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LAW TOWARDS FAMILY: FRIEND OR FOE

The family is the simplest and most natural group and, at the same time, the primary and enduring foundation of any every higher-order human community [Röpke 1946, 240, cited after: Walkowiak 2008, 195]. The family and parenting are, in particular, the archetype of power and the original axiological and sociological model for and the normative domain within a political community [Jonas 1996, 189]. On the other hand, the family is not self-sufficient and needs support from higher-order communities that it co-creates. Like every individual and community of people, the family and its members are bound by social norms, among which only the legal ones are linked to public coercion. The more the organization and goals of a political community depart from the original similarity to the family and the goal of protecting its interest, the more they become a threat to the durability and functionality of individual families and, ultimately, to the existence of the political community as such.

Positive law, as a normative manifestation of a political community, should be a natural ally and defender of virtues, including family life. However, as a product of imperfect people, it can itself reveal serious deficiencies, errors and deviations that make it a threat to individuals and the family. The article attempts to explore the matter, first by offering a historical and philosophical perspective, then discussing the impact of law on family life and the school of law education as a way to acknowledge the role of the family. The conclusion offers a recapitulation of the main points raised in the article.

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1. A historical and philosophical perspective

Family life is strongly intertwined with natural law because it relies on the original and deepest layers of the human nature, many of which surface even instinctively. For the sake of the social order and given human imperfection, it is beneficial for all if positive law regulates the fundamental and socially important family matters (e.g. marriage, adoption, inheritance) as long as it remains faithful to objective moral principles. Still, in most aspects of family life, the role of the law should be confined to protective functions. Experience shows, however, that attempts to reform the family with administrative tools spawn new problems and individual dramas. The use of legislation and public coercion to force a new vision of the world, humanity and morality is characteristic of the proponents of philosophical idealism and should be regarded as a blot on the landscape of the recent history of Europe.

In ancient Europe, Christianity was confronted with promiscuity and approval of divorces, although attachment to monogamy was certainly a favourable circumstance. Following the Edict of Milan (313), the standards of marital ethics and family life begin to settle in the Roman legislation and then, through the process of advancing Christianization, spread to other European peoples. Since the late Middle Ages, social, economic and mental transformations across the societies of the Occident have contributed to the weakening of the family in all the fundamental areas of its nature and functioning. When Martin Luther (1483-1546) rejected the scholastic primacy of reason enlightened by faith and the universal teaching of the Church based on that dogma, a broader movement arose which aimed to promote greater freedom and choice in the moral sphere. One of the foreseeable consequences of that shift was the dwindling authority of marriage, the questioning of its sacramental character and indissolubility, but also, though less directly, attempts to challenge the moral significance of adultery. It was the simplest and most practical reception of Wilhelm Ockham's voluntarism (1285-1347) which says that the human being regards themselves as empowered to revamp rules in matters that can are known by reason and are objectively resolved [Scheffler 2006]. Suffice it to say, the English supremacy of 1534 was rested on questioning the indissolubility of marriage.

Another turning point in social perception of the conjugal relationship and the family in the context of the entire social system was the relativistic concept of ethics by Immanuel Kant (1724-1804). Striving to find a basis for moral norms, often disparaged by the Enlightenment philosophers seeking answers only in natural sciences, Kant proposed that human conscience was the ultimate justification for morality. Therefore, as opposed to classical philosophy where the individual was to discover objective morality in his or her conscience through upbringing, religious and intellectual formation and their own reflection, Kant says that conscience should determine the content of moral norms by relying on the sense of justice. Kant's approach is horizontal, which is why it triggers a gradual reduction of the standards underlying formal and informal social control. This happens under the influence of the categorical imperative which fails to offer any other ultimate motivation to follow moral norms outside religion [Tatarkiewicz 1988]. This process runs in parallel to other influential theories that have been implanted in social mentality and are mirrored in the legal system. In chronological terms, we should begin by recognizing the unlimited power of the state to interfere in people's lives, which stems from the theory of social contract by Thomas Hobbes (1588-1679) [Kundera 2008]. Next, there is the dialectic of Georg Hegel (1770-1831). Through constant social discourse and subsequent trade-offs between the proponents of the relatively conservative thesis and progressive antithesis, it ensures a gradual transformation of social life through positive law [Palacz 1988, 170-75]. Finally, a factor that takes the processes outlined above to the next level is democracy. Its procedures force political powers to succumb to social sentiment, which is rather unstable in the era of ubiquitous electronic media.

The circumstances given above reveal some channels through which family-hostile solutions penetrate the legal system; however, to get a broader picture of the situation, these solutions need to be examined in terms of form and structure. Given the challenges of the 2010s, the key problem seems to be Marxism and its mutations surfacing in culture and axiology. Dialectical materialism developed by Karl Marx (1818-1883) and Friedrich Engels (1820-1895) operated in the political, economic and social life of Europe in two variants. The first was Bolshevism which, after the 1917 October Revolution, showed overt hostility towards the family and

promoted sexual permissiveness thanks to the efforts of the feminist People's Commissar Alexandra Kollontai (1872-1952) [Ratuszniak 2012]. That seemed to have been aligned with the policies of Vladimir Lenin (1870-1924) and Lev Trotsky (1879-1940), who treated the public focus on sexual affairs as an effective means of weakening reactionary movements. Joseph Stalin's coming to power led to a gradual reduction of intensity of the policy of sexual liberation, but still the ever-aggravated totalitarian rule affected matrimony and the education of children through terror.

The other variant of dialectical materialism emerged from the Frankfurt School made up by a group of philosophers initially employed at the Social Research Institute in Frankfurt am Main. Their critical theory was based on the exploration of the Marxist superstructure (culture, education, politics), which was to be stripped of the objective elements (rooted in morality and tradition) in favour of full relativism, hedonism and rejection of all compulsion. Having adopted the paths of Sigmund Freud, they recognized that the source of oppression, discrimination and intolerance in social and economic life is the so-called 'authoritarian syndrome', which they defined as a personality disorder which demanded consistent adherence to traditional values and norms and expectation of the same from others. They argued that children raised in the traditional model would be inclined to support authoritarian regimes as adults; therefore, they proposed that children be given freedom of behaviour and that education be free from conservative thinking [Adorno 2010; Horkheimer 1937]. The views of the representatives of the Frankfurt School colonized the culture and education of post-WW2 Germany as a method of eliminating totalitarian inclinations. They have been strongly influencing the legislation and mentality of European societies to date.

A consistent extension of the post-Kantian modernism pursued by the Frankfurt philosophers is the theory of liquid modernity by Zygmunt Bauman (1925-2017) [Bauman 2003]. It attempts to grasp the cultural and mental changes that have occurred in post-modern societies since at least the second half of the 20th century and are also reflected in the situation of the family. Bauman's description of liquid modernity corresponds to the model of living of many families of the Occident. This model features the diversity of forms, the disappearance of strong people-to-people ties and

a sense of responsibility, a departure from the traditional model of education based on morality and obedience, openness to profound transformations and experiments (not only in terms of sexual partners but also with one's own gender). In fact, this resembles a monumental voluntarism affirming the will prevailing over reason and, consequently, immanence over transcendence (Cartesianism), and experiences and demands over truth and duty.

2. Impact of law on family life

Through its overwhelming influence over society, law is an inseparable component of family life, but can it also be an ally in striving to secure the interest of the family and its members? The answer depends on the values that the legislator is guided by, the validity of its adopted legal norms, the methods of implementing those norms and the moral condition of the recipients of the law themselves. The multitude of legal regulations, most of which having some impact on the lives of at least some families, only partially highlights the scale of challenges and threats to the family well-being in the post-modern world. The concepts of relativism and pluralism of beliefs are no longer just a description of the actual state, but they began to be treated as autotelic values in public life, and sometimes even in private and family life. Therefore, the promotion of universal values and norms must, as never before, be rested upon cause-and-effect arguments and reasoning.

St Thomas Aquinas demanded that positive law showed alignment with reason, and that its overarching goal be common good, i.e. the well-being of the entire community [Tomasz z Akwinu 1985, 6 and 50, q. 90 a. 2 r.; q. 96 a. 4 q. 2 a. 2]. J. Krukowski argues that the interest of the family is an important element of common good, as it cannot be separated from the interest of the community in which family members live, work and operate [Stadniczeńko 2000, 78]. Consequently, an objective assessment of the validity of a legal norm cannot ignore its impact on the performance by the family of its proper tasks, and the key criterion of this assessment should be based on values and norms sourced from natural law through reason. It should be added that the concept of reason refers to the use of the power of cognition of reality in the pre-Cartesian sense, i.e. open to deductive

reasoning in search for the truth. This is a challenge in the era of uncontrollable subjectivity, but still feasible even *de lege lata*. For example, in its judgement of 18 May 2005, the Constitutional Tribunal of the Republic of Poland referred to the constitutional principle of subsidiarity, "according to which the state should support the family instead of replacing it in performing its functions."[1]. After all, as A. Kufmann pointed out, the law actually experienced by the person is a specific decision that expresses, "what is right in a particular situation" [Oniszczuk 2008, 682-83].

With regard to the regulations on family life laid down in positive law, the most cited ones address the family *expressis verbis*. The system of law is internally coupled with every sphere of social life, so it is impossible to precisely determine the impact of a specific legal provision on the lives of millions of citizens. This is very true also about family life and life in the family, which is not an optional environment for a person, but the method of functioning and an element of identity integrated with his or her personal and social nature [Bartnik 1995, 199-200]. Also, people who have not established their own family perceive their nuclear family as a point of reference: they do not sever ties with their parents, siblings or distant relations. Therefore, it seems more than justified to say that each currently effective legal provision has an impact, to some extent and even indirectly, on the lives of families and their individual members, although not always addressing family matters *explicite*. Law-making can even be considered the art of prudent service to people united in families and families made up of people.

Among the areas and disciplines of law relevant to family life, there is family law which covers matters essential for the existence of the family in legal transactions, labour law with professional pragmatics, economic law, social security law and tax law – due to the protection of the economic security of families – and selected regulations of penal law, civil law, education law, and medical law. As noted elsewhere, the impact of other fields of law on the family, which may only reveal itself in specific circumstances, must not be underestimated.

[1] Judgement of the Constitutional Tribunal of 18 May 2005, file ref. K 16/04, p. III.6.

3. Law education as a way to appreciate family

It would be difficult to rationally justify the positivist theory of rational legislator, which argues that imperfect people would be able to establish a perfect legal system, especially in a consensus-based political system. However, this is not in conflict with attempts to ensure that the elements of social organization meet the requirements of natural law and, at the same time, contribute to the building of the common good. This assumption underlies the idea of law education which emerged as a subdiscipline of the theory and philosophy of law and a practical model in the making, application, and teaching of the law.

The very concept of law education was coined by Leon Petrażycki [Kojder 2001, 165], so it is not new in jurisprudence. Yet, the point of the discussed concept of law education is to focus on learning about law as a social fact and to use it to achieve goals that, in principle, it is supposed to help achieve. "The presented approach is at the very core of law education. Assessment of a legal regulation, in particular its educational impact, must therefore refer the content and consequences of law to the norms and values of family life to determine how a specific problem would be solved if the standards of family life were employed (family being the most fundamental and natural environment), and, at the same time, how the situation of the law influences the situation of families (since their axiological, economic and social autonomy must be safeguarded). Only then, based on law education, a reliable assessment of legal regulations can be done followed by *de lege ferenda* recommendations. The presented method of critical legal thought, immanently embedded in law education, can be tentatively termed 'family jurisprudence' because in the assessment of positive law it is guided by the anthropological assumption about the fundamental role of education and family relationships for the personal and social development and for economic relations. It is therefore a variation of social and legal comparative statistics" [Stadniczeńko and Zamelski 2016, 60].

Everyone has the right to be raised in love for good, which is why the taking over of child and youth education by the state over the minimum determined by the principle of subsidiarity – so popular since the Enlightenment – violates the basic human rights [Stadniczeńko 2000, 115].

It is no different with the educational impact of law on society, still the multiplicity and diversity of real and potential problems really justifies the enactment of numerous legal regulations. Hence, the greater the responsibility of the legislator who, under natural law, should strive for the standards of natural law, including the principle of subsidiarity, to be respected, since they apply to everyone equally and objectively. Moreover, the political community expects the authorities to resolve their real problems effectively. Fulfilling these conditions at the level of the entire legal system would be sufficient for the law to satisfy its educational function in the community, thus acting in the interest of the family as its ally. This, however, is a demanding requirement for legal provisions and for the legislator who should display exceptional axiological and subject-matter competence.

Highlighting the importance of the family in law education can become a part of the legal system owing to the appreciation of such functions, duties and prerogatives in the family that can be developed and elevated to the level of duties of public authorities and a higher level of community life. On the scale of the society, co-responsibility and love in a properly functioning nuclear family will not experience affective empowerment, but they may still be entrenched in the consciousness of members of the political community through proper intellectual and personal formation. One of the means of formation of the society in this spirit is consistency in making, applying and teaching good quality law.

Concluding remarks

Law is a social fact, but its content depends on the will of those responsible for law making, application, teaching, and interpretation. There are justified doubts regarding validity and raised because of the content of the legal norm [Tomasz z Akwinu 1985, 43 q. 93, a. 3, ad 2; Radbruch 2009, 241-43], but they rarely lead to the norm being repealed. The impact of positive law on the family depends on the content of legal provisions and the resultant normative effects, while the legislator's attitude towards natural law is conclusive in this regard. Cognitive realism demands the recognition of primacy of natural law, the obligation to know and respect it; however, paradoxically, it is immanentism that leads to abandoning realism

in favour of idealism. *A priori* philosophical idealism is not able to deny the human nature as such, but it attempts to question individual values and norms derived from in natural law, which, because of requirements and consistency, may prove to be an impediment to the achievement of goals that are not aligned with the common good. Since the family is the original model of all power, subordination and responsibility, every power seeking to launch new models will act against the family as a competitor in pursuing its own agenda. This is legal anti-education which distorts the personality and social relations of the addressees and can even expose their lives and safety to risk. In contrast, the proposed philosophical and practical approach referred to as law education relies on the concept of unvarying natural law and on the definition of personal and social relations derived from neo-Thomism [Stadniczeńko and Zamelski 2016, 70]. When met, its conditions are capable of making positive law a faithful ally of the family, an ally that rejects a free dictate to serve its legitimate needs.

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Law Towards Family: Friend or Foe

Summary

The family and the state are two elements inherently linked to people's lives: the family under natural law and the state under positive law, the latter emerging from the natural human need for collective life. There is constant interplay between the natural family rights and obligations and positive law, sometimes even competition or contradictions. The family needs positive law because social life needs proper organization, but not every normative solution is conducive to the personal and community development of a person. Strong and weak rights, bans and orders may prove potentially dangerous, and this ultimately proves the absence of axiological or praxeological competence of the legislator and public enforcers. The key to making positive law a true family's ally is for that law to abide by perpetual natural law, which requires a constant diagnosis of and reflection on the changing reality.

Key words: axiology of law, social philosophy, family law, law education, natural law

Prawo wobec rodziny – sojusznik czy zagrożenie

Streszczenie

Rodzina i państwo należą do elementów immanentnie związanych z życiem człowieka: rodzina na mocy prawa naturalnego, państwo na mocy prawa stanowionego, które wynika z naturalnej ludzkiej potrzeby życia zbiorowego. Pomiędzy naturalnymi prawami i obowiązkami rodziny a prawem stanowionym zachodzą wzajemne oddziaływania, często powstaje konkurencja, czasami również sprzeczności. Rodzina potrzebuje prawa pozytywnego ze względu na konieczność zorganizowania życia społecznego, jednak nie każde rozwiązanie normatywne jest korzystne dla rozwoju osobowego i wspólnotowego człowieka. Potencjalnie niebezpieczne mogą okazać się nakazy, zakazy oraz uprawnienia mocne i słabe, przy czym sytuacja taka ostatecznie dowodzi braku kompetencji aksjologicznych lub prakseologicznych po stronie prawodawcy i organów stosujących prawo. Kluczem do uczynienia z prawa stanowionego prawdziwego sojusznika rodziny jest jego zgodność z niezmiennym prawem naturalnym, co wymaga stałej diagnozy i refleksji nad zmieniającą się rzeczywistością.

Słowa kluczowe: aksjologia prawa, filozofia społeczna, prawo rodzinne, pedagogika prawa, prawo naturalne

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