of the rights of both *ius circa sacra* and *ius in sacra*, which is based on the fact that the state may get familiar with all the activities that could endanger the purpose of the state.

On the basis of the legislative power of the state relating to *ius circa sacra*, it may establish provisions for the members of the Church, as of a society *(ius de personis)*. In this framework, this right relates to all members of certain Church, with particular regard to persons holding office or serving in the Church, who are citizens of the state, as well. Therefore, the state may lay down provisions for these persons. The state may exercise this power to such an extent that it should not suffer any damage in the absence of any provisions for them. In this field, the state has rights as follows:

- Optimizing the number of persons devoted to Church service *(ius cavendi numerus ministrorum)*. From the viewpoint of the state, it is reasonable that the number of these persons does not exceed the desired level. This requirement is related to the property of such persons so that the state may take restrictive measures in this respect *(ius ferendi amortisations)*. By these restrictive provisions, the state may determine the extent of property that may be attributed to the ecclesiastical bodies. The proliferation of such property of the "dead hand" *(manus moruta)* poses various dangers to the state, inter alia, it hinders the trade and the cash-flow.
- Determination of the age reaching which is required to devote himself to Church service *(ius definiendi aetatem, qua quis huic statui se addicere posset)*. Such a person is exempted from other state services, such as military service, guardianship, curatorship.

[31] Ibid. 199–200.

- In addition to the rights of the state to support the Church traditions, ceremonies, and the establishment of fraternal communities, – which would otherwise be based on the voluntary decision of a Church –, the state may limit them in the interest of the public good *(ius ritibus arbitrariis etiam restringendi bona communis gratia).*
- Termination of Church communities that abuse their authority and foment hostilities in the territory of the state *(ius abusum potestatis ecclesiasticae si dissidia, et turbae inde immineant, tollendi).*
- Tolerance or prohibition of the religions that are divergent from the so-called "true religions" *(ius tolerandi ecclesias ex religionibus a vera alienis compositas, aut non tolerandi).* It may happen that a "false religion" is regarded as a harmless to the state or even it may be useful for it, but there may also be such a false religion that at the same time harms to citizens of the state. In the former case, the right of tolerance prevails, but in the latter, it is not the case. The *ius tolerandi* can also take place in controversial situations where the prohibition of a false religion would result in greater harm to the state as if it were to be tolerated. In this case, the state rightly tolerates the incidentally harmful religion. Exercising the tolerance toward a harmful religion is even more justified if its members are foreigners. Therefore, it is a general principle, according to which, it is more appropriate to tolerate a harmful religion, as the prohibition of it would lead to a religious war, and as a consequence, it would destroy the state.
- Suppression of disruptive religious debates *(ius concertationibus silentium imponendi, si tumultibus occasionem praebeant).*
- Prohibition of all the doctrines and books promoting them that are harmful to the constitutional settlement of the state *(ius prohibendi doctrinas quascunque noxias rei publicae).*
- Creations of the laws that separate the ecclesiastical authority from the secular matters in which the Church cannot exercise any power *(ius legibus separandi).*

The state may exercise the rights relating the supervisory power over religious affairs as follows:

- The state has the right to exclude those ecclesiastical persons operating in its territory from the leadership of the Church whose activities are suspected to be trouble-making or actually cause any disturbance. Against them, the state may also apply coercion *(ius exclusivae, coerendi).* The state may enjoy this right over any society or association so that it may be exercised over the Church, as well.
- Associations and meetings endangering the purpose of state and suspicious in this regard can be checked and banned, if necessary *(ius heterias cohibendi).*
- Provides access to the authorities of the state for every citizen who has been harmed by Church, obviously abusing its authority *(ius dandi recursum ad se).*
- The state is entitled to the secular right to protect the Churches with its own authority *(ius brachii saecularis seu ius assistendi ecclesiae sua auctoritate).*

- The state may exercise the right to impose state punishment on the subjects who, by not fulfilling their religious duties, also are in breach of their public duties *(ius puniendi)*.
- State penalties may be imposed for violating the Church laws that are not contrary to the purpose of the state, in order to increase their prestige *(ius leges ecclesiasticas sanctione civili muniendi)*.
- The state has a privileged authority over clerics which is manifested in eminent domain over ecclesiastical persons and goods *(ius eminens in ministros ecclesiae et bona ecclesiastica)*. Since the religion does not constitute an exemption from public duties, and the ecclesiastical goods are also regarded as private property over which the state has the right of expropriation. After all, the persons consecrated to religious services remain citizens of the state, and the assets used for the ecclesiastical purposes are also regarded as the national wealth of the state.[32]

The state exercises its supervisory power over religious affairs based on the theory that is becoming aware of any activity that could endanger the purpose of the state is within the competence of the state. The supervisory power of the state over religious affairs can prevail in both areas in *ius circa sacra* and in *ius in sacra*, thus it includes the supervision of the rules relating to the essence of the Church, the prohibition of church denominations which are contrary to the purpose of the state, and the repression of religious confrontations. These are explained in more detail in the following rights:

- The so-called "king's pleasure" *(ius placeti regii)* which means the supervision of decrees of Churches relating to disciplinary rules and religious dogmata from the aspect of whether they do not contain clauses jeopardizing the purpose of the state. The state exercises this right as a protector and advocate of the Church whose duty is to promote religious life.
- Convocation of clerics and seeking their advice in the religious issues *(ius ministros sacros convocandi, eorum consilia exquirendi)*.
- Prevention of schisms by appropriate means *(ius mediis aptis praecavendi, ne chismata oriantur)*.
- Establishing bodies, concluding agreements *(ius collegia, et tractatus instituendi)*.
- Supervising the use of the sacred objects, according to whether they are used for the intended purpose *(ius vigilandi, ut res sacrae suis adhibeantur usibus)*, as the abuse of the holy objects can repel the religious zeal.
- Preliminary examination of contracts with religious content concluded by the citizens of the state and, if they are contrary to the constitutional settlement and rule of the state, their annulment *(ius pacta civium, quae simul religionis negotia sint examinandi, si reipublicae noceant, irritandi)*. For example,

[32] SZIBENLISZT: *Jus naturae sociale...,* op. cit. pp. 208–210. MARTINI: 79. ZEILLER–EGGER: *Das natürliche öffentliche Recht...*, op. cit. pp. 286–287.

agreements that can also be regarded as secular contracts, such as engagement, marriage, as well as those that are related to a vow, a promise. The validity of transactions concluded with a religious vow can only extend as long as they are consonant with the purpose of the state. It produces an additional right entitled to the state that it may institutionalize marital barriers *(ius impedimenta matrimonium dirimentia stauendi)*[33].

9. Summary

Natural law derives the attitude of the state towards the Churches from the authority of the state. The power of the state to intervene in the affairs of the Churches, like all other powers, is purpose-related, thus has limitations. In the concept of natural law, the purpose of the state is the *salus rei publicae*, i.e., the public good, the guaranteeing of well-being and legal certainty of citizens of the state. In this context, the importance of religious life has a specific role, due to the fact that it is recognized by natural law as a useful, suitable and necessary means of promoting the public good. In parallel with this principle, individual rights are admitted by natural law as the starting point of the rules of the community, and they are regarded as based ones on human dignity. Both private and public law institutions should be at the service of human dignity.[34]

Natural law regards the right to freedom of conscience and religion as such an individual right to be enforced in a community that results in the freedom of expression and thought. Thus, the religious acts manifested internally cannot fall within the competence of the state. The so-called dogmatic actions related to the essence of the religions should be regarded as such. The definition of them is given by natural law within the scope of the *ius in sacra* which right does not otherwise fall into the state authority. According to its reasoning, the citizens were not willing to transfer the right of defining the dogmatic actions to the state.

Also, sharing the principle of the social contract theory, the natural law emphasizes a consensual basis of the legal status of Churches, religious denominations, and communities when it regardes them as a society, an association. According to this, they are considered as societies which involve natural persons confessing the same faith. Due to the *maxima societas* nature of the state, the associations established in the territory of the state may follow their aim freely until they impede the achievement of *salus rei publicae*, i.e., of public good, by their activities.

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[33] SZIBENLISZT: *Jus naturae sociale...*, op. cit. pp. 205–28. MARTINI: 78–79., ZEILLER–EGGER: *Das natürliche öffentliche Recht...*, op. cit. pp. 281–286.

[34] This concept still effecting to the present day can be read in the introductory part of the Act CCVI of 2011 on the Rights to Freedom of Conscience and Religion and on the Status of Churches, Religious Denominations and Communities. The Act, respecting the neutrality, *"admites the respect of human dignity as the key of promoting the common good which allows to fulfill their mission for the religious community"*. In this field, Churches of decisive importance of the country deserve special emphasis.

Natural law definitely emphasizes the requirement of the separation of state and Churches. The reason for separating the powers, however, is not based on the widespread opinion according to which the freedom of man is hindered by two interwired power, by the shackles of state and Church, therefore separating and weakening these two entities can lead to fulfilling the freedom of man. In the system of natural law, both the state and the associations established by citizens freely in the territory of the state, such as religious communities, may not serve a different purpose than the well-being of the members, that is of the citizens. Bringing these goals together is vital for both of them. In order to ensure them, the state admits the religious communities as a useful and necessary means of the public good. The Churches and religious communities, as suitable and necessary means of ensuring the *"salus rei publicae"*, cannot endanger the common good. However, they realize the common good by various means, so the distinction between these powers is justified by natural law, as well.