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Natural Law Interpretation of the Legal Relationship between Parent and Child in European Legal Thought and Its Impact on Hungarian Family Law[1]

Children's rights were not born in the second half of the 20th century but can be traced back to biblical natural law. Biblical thought reached European legal culture in two ways: directly through the spread of Christianity and indirectly through the Jewish diaspora. Although rabbinic jurisprudence developed as group law, mostly in isolation from its environment, the influence of Christian thinkers helped to define the fundamental rights of the child that appeared centuries later in the children's rights movement. It is also a fact that the integrative view of the biblical natural law which carries the Christian premoral goods helped to conceptualize the rights of children to the rights of parents. This tradition emphasised the responsibility of parents, with the intention of shaping adult behaviour in accordance with the normative requirements of legitimate marriage and, in contrast to other forms of cohabitation, regulating procreation, parenthood and children's rights within this framework. However, children's rights continued to be particularly neglected in two areas until the second half of the 20th century: the distinction between legitimate children on the basis of their gender persisted, and while the church and state gradually increased the protection of children's rights, they systematically denied rights to nonmarital children. Therefore, after a meta-perspectival overview of the thinking about children's rights, this paper will examine also the emancipation of legitimate female children and illegitimate children through the Hungarian example, interpreting it in the light of European intellectual currents.

***Keywords**: biblical natural law, ius Divinum, children' rights, child protection, emancipation of female children, legitimate and illegitimate children*

> *"The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society."*[2]

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1 The study was carried out in the framework of the research project *"The Legal Relevance of the Vetus et Novum Testamentum. Parallels between the Jewish-Christian and Roman Law Roots of our Legal Culture"* (No. 138899).

2 The family-definition of *Charles Malik*, a Christian Lebanese philosopher and stateman, in the draft of Udhr, see: Morsink, The Universal Declaration of Human Rights 254.

1. Freedom and equality in family law: questions and hypothesis of the research

Ensuring freedom and equality is of paramount importance not only in the public law relationship between the state and the individual, but also in the private law relationship between individuals. Within the latter framework, a specific area is the family law relationship between parent and child.

One of the roots of European legal culture is undoubtedly the biblical tradition, which to certain extent is the shared heritage of Western Christianity to the present day. A complex, nuanced picture of the legal relationship between parent and child emerges from the biblical natural law (*ius Divinum*).[3] However, there may be questions to what extent and in what form the principles and provisions of this complex, primary source of Jewish and Christian (canonical and other confessional) laws, and way of thinking based on them, have appeared in the legal tradition of European states, and whether they have contributed to a non-discriminatory and even equal opportunities approach in the 21st century legal culture.[4]

As the psalmist *Solomon* says, *"Children are a heritage from the Lord, offspring a reward from him. Like arrows in the hands of a warrior are children born in one's youth. Blessed is the man whose quiver is full of them. They will not be put to shame when they contend with their opponents in court"*.[5] The main hypothesis of my study is that children's rights were not born in the second half of the 20th century but can be traced back to biblical natural law. Therefore, in my study, I examine children's rights in the light of the Judeo-Christian tradition, in a meta-perspectival approach.

Biblical thought reached European legal culture in two ways: directly through the spread of Christianity and indirectly through the Jewish diaspora. Although rabbinic jurisprudence developed as group law, mostly in isolation from its environment, both in the Imperium Romanum and after its fall in the medieval states that developed a system of state religion and were religiously and ethnically intolerant, the influence of Christian thinkers, starting with the teachings of the early Christian Church Fathers,[6] helped to define the fundamental rights of the child. The tradition about the nature of the marital family became axiomatic for the Western Christianity in the teaching of *Thomas Aquinas*. However, other medieval theologians and jurists, including *Cyprian of Carthage*, *St. Gregory of Nazianzus*, *St. Basil* and *St. Ambrose*, pointed out that the Old and New Testaments wrote into man's conscience the responsibility for children, and especially for orphans, poor or handicapped children.[7] The period of the Protestant Reformation was a turning point for the subject in that these 'children's rights' were incorporated into the post-Reformation state family law system, i.e. the legal obligation to care for children was seen as primarily a legal obligation of parents, but secondarily of church or state authorities.

3 For the definition, see generally: Doe, Christianity and Natural Law; Seiple, Christianity, human rights, and a theology 320–334.

4 On the relationship between divine natural law and secularized law, see, among others: Domingo, God and the Secular Legal System; Vallauri – Dilcher, Christentum, Säkularisation und modernes Recht.

5 Psalm 127:3–5.

6 Although the following study deals primarily with the teachings on marriage, it also addresses the issue of childbearing and child rearing in the works of the Church Fathers. See: Herger, A germán férji Munt és az egyházatyák házasságfelfogása 62–97.

7 Reid, The Canonistic Contribution to the Western Rights Tradition 59–72; Hiers, Biblical Social Welfare Legislation 49–96; Bartók, Az őskereszténység és a szociális kérdés 216; Aiken, The Doctrine of the Fathers of the Church on the Right of Private Property 198–211.; Tierney, Medieval Poor Law 23–25, 34–42, 124–128.

Many enlightened, liberal thinkers in Western legal culture found congenial the classical and Christian teachings about children. Although they did not recognise the child's independent agency, stressed the need to care for and educate the child, and some of them argued for parental authority instead of paternal authority.[8] To prove the hypothesis, I would like to present this developmental arc of legal thinking in the first half of the study.

In the era of civil modernisation from the beginning of the 16th century until the end of the 19th century, when the rule of law was gradually established in the Western world, the area of children's rights remained a sadly neglected area in the modernisation of family law, alongside the issue of women's equality.[9] There were two areas of particular neglect in relation to children:[10] The first is the inequality of children rights on the basis of their gender. The education of female children had already been emphasised by natural law scholars, but their property status (mainly inheritance rights) was not equal to that of their male siblings. Secondly, while the protection of legitimate children's rights was acknowledged from the 16th century onwards, the rights of children born out of wedlock were systematically denied. As *Witte* aptly remarks, sins of fathers and mothers were vested upon their nonmarital children, and *"graver the sins of the parents, the further these children fell in social standing, legal protection, and access to rights"*.[11]

These general observations are also justified in the development of Hungarian law. Hungarian legal culture has been part of Western legal culture since the foundation of the state in the 11th century. Family law thinking has been influenced by the same factors, even if the waves of modernisation arrived in Hungary with some delay (partially at the end of the 18th century, then much more strongly during the revolutionary wave of 1848, and finally in the last decades of the 19th century). As in the Western legal culture, the idea of equality under natural law also appeared in the development of Hungarian family law, but this did not lead to significant legal modernisation during the so-called codification movement under the influence of natural law at the end of the 18th century. In the second part of this paper, I will present these two critical areas (inequality of children rights on the basis of their gender, and legal status of illegitimate children) in the light of European thought, based on the development of Hungarian law prior to the mid-20th century. Hungarian legal modernisation started with Western influence.[12] The first part of this study can therefore be considered an interpretive framework, while the second part examines the extent to which new ideas were able to break the "hardness" of traditional law in the two mentioned, especially neglected areas.

At first glance, it seems that the timeframe of the investigation is long, but I am not undertaking a detailed analysis of legal sources, but rather presenting a way of thinking. On the other hand, as the title indicates, I examine the legal relationship between parent and child from the point of view of the interpretation of natural law. And the simple natural observation that a foetus can neither decide whether he or she is born a boy or a girl, nor whether he or she is born out of wedlock, consistently led to the equalisation of rights in Hungarian family law only in the middle of the 20th century. Legal modernisation was decisively influenced by the (diverse) natural law thinking in the 17th and 18th centuries during the codification wave of natural law.

8 Woodhouse, Religion and Children's Rights 299–315; Witte – Good, The Duties of Love 266–294.

9 Herger, A nő házassági vagyonjogi állása 59–80; Herger, Natur und Mensch 131–137.

10 The issue of the natural law status of the child in the womb is dealt with in a separate study.

11 Witte, Church, State, and Family 151–183.

12 For a monographic treatment of the topic, see: Kajtár, A 19. századi modern magyar állam- és jogrendszer alapjai. Európa – haladás – Magyarország.

However, even if we look only at biblically based natural law,[13] this has roots going back thousands of years, which have survived in the Christian world to the present day. It is no coincidence that nowadays, in addition to public law issues,[14] the research of biblical natural law is once again attracting keen attention in the field of family law also.

2. Origin of the children's rights in the Western Christian tradition

2.1. Searching for the roots of children's rights in 20th century international law

When the 1989 Convention on the Rights of the Child[15] (Crc) was adopted by the United Nations General Assembly in New York, it was built in part on provisions of two earlier children's rights declarations from the 20th century,[16] and it imputed directly to children a number of the rights set out in the 1948 Universal Declaration of Human Rights[17] (Udhr) and elaborated in the twin 1966 covenants on civil, political, and cultural rights.[18] Although the declarations of first generation of human rights, the classical liberties, which were the product of the age of civil modernisation, contained the principle of equal rights for all human beings, derived from the dignity given by the *Creator*, or from reason,[19] they did not deal with the rights of children, among others. Family lawyers, as the Hungarian *Dezső Márkus* (1862–1912)[20] at the turn of the 19th and 20th centuries or other modern scholars[21] have asked why this happened, and why it took until the first decades of the twentieth century to focus attention on children's rights (in parallel with women's rights).

I agree with *Browing's* and *Reid's* observation that from the Middle Ages onwards, the Western Christian tradition helped to define of the basic rights of the child that appeared in the children's rights movement (1960–1990), and in the 1989 Crc. It is also a fact that the in-

13 See, among others, Cambridge University Press' series: Reynolds, Great Christian Jurist and Legal Collections in the first Millennium; Domingo – Martínez-Torrón, Great Christian Jurists in Spanish History; Descamps – Domingo, Great Christian Jurists in French History; Dreisbach – Hall, Great Christian Jurists in American History; Decock – Oosterhuis, Great Christian Jurists in the Low Countries; Hill – Helmholz, Great Christian Jurist in English History; Longchamps de Bérier – Domingo, Law and Christianity in Poland: the Legacy of the Great Jurists.

14 See for more: Shah-Hertzke, Christianity and Freedom 1: Historical Perspectives.

15 Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

16 See: Geneva Declaration of the Rights of the Child (1924) and Declaration of the Rights of the Child (1959).

17 Woodhouse, Religion and Children's Rights 299–315.

18 International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social, and Cultural Rights (1966).

19 See among others: Habeas Corpus Act (1679), Bill of Rights (1689), and Act of Settlement (1702) in England, Declaration of Independence (1776), and Bill of Rights (1791) in the Usa, Declaration of the rights of man and of the citizen (1789) in France, Grundrechte des Deutschen Volkes (1848) in Germany, or the so-called April Acts in 1848 in Hungary. See more: Herger, Szakrális kontra szekuláris értékek a polgári modernizáció korában 33–44.

20 Márkus, A házasságon kívül született gyermek és joggyakorlatunk 337–339; Márkus, A házasságon kívül született gyermek öröklési joga anyja után 357–358.

21 Woodhouse, Religion and Children's Rights 302; Seiple, Christianity, human rights, and a theology 320–334.

tegrative view of the Christian natural law which carries the Christian premoral goods helped to conceptualize the rights of children to the rights of parents. This tradition emphasised the responsibility of parents, with the intention of shaping adult behaviour in accordance with the normative requirements of legitimate marriage and, in contrast to other forms of cohabitation, regulating procreation, parenthood and children's rights within this framework.[22]

2.2. Rights of children within the priority of the natural family: from the Old Testament to the Enlightenment

The validity of the claim that Western civilisation can be seen as a continuum between the poles of Athens and Jerusalem can easily be justified by the norms of sexuality and obligations of the family members, which are reflections of civilisation and society. The importance of the Jewish tradition is also reflected in the fact that *"traditional Christian moral teaching has adopted it knowingly and willingly, with virtually no alterations"*.[23] The Bible sees children as one of *God's* greatest blessings.[24] In the Old Testaments times, hundreds of years before the first Greek thinkers, having children not only obeyed the *Torah's* (the Mosaic Law's) first command,[25] but also increased adults' maturity, which directly and indirectly influenced their ability to become constructive members of society. Only people with children of their own were eligible to serve as judges in capital cases,[26] because only such people can know the *"true value of life"*.[27] The complex set of the right of parents and children cannot be presented in its entirety within the framework of this study, but only a few examples can be highlighted. The duty of parents (primarily the father, but also the mother alongside the father) towards the child, and the duty of the child towards his parents, is evident from both the Old and New Testaments.[28] Approaching the same question from the other side, natural parents have the prima facie right to raise their own offsprings and that children have a right to be raised by the parents who conceive them, unless there are circumstances that make this impossible or negative for the well-being of the child – as *Browning* states.[29]

He draws attention also to the fact that the tradition about the nature of the marital family found early expression in the writings of *Aristotle* (384–322 BCE). He offered insight into the so-called kin altruism[30], which phrase refers to our tendency to invest ourselves more fully in persons with whom we are biologically related, our blood kin. *Aristotle* thought that humans have a natural desire *"to leave behind them an image of themselves"*[31], therefore family is the basic

22 Browning, Christianity and the rights of Children 283–285; Reid, The Rights of Children in Medieval Canon Law 2.

23 Novak, Covenantal Rights 167.

24 See first of all: *Abraham*'s (Genesis 15:5, 17:3–8), *Isaac*'s (Genesis 26:4) and *Jacob*'s blessing (Genesis 35:9–12).

25 Genesis 1:28. See also: Isaiah 49:15 *"Can a mother forget the baby at her breast and have no compassion on the child she has born?"*

26 T. Sanhedrin 7:3 and B. Sanhedrin 46b. See: Ruff, A Misna Szanhedrin traktátusa 121–155; Knierim, Customs, judges, and legislators in ancient Israel 3–17.

27 Elliot, Moses, the Prophets, and the Rabbis 31.

28 In addition to the line quoted as a motto, see: Colossian 3:20–21.

29 Browning, Christianity and the rights of Children 283.

30 Kahn, Aristotle and Altruism 20–40.

31 Aristotle, Politics, bk. I. ch. 2, 1128., quoted by Browning, Christianity and the rights of Children 287.

group unit of society. Thus, he denied *Plato's* idea, whose vision of on omnipotent parental state and an anonymous unrelated citizenry[32], echoed among others, in the family policies of ancient Sparta, early Soviet Communism[33] and Nazi Aryanism.[34] *Aristotle* believed that, in the state that separated natural parents and children, filial love would become *"watery"* and diluted[35]. His view seems to express a universal human appreciation of natural family, based on the obligation of parents to care for, educate and provide for the child, and it would be difficult to find an archaic society and legal system in which the phenomenon of kin altruism was not known, if not scientifically formulated.

In the Jewish tradition, a family was a miniature community including men, women, and children.[36] According to the Old Testament, Israel became a nation from a family of 12 descendants of *Jacob's* sons during the centuries of Egyptian captivity. In the Old Testament, the altruism approach can be observed in the precise genealogical tables, in the placement of human life on the timeline between ancestors and descendants, which makes us aware that the fate of the individual is not independent of the consequences of the thinking and actions of his or her ancestors: it was clear to *Adam* and *Eve* that the woman's *"seed"* was going to *"strike the serpent's head",*[37] and *David* knew and believed that his son (descendant) would be the *Savior.*[38] The responsibility of the parents was also manifested in the lives of the descendants: *Abraham* was chosen by the *Creator* because he knew he would teach his children the law of the *Lord,*[39] and the wise king *Solomon* advised his readers: *"Listen, my son, to your father's instruction and do not forsake your mother's teaching".*[40] It is noteworthy that in this ancient (patriarchal) family model, the responsibility of the mother has been added to that of the father: *"(…) a child left undisciplined disgraces its mother".*[41] In Old Testament society, it would have been inconceivable – in Aristotle's words – to separate the natural parent from the child, and instead to focus on community care and education. If such an exception was made, as in the case of *Moses* or *Daniel* and his fellow prisoners during the Babylonian captivity, it was the result of a historical tragedy.[42] Children who were orphans or destitute were supported by the community,[43] a well-known biblical example being *Esther* (Heb.: *Haddasah*), who was raised by her uncle, *Mordechai* during the Babylonian captivity.[44] The *Talmud* held in high esteem those who adopted children: a person who raised an

32 Plato, The Republic, bk. V. par. 462, quoted by Browning, Christianity and the rights of Children 287. See: Annas, Plato and Aristotle on Friendship and Altruism 532–554.

33 Somlai, Családpolitika a Szovjetunióban 1917 után 25–40.

34 Gross, Rassenpolitische Erziehung; Koch, Elterliche Sorge 1235.

35 Aristotle, Politics, bk. II, chs. 3–4, 1148–50. See: Browning, Christianity and the rights of Children 287; Novak, Covenantal Rights 166.

36 Novak, Covenantal Rights 170; Daube, Communal Responsibility 170.

37 Genesis 3:15.

38 See inter alia: 2 Samuel 7:12–22; Jeremiah 23:5.

39 See inter alia: Genesis 12:2, 28:13.

40 Proverbs 1:8–9.

41 Proverbs 29:15b.

42 Daniel 1:3–6. See also Chapter VI: Community and human person: Novak, Covenantal Rights 157–186.

43 Deuteronomy 10:18; 14:29; 16:11 and 14; 24:17-21; 26:12-13; 27:19.

44 Esther 2:7.

orphan in his own home was considered to have given birth to the child himself.[45] One of the classic commentators on the *Talmud*, *Rabbi Samuel Edels*, also stated that this Talmudic recognition of the person who raised an orphan extended to the caretakers of children whose parents were still alive but unable to care for them.[46] It is not the purpose of this paper to review the provisions and moral recommendations of the *Torah*, the entire Old Testament scriptures and the rabbinic jurisprudence on the duties of the parents (to teach and support their children) and the duties of the children (to honour their parents and to revere them) which appeared on the other side as rights. These are only touched upon insofar as they have influenced the development of law in Western Christianity. However, the lines quoted as a motto from the Psalm of *Solomon* (127:3–5) sum up the essence of the way of thinking about children that the Judeo-Christian culture embraces: *"Children are a heritage from the Lord, offspring a reward from him".*

As the Old Testament, so *Jesus* warned against harming or misleading children. As an example of the biblical influence, *St. Ambrose* (340–397), in his writing on the six days of creation, spoke out sharply against the practice of child abandonment and the contemporary custom of abortion,[47] and then, under the influence of *St. Augustine*'s (354–430) *De bono conjugii,*[48] it was generally accepted later in the Western Church that the function of marriage was directed to a natural end, to provide the optimum conditions for procreation. For more than a thousand years, the canon lawyers who followed *St. Augustine* named fidelity *(fides),* children *(proles)* and sacrament *(sacramentum)* among the benefits *(bonum)* of marriage.[49]

As Roman law distinguished among a variety of classes of children, depending upon the condition of their birth, and the relationship and legal status of their parents (1, *liberi iusti* = legitimate children born in legal marriage; 2, children of concubines; 3, *spurii* or *volgo concepti* = children born of illicit sexual liaisons, such as adulterous or incestuous unions; 4, children of slaves), this distinction continued into the Christian era.[50] But the theological teaching systematically discredited the ancient paternal right to dispose of unwanted offspring,[51] and Christians felt obliged to build a set of social structure, that would give protection to such children.[52] One example was the development by pastors and churchmen of a network of laws and practices designed to rescue and shelter children otherwise at risk. So, the preamble of the decree of the Council of Vaisons (around 490)[53] condemned the evil of exposure, stressing that children should be the objects of love and should therefore not be left alone in the wind and the cold to die of the elements or be torn apart by wild dogs. The decree went on to create a system of informal adoption designed to ensure that children whom a mother might be unable to raise might be placed with another family.[54] Based on

45 Talmud Sanhedrin 19b.

46 For more, see: Pollack – Bleich – Fadel, Classical Religious Perspectives of Adoption Law 104.

47 Babura, Szent Ambrus élete 39.

48 See in English translation: https://bkv.unifr.ch/de/works/cpl-299-1/versions/on-the-good-of-marriage/divisions.

49 Herger, A germán férji Munt és az egyházatyák 62–97.

50 Brundage, Law, Sex, and Christian Society in Medieval Europe 35–36.

51 For more, see: Harris, The Roman Father's Power of Life and Death 81–95.

52 Reid, The Rights of Children in Medieval Canon Law 11–12.

53 For text of the council degree, see: Migne, Concilium Vasense Primum, vol. 84. 261–262.

54 For analyses of the council degree, see: Pollack – Bleich – Fadel, Classical Religious Perspectives of Adoption Law 101–158.

the letter of Pope *Nicholas* to the Bulgarians, *Lindner* and *Plöchl* came to the conclusion, that the marriage impediment of legal kinship (*cognatio legalis)* was in force in church jurisprudence at least from the 9th century,[55] i.e. we can be sure that adoption was a widespread institution in the medieval Christian world even in earlier times. The custom of oblation children was legally accepted in the great monastic rules of the 6th and 7th centuries. Although *Boswell* described child *"[o]blation [to monasteries or convents as] in many ways the most humane form of* abandonment *ever devised in the West",*[56] parents forced to do so by economic or social circumstances could be confident that their children would be well cared for and grow up safely.

In classical canon law, there was no specific title or book dealing with the rights and duties of children, but the corpus of canon law dealt with them under various headings. In the middle of 12th century, the work of Magister *Gratian*, *concordantia discordantium canonum,* brought about a change for the paper's subject in that the process of unification of Western canon law was significantly advanced by this collection. The family based on the institution of monogamous indissoluble and sacred marriage[57] was strengthened by the system of marriage impediments,[58] as opposed to other forms of cohabitation. The insight about the priority of the natural family, and the need to protect and privilege the special bond between parents and children, which can be summed up by the term "parental responsibility" became axiomatic for the Christian thinking, however, through the work of *St. Thomas Aquinas* (1225–1274) about a century after *Gratian*. *Aquinas* extended *Aristotle*'s teaching, that humans are family animals before they are political animals, and the third-century Roman jurist's, *Ulpian*'s teaching, that natural right is that which all animals can learn from the nature.[59] He also added theological arguments in support of this natural construction of the family.[60] Parentage is not just a natural inclination and duty, aimed to perpetuate the human species in general and one's own family in particular. It also engenders a Christian privilege and responsibility to participate in the creation of *God*, and as *Abraham* taught his son, to teach children the essence of the so-called Golden Rule.[61] Medieval scholars were familiar with two ways of construing natural law: as an animal instinct that humans shared not as humans, but as animals, and as the first, self-evident principles of practical reasoning, such as the positive (biblical natural law) [62] and negative (universal natural law)[63] versions of the Golden Rule and the Ten Commandments.[64] *Reynolds* stated that one way to resolve the distinction between these two meanings of natural law was to recognize both by treating the term "natural law" as equivocal.[65] It is another question why the universal rule (also

55 Lindler, Die gesetzliche Verwandtschaft als Ehehindernis im abendländischen Kirchenrecht des Mittelalters 21; Plöchl, Das Eherecht des Magisters Gratianus 86.

56 Boswell, Kindness of Strangers 238–239.

57 Herger, A decretum Gratiani 180–188. See also: Winroth, Gratian and His Book 1–15.

58 Herger, Magister Gratianus tanítása a házassági akadályokról.

59 Aquinas, Supplement. Summa Theologica III, q. 42. A. 3. and q. 41. A. 1. Quoted by Browning, Christianity and the rights of Children 287.

60 Sweeny, Thomas Aquinas on the Natural Law Written on Our Hearts 133–154.

61 Reynolds, St. Thomas Aquinas 179–190.

62 Matthew 7:12 *"(…), do to others what you would have them do to you, (…)".* See also: Luke 6:31.

63 *"Do not others as you would have them do to you".* See: Reynolds, St. Thomas Aquinas 179–194.

64 Green, Instinct of Nature 173–198.

65 Reynolds, St. Thomas Aquinas 183.

found in other religion, for example in Zoroastrianism or Hindu tradition) was emphasized by the 13th century teacher, when *Jesus Christ* set a higher, specific standard for his followers, which of course also applied to the legal relationship between parent and child: *Aquinas'* bio-philosophical approach (which did not mean the describing family relationships in terms of natural rights and duties), was shaped by *Aristotle* and *Ulpian*, while his religious language was derived from the Bible, from the Old Testament stories and their commentaries in the New Testament.[66]

In the high middle age, no separate book in the *Corpus iuris canonici* or the *Corpus iuris civilis* brought together the disparate rights of children, and even the vast treatise on *ius commune* contained few writings dealing specifically with the legal status of children. Yet we can find sources that have also talked about the natural rights of parents and children within and beyond the marital household as well. A good example of this are a title of the Fourth book of the *Gregorian Decretals* (1234) which covered the church's matrimonial law, dealt with the special problems raised by the marriages of children (X 4.2.1-14, *De desponsatione impuberum*), and a short title, devoted to the delicts of children in the Fifth book, which contained the penal law of the church (X 5.23.1-2, *De delictis puerorum*).[67] The biblical natural law[68] repeatedly commanded special care and justice for the fatherless and orphan children. This medieval – only partially unified – Western church law, which prevailed throughout the Catholic world, including in Hungary, formulated the church's obligation to children partly in term of the rights of the child: the right to life and the means to sustain life; the right to obtain care, nurture, and education, the later also right to contract marriage[69] over 12 year[70] or to enter into a religious life; and the right to support and inheritance from biological or adoptive parents.[71] Illegitimate children furthermore had limited but special rights to oblation in a monastery or legitimation by a natural or adopting parent. Poor children had special rights to relief or shelter. Abused children had special rights to sanctuary and foster care. Abandoned or orphan children had special right to adoption and to foundling houses and orphanages,[72] and these eventually succeeded to the role filled by monasteries in providing shelter for abandoned and needy children, especially in

66 Browning, Christianity and the rights of Children 288.

67 Quoted by Helmholz, Children's Rights and the Canon Law 41. See also: Reid, The Canonistic Contribution to the Western Rights Tradition 59–72; Witte, Church, State, and Family 84.

68 Costigane, Natural Law in the Roman Catholic Tradition 17–36.

69 In the context of certain impediments to marriage, Magister *Gratian* discussed the question of paternal approval of marriage in several places, but he did not give a clear picture of whether approval is a condition for a valid marriage in a general sense. It was undoubtedly necessary in the case of a raptus, since without it the impediment to marriage could not have been removed, but several authors have concluded, on the basis of c. 12 C. 32 qu. 2, that paternal approval was otherwise only relevant to the legitimacy of the marriage *(matrimonium legitimum)* and did not affect its validity. This view seems to be correct because in *Gratian*'s time secret marriages *(matrimonium clandestinum)* were valid and remained so until the decree of the Council of Trent on marriage law, even if the magister himself did not approve of such cohabitation. See: Plöchl, Das Eherecht des Magisters Gratianus 63; Köstler, Die väterliche Ehebewilligung 107; Freisen, Geschichte des canonischen Eheschließungsrechts bis zum Verfall der Glossenliteratur 316; Colberg, Ueber das Ehenindernis der Entführung 66.

70 Gratian considered the first year of the capacity to marry to be the 12th year, while leaving open the question of the conditions under which a valid marriage could be contracted between the 7th and the 12th year. Below the age of 7, marriage was in principle excluded. See: Plöchl, Das Eherecht des Magisters Gratianus 54; Hörmann, Die desponsatio impuberum 52.

71 For canonistic adoption law, see: Reid, Power Over the Body 182–193.

72 Witte, Church, State, and Family 93.

the new urban centres of Europe.[73] In conclusion, it is worth pointing out that canon law also asserted a specific ecclesiastical jurisdiction: the Church considered itself responsible for persons who could not defend themselves adequately (*miserabiles personae*). In particular in cases, when no other remedy was available, ecclesiastical courts claimed the right to intervene in otherwise secular matters on behalf of disadvantaged children in need. This tradition based among others on the teaching of *Moses* (*"Ye shall not afflict any widow or fatherless child"*)[74] and a prayer of King *David* (*"bring justice to the orphan and the downtrodden"*),[75] quoted in early collections, which were then systematically collected and explained in *Gratian's Decretum*: the essence of doing justice was the defence of the weak, and among them of the children (C. 23 q. 5 c. 23).[76] *Gratian*'s work[77] remained the authoritative source for centuries, essentially until the codification of Catholic canon law in 1917.

Although violations could and did occur in every century, these rights were respected and expected by the Christian tradition based on the divine natural law, as evidenced by the biblical passages quoted earlier. The problem, therefore, was not that children's rights did not exist, even if they were not necessarily established by written legal norms, but predominantly by moral and canon law rules. Rather, the problem was that there was no safety net in the event of violations of these children's rights. It is important to see, however, that these rights were not predominantly created within the family, but as part of a care of society. Christian morality "refined" the scope of paternal authority, as it had done in the development of Roman law, in the medieval Western legal culture after the fall of the empire. As *Reid* summed up, *"Christians not only abolished the ancient father's right of life and death over his offspring in favor of solicitude for the life and welfare of vulnerable infants and children; they also made the case that all children enjoyed a fundamental right to be provided for"*.[78] However, the legal relationship between parent and child was not regulated in its entirety by canon law, and traditional customary law, apart from this "refinement", did not show openness to change for a long time. By parallelism of sources of law in this respect, we must understand that legal institutions falling within the canonical legislative and judicial competence (such as marriage or widows and orphans) were only affected by traditional customary law or other secular sources of law to the extent that the protection of the canonical legal institution in question required it. In contrast, the secular regulation of non-canonical legal institutions was only framed by the moral and theological requirements of the Church. A typical example of this is the criminal law protection of the family (as family member of the legitimate child) and marriage in traditional customary law, which in Hungary appeared in *István Werbőczy*'s customary law collection (*"Tripartitum opus juris consuetudinarii inclyti Regni Hungaria",* 1517).[79] Theology and canon law gave the concept of these legal institutions, but the implementation of the protection belonged to the field of customary law.[80]

73 Reid, The Rights of Children in Medieval Canon Law 15.

74 Exodus 2:22.

75 Psalms 10:18.

76 Helmholz, Children's Rights and the Canon Law 42.

77 After *Gratian* the medieval civilian *Baldus de Ubaldis* (d. 1400) also looked upon Roman law as a distinct factor in validating this special canonical jurisdiction. As *Helmholz* has noted, the explanation of this right was traced back to the privilege of *miserabiles personae* granted by the Emperor *Constantine* in 334. See: Helmholz, Children's Rights and the Canon Law 42.

78 Reid, The Rights of Children in Medieval Canon Law 16.

79 Mezey, Werbőczy István 14–20.

80 Mezey, Adalékok a család büntetőjogi védelmének történetéhez 203–214.

As in the field of marriage law,[81] there has been a change in European legal thinking on children's rights protection with the emergence of Protestantism. *Luther* saw marriage, a creation and gift of *God*, as a social institution of earthly rule, and the family based on marriage as a natural order and an earthly institution that generated state legal protection of scarce legal institutions. *Calvin*'s contribution to the development of children's rights was primarily his strong opposition to abortion, killing or exposure of a newborn child, child abuse and, consequently, all extramarital sexual relations from which unwanted children are mostly conceived. He ordered the Council and Consistory of Geneva to punish the perpetrators of such crimes and advised infertile couples to support or adopt orphaned children,[82] primarily to save a human life, and not only to provide an heir for the adopter.

Looking at the theological teachings on family in the 16th and 17th centuries, *John Witte Jr.* discusses four Christian marriage law models that influenced the development of children's rights. The so-called Lutheran social marriage model placed the relevant legal institutions under state jurisdiction. In the Calvinist so-called covenantal model state and church shared powers. The Anglican model, after a brief hesitation, returned to medieval canon law and the exclusivity of ecclesiastical authority for family life, while the Catholic model, in reaction to Protestant family law reforms, took on for itself an increased role in child and family protection, with state support.[83] As consequence of these changes, the rights of children, present in the medieval Christian world, were incorporated by the early modern Protestant and Catholic states into the post-Reformation state family law system.[84] The obligations of parents were replaced by the obligations of church and state authorities to care for children on behalf of parents when they are unable or unwilling to do so.[85] This change of attitude coincided with the realisation of the absolute states, which cared for their subjects, that they could not renounce a single illegitimate, orphaned, neglected, or abandoned child.

In addition to the writings of Catholic and Protestant theologians,[86] *Witte*'s and *Good*'s research also draws attention to a lesser-known group of sources, so-called household manuals, which conveyed theological teachings in simple form, shaping community value orientations in significant ways in the early modern European society: parents, children, and other household members were instructed through them on domestic, spiritual, emotional, and social responsibilities to *God*, neighbour, and self. The manuals outlined the duties of love, respect, recompense, and life-long honour that children owed to parents, and the duties of love, support, education, nurture, emancipation, and inheritance that parents owed to their children. The importance of these sources shows that some of them proved to be prototypes for later children's rights, too.[87] Instead of a full European overview, I would like to refer only to the Hungarian parallel phenomena. In the collection of his sermons the Jesuit monk and Archbishop of Esztergom, *Péter Pázmány* (1570–1637) dealt with the Christian education of boys *("About the Godly Education of Sons",* Hung.: *"A fiaknak istenes neveléséről"*) and

81 For *Martin Luther*'s and *Jean Calvin*'s understanding of the legal relationship between spouses and parents and their children, see: Herger, A 17. századi protestáns természetjogászok családképe 58–80.

82 Herger, A 17. századi protestáns természetjogászok családképe 58–80.

83 Witte, Church, State, and Family 72–105.

84 Ozment, When Fathers Ruled 39.

85 See also: Woodhouse, Religion and Children's Rights 299–315.

86 Raunio, Natural Law in the Lutheran Tradition 77–97; Huffel, Natural Law in the Reformed Tradition 121–139.

87 Witte – Good, The Duties of Love 266–294.

girls *("How to Educate a Christian Girl",* Hung.: *"Mint kell a keresztény leányt nevelni").*[88] In 1777, the enlightened Hungarian philosopher *György Bessenyei* published his book of advice for women, entitled *"The Education of a Mother" (*Hung.: *"Anyai oktatás").*[89] However, *Bessenyei* presented this work to his readers at a time when many philosophers and jurists[90] attempted to break down the differences between the religious family law models. Their tool was no longer an interpretation of family law based only on biblical natural law, but on universal natural law.

2.3. Enlighted natural lawyers about parental authority, equal rights of children, and natural need of illegitimate children for parental support

In the European legal history scholarship, Enlightenment family theories[91] are described primarily in terms of their impact on individualism and secularisation, although many thinkers of the common law world[92] and private law codes of the civil law word[93] defended traditional family and sexual norms. Enlightened jurists, even those who rejected or reconceived the relationship between Christianity and law, knew and found congenial the classical and Judeo-Christian teachings about children. The development of Hungarian law was influenced by both: just as Western Christian legal culture was "united" in the Middle Ages by the complex legal system of the *ius commune*, so from the 16th century onwards it was again "united" by the intellectual currents of reform, even if there was a certain delay in moving from the central states to the so-called periphery. These intellectual currents reached Hungary first with the spread of the Reformation and the study abroad of Hungarian students, and then through the scholarly works of the time and the Western study trips of intellectuals and nobles open to reform.[94]

A good example from the common law world is the puritan *John Locke* (1632–1704), who glossed and paraphrased several of the same biblical passages about children highlighted by medieval writers but – as *Witte* stated[95] – said *"nothing new"* about children's rights. In his writing *Thoughts Concerning Education* he gave instructions about nurture and education. *"Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they art wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite*

88 *Pázmány's* collected, edited and annotated writenig, see: Tarnóc, Pázmány Péter művei 76–97, 338–361.

89 Pogány, Nőemancipáció 5–7.

90 For *Hugo Grotius*' and *John Selden*'s understanding of the legal relationship between spouses and parents and their children, see: Herger, A 17. századi protestáns természetjogászok családképe 81–88.

91 Herger, A nővételtől az állami anyakönyvvezetőig 37–41. See also: Schwab, Grundlagen und Gestalt der staatlichen Ehegesetzgebung in der Neuzeit bis zum Beginn des 19. Jahrhunderts 170–183.

92 Herger, Natur und Mensch: Die Verteidigung der traditionellen Familie im aufgeklärten Naturrecht 131–137; Witte, Church, State, and Family 151–183, first of all 152.

93 Herger, A nő házassági vagyonjogi állása a német természetjogi kódexekben 59–80. See more: Coing, Europäisches Privatrecht 320–329.

94 P. Szabó, Europäische Impulse in der Entwicklung der Rechtskultur im Karpatenbecken 11–29, 177–205, 297–314; P. Szabó, Verweise auf das Naturrecht in den Quellen des spätfeudalen ungarischen Privatrechts 161–180.

95 Witte, Church, State, and Family 98.

off, and leave a man at his own free disposal".[96] The strongest version of his arguments against the emancipation of children was that the rights are reserved for adults. The child has not independent agency, the argument goes, the reason and capacity to operate on his or her own. Just as responsibilities to the state (like paying taxes or serving in the military) or responsibilities to other private parties (like performing contracts or paying tort damages) do not begin until adulthood, so rights against the state or any other party cannot be claimed until emancipation from the authority of parents or guardians. A child, as such, has public and private rights claims only vicariously through parents or guardians. In the *"conjugal society"* as he called the marriage, the common offspring have a right to be nourished and maintained by them, till they will be able to provide for themselves.[97] They have right to *"inherit their parents property"*, but the right to *"full liberty"* only when *"they become adults"* with their reason fully formed. As a novelty of the time, *Locke* also drew attention to the unworthy neglect of the mother and argued for parental authority instead of paternal authority.[98]

Many of the later representatives of natural law, for example the protestant feminist *Mary Wollstonecraft* (1759–1797) also came to the defence of the traditional family as the ideal place to have and raise children. She set out obligations and rights concerning boys and girls alike. She frequently repeated the argument that *"natural justice"* compels fathers and mothers alike to discharge their *"most sacred duties"* to nurture, maintain, and educate their children and to desist from cruelty, abuse, and exploitation of them.[99] Like *Martin Luther, Melanchthon,* and other *Protestant* educators[100] she emphasized need for public education for every child. The differences between girls and boys could, for a time, suggest different roles in the public and private spheres and different education for girls to prepare them for the unique vocation of motherhood. But in matters of basic knowledge, virtue and morality, men and women are inherently equal and women should be given the same freedoms and resources as men, *"rather than being like some fanciful kind of half-being"*.[101] This equal right becomes their natural gift, as the Cambridge theological utilitarian, *William Paley* (1743–1805) also stated.[102]

The greatest Scottish philosopher of common sense, *Francis Hutcheson* (1694–1746), based his arguments in favour of a faithful monogamous marriage on the natural needs of mothers and their children. If men and women are allowed to indulge their monstrous lusts and practice licentious procreation without the stability of a marital household, *Hutcheson* said, it will destroy both the body and the mind of youth, produce a race without any parental support. Non-marital procreation may be normal for other creatures, but for humans it is against all deductions of reason and sacred law of nature. He thought, it does not help much to rely on the state to raise or support children born out of wedlock, since without the experience and imitation of their parents' natural affection and love, children would slowly degrade over the generations into a *"miserable slavery"* under *"dutiful"* carers.[103]

96 Locke, The Two Treaties of Civil Government. Thoughts Concerning Education, Chap. VI. Of Paternal Power, Sec. 55.

97 The summarising of *Locke*'s view about children's rights, see: Witte, Church, State, and Family 99.

98 See more: Witte, Church, State, and Family 101.

99 See more: Witte, Church, State, and Family 101; Botting, Mary Wollstonecraft 275–290.

100 Ozment – Witte, Martin Luther 195–214.

101 Wollstonecraft, Vindication of the Rights of Woman 63, 141, 100, 133, 112–113.

102 Paley, The Principles of Moral and Political Philosophy 99–216.

103 Hutcheson, A Short Introduction to Moral Philosophy in Tree Books 244–255.

A general picture of the legal status of the child can also be drawn from the textbook-like summaries of the common law world. Much like the medieval canon lawyers, and like the philosophers of his day, *William Blackstone* (1723–1780) identified in 1765 in his *"Commentaries on the Laws of England"* a matrix of natural rights and duties from a principle of natural justice and retribution that the law imposed on parents and children. These duties of parents are the correlatives of the rights of children to receive support, education, and care, which continue even after divorce (through child support) and even after the parents die (through testamentary obligations and presumptions in favour of children).[104]

The Lutheran and Calvinist doctrines of parental responsibility for the care and education of children also appeared in the Enlightenment thinkers of the continental Europe in connection with the defence of the traditional family. The Hungarian examples for that Western phenomenon were related to Protestant theologists and lawyers: Pastor *János Herepei* took women's rights to be respected, loved, cared for and protected by their husbands into account in his teachings (*"Az asszonynak jussai"*, 1797), while professor *Sándor Kövi* presented the Hungarian laws in a form that also children could understand, with the intention, among other things, of teaching them their rights (*"Magyar törvények rövid summája gyermekek számára",* 1798).[105] Although legal reforms were still to come, attention (among a narrow intellectual class) was also focused on the need to protect children's rights, the legal mindset clearly changed.

It is noteworthy that the actual beginning of Hungarian private law scholarship can be dated from the same time. One of the last landmarks of this change was the Latin, three-part basic work by *Stephanus Huszty*, which appeared in Buda in 1745 (*"Jurisprudentia practica seu commentarius novus in Jus Hungaricum"*). In terms of content, it was no more than the presentation and possible explanation of *Werbőczy*'s customary law book with the help of supreme court practice. When however Hungarian law students and lecturers, through foreign studies or by familiarising themselves with Western European specialist literature, first adopted natural law, which was adapted to the Christian view, and then later also its enlightened variant, rational law, these ideas played an important role in the development of national jurisprudence. In 1792, the Calvinist *Sámuel Dienes* considered it important to translate the famous teachings of the Viennese private lawyer, *Martini*, into Hungarian and thus offer a Hungarian textbook of legal education (*"Martini bárónak á természeti törvényekről való állításainak magyarázatja"*) although *Martini*'s teachings were not necessarily and not always welcomed by Hungarian lawyers. *Dienes*' work was naturally followed by other textbooks. *Benjámin Nánásy*'s comprehensive work on testamentary inheritance law was published in Pest in 1798 by *Mátyás Trattner*. *Nánásy* was also of the opinion that the national language had a special significance in the legal life of the nation. In the preface to his work, he no longer spoke of subjects, but of citizens. And the citizens of the union, as he called the state, should learn about their rights vis-à-vis the prince of the union. His task and responsibility as a patriot was – the advocate added – to enable this 'exit of the citizens (i.e. of women and men alike) from their immaturity' through the Hungarian-language revision of the law of succession.[106]

These works did not contain new law, but they interpreted traditional Hungarian law in a new way, with a natural law approach. From this point onwards, it is difficult to separate the

104 Blackstone, Commentaries on the Laws of England, 1.16.1. See more: Witte, Church, State, and Family 111, 265.

105 These writings in Hungarian also contributed to the creation of the Hungarian legal language. See: Herger, Im Geist des Naturrechts 239–256.

106 Nánásy, Testamentom á magyar országi törvények szerént VI–VIII.

influence of biblical natural law from that of reason; in fact, only the argumentation revealed the authors' attitudes, while their conclusion, the need for equality of rights, was the same.

3. The children's rights in the Hungarian legal development from the end of 18th to the mid of 20th century: the case of (in)equality of daughters and sons

A noteworthy question in the development of family law in Europe is how natural law ideas have influenced the community's value orientation towards the relationship between parent and child and then as an impact of this change also the legal regulation of this social relationship. The first part of this study outlined the ideas underpinning natural law, while the second part describes the development of the legal regulation using the Hungarian example. This example from Central and Eastern Europe for children's rights reforms is also worth examining because the ideas mentioned were not born on Hungarian soil but were adopted as an influence of European legal culture in a country that was not a central power in Europe, but which has always showed a commitment to European values. One of the early representatives of the Hungarian historical legal school, *Ignácz Frank*, did not see in 1845 Hungarian law as separate from Western legal culture: *"When the Hungarian nation broke away from Asia into Europe, it developed here, it became more beautiful here. It is therefore not surprising that we find in our domestic law a kinship with Roman and ecclesiastical law, not to mention the old German and Frankish customs."*[107] It was during this period, mid of 19th century, the so-called reform era, that the first real legal changes in the field of children's rights took place in Hungary. The question is therefore how the Hungarian legislator has responded to the problems of rights of female children and illegitimate children.[108]

A few decades after *Locke*'s main writings publication, the private law codes of the wave of codification movement under the influence of natural law, in particular the *Codex Maximilianeus Bavaricus Civilis* in Bavaria (1756), the *Allgemeines Landrecht für die Preußischen Staaten* in Prussia (ALR, 1794), the *Code Civil* in France (1804) and the *Austrian Civil Code* in the dominions of the *Habsburg* dynasty (ABGB, 1812), usually enshrined the principle of equality of all human beings under the law of nature. But they did not establish a corresponding, consistent body of legislation: there was no equalisation of the rights of married women, i.e. the husband retained his personal and property rights until the mid-20th century, and no equalisation of the rights of female and male children, and legitimate and illegitimate children.[109] Even so, it is true that the ABGB has somewhat refined the Hungarian legal thinking on the legal relationship between parent and child in the second part of the 19th century, as will be shown. In the same period, in countries where codification of private law was not an aim or failed, partial legislation and, above all, customary law, which was developing in judicial practice, also ensured the survival of traditional law. Hungary belonged to these countries: although the idea of equality under (divine and universal) natural law appeared in the field of family law, it is a striking omission that it did not lead to any significant legal modernisation in the drafts of private law code in 1795. The content of the drafts remained essentially in line with the traditional law position on both of discussed.[110]

107 Frank, A közigazság törvénye Magyarhonban 80.

108 The history of the development of children's rights in Hungary is the subject of several authors. A general overview cannot be given within the framework of this study. For recent literature see: Visontai-Szabó, A szülői felügyelet tartalmának és rendezésének jogtörténeti fejlődése 130–141.

109 Herger, A germán férji Munt továbbélése a természetjogi kódexekben 195–202.

110 Homoki-Nagy, Az 1795. évi magánjogi tervezetek; Homoki-Nagy, A magyar magánjogi kodifikáció

This phenomenon can be explained by several factors. It is true of the development of the law of European nations in general, but it can also be proved with regards to Hungarian law that the institutions of traditional customary law survived after the adoption of Christianity, they were only certainly 'refined' by biblical culture (canon law, and from the 16th century onwards the Protestant confessional teachings and laws).[111] The responsibility of the husband or father to put into practice the Christian teaching to his wife (to love and care for her as Christ loves and cares for the church[112]) and to his children (to raise them to be adults capable of human coexistence[113]) is undoubtedly significant. And if there could be a discrepancy between the ideal and the reality, even in the case of the family based on marriage, it would have been particularly important for the legal system to provide adequate means of protection for the weakest members of society, the female children and children born out of wedlock. However, the question of the difference in their status was not even raised at this time because of the different social functions of women, and the care of illegitimate children was seen as a social issue.

In Hungarian customary law, according to *Werbőczy*'s customary law book, the *Tripartitum*, a child became a member of the family community if the father's will so directed: it had to be born in marriage or legitimised. The *Tripartitum*, although it basically contained noble customary law, was also applied in practice to the legal relations of non-nobles, if only a separate rule did not apply to non-nobles. Among legitimate children, boys became emancipated when they reached the so-called legal age, but girls were freed from paternal authority only by marriage. If their fathers had died earlier, the boys were under guardians until the legal age, but the girls, being considered of easy mind, until they were married.[114] In contrast to the Germanic legal culture, in Hungary married women, regardless of their status in the social order, were granted personal and property autonomy, and if widowed did not lose their autonomy. Even at the beginning of the 20th century, Hungarian private lawyers – with national pride – drew attention to this peculiarity, in contrast to the German legislation, which in the *Bürgerliches Gesetzbuch* (Bgb, 1900) maintained the property dependence of the married woman on her husband in the case of statutory property regime (*Verwaltungsgemeinschaft*).[115]

The legal inheritance status of the daughters of serfs was changed in the reform era (Act VIII of 1840), when they inherited in equal shares with their brothers (§ 2). In terms of their property and inheritance rights, they could claim the so-called women's special rights for dowry *(allatura)*, marriage gift *(parapherna)*, marrying off,[116] and fidelity wage *(dos),* while the girl's quarter *(quarta puellaris)* lost it importance in inheritance law after 1840. As a result of the second wave of codification of private law (1880/1900-1928) in Hungary after the first attempt in 1795, the doctrinal positioning of these women's rights was clarified: some of them would be placed in family law (matrimonial property law) and others in the law of succession (among the rules of statutory succession). Differentiation according to gender in the law of succession of

első lépései 149–160.

111 See more: Herger, A germán férji Munt és az egyházatyák házasságfelfogása 62–97.

112 Ephesians 5:25.

113 Colossians 3:21.

114 Homoki-Nagy, A magyar magánjog történetének vázlata 35–36.

115 Motifs of the Hungarian General Civil Code I. Introduction. Personal law. Family law 193–194.

116 For a detailed description of women's special rights, see: Herger, A modern magyar házassági vagyonjog 156–353.

legal descendants has been unthinkable in the legal order since 1840.[117] This is not necessarily the picture that emerges from everyday legal life. I examined the case law of the Royal Court of Pécs in the period between 1848 and 1946 for all types of family law cases, including succession disputes. 1848 marked a milestone in the development of Hungarian law, because after the defeat of the War of Independence (1848–1849), Austrian legal transfer had a profound impact on Hungarian private law, while 1928 did not mark the end of an era because the second wave of codification was unsuccessful, and traditional law survived, albeit in a different form, until the mid-20th century. That is a fact, that the equality before the law of male and female children in the case of statutory inheritance applied to all social groups. However, among the peasant population, when it came to making a will in the event of death (inheritance contract, testament, gift) preference was usually given to male children, which can be explained by economic reasons. Another question is what happened if only a girl child was born.

During this research in the Archives of Baranya County of Hungarian National Archives (Mnl Bml) I have come across several contracts between father of the bride and his father-in-law *(vőfogadó szerződés)* or testaments, in which the father made his daughter's husband his heir in order to ensure male labour on the family farm. In such cases, the aim was not to discriminate against the girl child, but to maintain the family's financial security.[118] Since the father was of course free to dispose of his estate by contract or will, the legality of such acts cannot be questioned. The question is how his daughter was able to accept all this. On the one hand, the institution of a compulsory portion (*kötelesrész*) in the case of a non-statutory succession was granted to both the son and the daughter from the parental estate, which can be considered as proven on the basis of examined case law in Baranya County also. On the other hand, however, the statutory matrimonial property regime among peasants was the limited community property regime (*közszerzeményi rendszer* = community of acquisitions).[119] This system was based on partial property unification, i.e. the inherited assets were considered separate property. This means that if the marriage had subsequently been dissolved, the daughter would have lost a substantial part of her "inheritance", as the *vőfogadó* contract or the testament would have made it the separate property of her husband. It cannot be assumed that the marriage was certain to last until the death of the parties, since in the period under consideration the denominational law of non-Catholics allowed for divorce, and from October 1895 (with the entry into force of Act No. XXXI of 1894 on civil marriage) a uniform divorce law was introduced in Hungary, independent of religion.[120] I have not found any trace of the *vőfogadó szerződés* in the Hungarian literature, only thanks to my archival research. This phenomenon also proves that the study of legislation alone is never sufficient in legal history research, but that the exploration of case law and social conditions is also necessary to form an opinion on the effectiveness of legislation. In the case of other social groups, I have not found any examples of discrimination against female children in Hungarian inheritance law of the period. It was mainly due to the efforts of the women's movement[121] that in the last decades of the 19th century several prominent representatives of Hungarian private law emphasized the importance of this hitherto neglected topic. The social sensitivity of this

117 Sándorfi Pap, Törvényes öröklési jog 42–227.

118 Herger, Beiträge zur Entwicklung des ehelichen Güterrechts in Ungarn 26–27.

119 Herger, Beiträge zur Entwicklung des ehelichen Güterrechts in Ungarn 21.

120 Herger, The Introduction of Secular Divorce Law in Hungary, 1895-1918: Social and Legal Consequences for Women 138–148.

121 Császár, Nőmozgalmak a dualizmus-kori Magyarországon 117–128.

so-called social private law school and its quest for natural justice led to gradual reforms. The above mentioned *Dezső Márkus*, judge of the Supreme Court and councillor judge of the Ministry of Justice, was a supporter of women's equalisation. He felt responsible to speak also about the problems of the socially deprived part of Hungarian society, so about the legal status of children born out of wedlock. The actuality of his examination was the fact that the drafts of the first Civil Code in Hungary was under drafting (1900–1928) at the same time.

Márkus dealt extensively with the legal status of children born out of wedlock in his writings in the *Jogtudományi Közlöny* (*Legal Gazette*) in 1905 and 1907, and in the *Ügyvédek Lapja* (*Lawyers' Journal*) in 1908 in order to encourage the courts applying customary law to adopt a more favourable attitude towards illegitimate children.[122]

The question was what legal arguments could be used to justify the change of approach. After the years of neo-absolutism, when the Abgb was in force in Hungary (1853–1861), Part I, Section 9 of the so-called Provisional Legislative Rules (Itsz, 1861), which partially restored Hungarian law, provided that in the absence of a will, all the testator's property passes to his or her legitimate children. On this basis - and following the Hungarian customary law from the time before 1848 - the practice developed that in the absence of a will, an illegitimate child could not inherit from his mother (and father) at all, even if she had not a child born of marriage. In his studies, *Márkus* wanted to prove that illegitimate children were not taken into account, when the Itsz was drafted, and therefore their right to inherit from their mother was not denied by definition.[123] In addition to his commitment to natural justice, *Márkus*' thinking was undoubtedly shaped by the Abgb (§ 754). The fact that other judges also adhered to the Austrian legal principles of the neo-absolutist years is evidenced, among other things, by the fact that from the 1870s onwards, case law recognized the right of inheritance of a child born out of wedlock to the mother even if the woman had legal descendants. Indeed, the Royal Curia ruled on 27th September 1905 (No. 6059/1904) that the illegitimate child is entitled to inherit the father's property, regardless of whether the father has a legitimate child. As *Márkus* put it, punishing a child for life for the sins of the parents is inhumane, unfair and unjust,[124] contrary to what natural justice dictates.

Similarly, before Act IV of 1952 on Marriage, Family and Guardianship came into force in Hungary, also the matter of child support was mainly regulated by customary law, which gradually developed in judicial practice, and survived until the mid-20th century. Some paragraphs of Act XX of 1877 on the Matters of Guardianship, Act XXXI of 1894 on Matrimonial Law and a Prime Ministerial Decree regulated child support matters, but judges followed the regulations of the 5th Draft of Hungarian Civil Code (Mtj) in 1928 as a reference and guidance, yet it was not officially in force. Child support meant the expenses for the upbringing of the child according to his or her social status, the expenses for education in general and the expenses for their studies that qualified them for work. The age when they reached the ability to work differed according to social status. Legitimate children had the social status of their parents and illegitimate children their mother's, since illegitimate children were only related to their mother and her family. According to the practice and the opinion of the Royal Curia, children were able to work at the age of 16, but if the mother or the parents were wealthy(regardless of social

122 Császár, Márkus Dezső a nőkérdésről 137–150; Császár, Márkus Dezső a nőkérdésről II 230–242.

123 Császár, Márkus Dezső a nőkérdésről 145.

124 See the decision of the Royal Court and *Márkus* opinion in more details by Császár, Márkus Dezső a nőkérdésről 143–144.

group) then the children could be deemed unable to work even until 24 years old, if they studied, as *Krausz* has shown by analysing the practice of the high courts of the time.[125] Minor meant a man under 24 years old, and an unmarried woman. Women came of age when married and retained their majority even if their marriage ended before they were 24. Since the traditional family model prevailed until the Family Law Code in 1952, the father as head of the family was the first person obligated to support his children whether they were born in or out of wedlock.

During this period of change, which still bore traces of traditional law up to the middle of the 20th century, the question of the maintenance of children born out of wedlock also evolved in the jurisprudence. In the cases of illegitimate children from the first half of 20th century, at first, the person of the father had to be identified, then the court determined the amount of child support per month and obliged the father to pay it. Until the father could be identified, the mother alone had to cover the expenses of the upbringing, although it should be stressed that according to court practice, the mother had to contribute to the finances for the upbringing of the child as well. If the father was incapable of supporting his children alone, then the mother had to help. If both were unable to provide for their children, subsidiary the grandfather or grandparents were obliged to do so,[126] as in practice it also happened in the case of peasant families that the father of the husband was ordered by the court to support the daughter-in-law instead of the husband.[127] However, when determining the maintenance of minors, similar principles were followed in the cases of both legitimate and illegitimate children, children born out of wedlock were in a less favourable situation, since at first the father had to be identified. The regulation of the maintenance for illegitimate children was highly important for the State since the child mortality rate of children was double that of legitimate children. Ultimately, it seems to be not so much the appeal to natural justice, but rather this rational recognition that led to the emancipation of illegitimate children, as the motifs of Act XXIX of 1946 on the status of children born out of wedlock attests.

125 Krausz, The Difference between the Legal Status of Minor Children Born in and out of Wedlock 317.

126 Krausz, The Difference between the Legal Status of Minor Children Born in and out of Wedlock 321–322. More literature, see: Csorna, Rokonság 294–369.

127 Herger, A modern magyar házassági vagyonjog 186.

4. Conclusions

The new approach for emancipation of female and illegitimate children has dominated in Hungary since the middle of the 20th century. However, the ideological background for this change in the Hungarian Family Law Code (Act IV of 1952) following the Soviet principles of family law was no longer to be found in the natural law argument. The family-definition of *Charles Malik* in the draft of Udhr, based on Christian social teaching,[128] was born in the same era. The religious narrative to support the institution of marriage was lost in the final formulation in the Udhr in 1948, but the Declaration retained the family *"as natural and fundamental group of society"*, and this phrase became the basis of parental and children's rights in 1989 Crc. As proof of this, I have only been able to mention in my paper a fraction of the works that deal with the ideological and legal history of children's rights, but there is no doubt, the biblical natural law played a crucial role in this process. As *Browning* aptly remarked, the family and the integrative system of parental and children's rights were not created by the State, and *"the family has preexisting rights resident in its very nature"*.[129]

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128 Rerum Novarum (1891), Casti Connubii (1930), Quadragesimon Anno (1931). See more Browning, Christianity and the rights of Children 294.

129 Browning, Christianity and the rights of Children 286.

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