Excerpts from the *Staats-Lexikon*: "Family, Family Law" (1845–48)

Abstract

This entry from Carl von Rotteck's and Carl Welcker's *Staats-Lexikon* (1845–48) on "Family, Family Law" reflects the dominant patriarchal view of the family at mid-century. Marriage was the original basis of family and social life. It was the moral and legal union of two people and was based on mutual love, but also on the superiority of the husband. Parents had authority over their minor children, and heads of households had authority over their servants, who were regarded as part of the family.

Source

Family, family law (natural). The family is the earliest arrangement of several individuals for a shared life and a truly united personality, earliest because it was established by nature itself. This has made it the foundation of all larger and more artificial social associations erected subsequently, which are the necessary condition for any development of humanity and civilization. The slowly expanding family circle becomes a tribe; several tribes in closer contact form a horde, or – if they recognize the inadequacy of the family bond, which becomes looser with expansion, and reach an agreement on more orderly conditions – a civic or political community, a nation, a state. The simplest form of the state, the patriarchal one, arose directly from family life; this is the root from which have grown all the other social relationships between humans that exist in the state, indeed, are inconceivable without the state. But even now, when this further development, expansion, and multiplication of social ties has long since taken place, the family remains the foundation of all nobler human and civic life, of all human and civic happiness. Therefore the family or the good order of the family is at all times one of the most important elements entrusted to the care of the state, and the neglect thereof never fails to take a heavy toll.

Our purpose here is not to list how the various states, ancient and more recent, fulfilled this duty, or the spirit in which they established the laws pertaining to the family. Some references to these matters can be found in several of the articles devoted to legal history. Here we inquire merely into the natural order of the family, which the legislation of the state is most immediately called upon to arrange in the best possible way, and, where it is deficient, to perfect in the sense of its highest principle or to define with greater precision. Few deviations from the natural law for the sake of political interests can be permitted in this matter, for the simple reason alone that the association of the state was generally – so the reasoned presumption - entered into by heads of families, that is, by entire families in whose names the heads of the families acted, and not by individuals; hence the recognition and safeguarding of the natural rights of the family should be regarded as one of the chief articles of the civic contract of association. At any rate, changes to these rights can be recognized as legitimate only to the extent that one can confidently expect all family members, in their capacity as such and as citizens, to give their free consent, or such consent can be presumed to exist. Hence, an agreement about the principles of a natural law of the family is thus the first requirement for the drafting and examination of a positive law. Political interests may only be a secondary consideration; however, these interests will be most perfectly promoted – that is, the noblest fruits for the state and the family order will be brought forth – precisely when the law adheres as closely as possible to the natural order, that is, when it preserves this natural order in its full purity, to the extent that the conditions of the civic association permit, and when the intent of its positive stipulations is merely to provide a more precise definition of this order, and to perfect and protect it. The establishment of these principles of reasoned jurisprudence for the family order is thus also one of the tasks of political theory; however, here we shall limit ourselves to a few

general observations, since more detailed ones are more appropriately laid out in separate articles (such as “Marriage,” “Paternal power,” “Rules for domestics”).

The family in the narrower sense includes merely those persons who are naturally and most directly united through marriage and immediate descent, that is to say, spouses and children. In the larger sense, however, one includes in it the totality of those descended from a common ancestor, and this probably includes also those linked to it by marriage; indeed, domestics are also included in the concept of the family, because they, too, are partners in the communal life of the family, which is one of the chief characteristics of the family in the narrower sense. Three (or four) different kinds of relationships, fundamentally different one from the other, thus exist united in the family, and just as many principles are accordingly relevant for its reasoned legal order. A reasonable family law can be derived not from the general law of society, but only from the special legal nature of these three or four relationships: to wit, that between the spouses; that between parents and children (the relationship between the children is of little concern); and, finally, that between masters and servants. We shall take a brief look at these three (or four) relationships.

Marriage is the first foundation of the family. What is marriage from the perspective of the law of reason? In agreement with common sense, it would be difficult to define it as anything other than a union between man and woman, entered into for the purpose of the enjoyment of sexual love in accordance with the law of morality and with the nobler nature of man. For it is only this definition that satisfies the idea of the dignity, indeed the sacredness, of marriage that exists among all the civilized peoples, and even among those who still live in natural simplicity, […]

What constitutes the moral foundation of marital law, then, is that the purpose of marriage cannot be the satisfaction of the sexual impulse as such (for otherwise man would be equal to the animals), but only a refined satisfaction, that is, one in accord with the higher human dignity and man’s nature as a creature of reason. The refinement of this impulse, however, is achieved through love, which directs all its strength at a single person, and desires sexual pleasure as nothing other than the expression of this love, as the most intimate union with the beloved. Furthermore, the natural consequence of sexual union points to the natural purpose of the sexual urge – the propagation of the species, and thus the obligation to satisfy this impulse only in accordance with this purpose. The requisite refinement of the sexual urge lies in the sincere cultivation of that emotion and in the honest, active recognition of that duty, and reasonable marital law arises from the establishment of this refinement as the character and purpose of marriage.

Most immediately, from the depth of love flows its exclusivity and also the intent that the union endured for a lifetime. The obligation of raising one’s offspring that is connected to the creation of children points in the same direction. Monogamy and the indissolubility of marriage – which should be recognized at least as a rule – are thus part of natural marriage law and lay claim, for the most important reasons, to sanction by positive law. A woman who gives herself to multiple men does not know the feeling of true love, and at the same time she sins against nature, which has endowed her with the sense of shame as the most beautiful ornament and as the guardian of virtue. The exclusive devotion to one man is thus for woman the first condition of sexual pleasure permitted by morality. But man, as well, since he demands such exclusive devotion, owes the same in return, and his mere wooing of the love of a virtuous woman contains – provided he loves honestly and truly – the tacit promise that the union will be exclusive and lifelong. If the marriage is blessed with children, the parents’ joint duty to raise their children already demands that they stay together; for the purpose of marriage is not fulfilled with procreation, nor with the physical rearing of children. The children must be raised and educated to be human beings and citizens in the state; and by the time that has been accomplished, the parents have usually reached an age that is little suited for a further pursuit of love. But even if that is not the case, if, for example, the children died early or the marriage remained childless, the notion of the depth of love that sealed the union implies the mutual claim to lasting attachment, care, and the sharing of both the pleasures and

travails of life. Without this, marriage would not be what it is supposed to be, a union of two persons of different sexes for the purpose of a complete personality and a shared life.

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With respect to the mutual relationship between the spouses that is created by marriage, the basic law that applies is the shared community of life based on life and duty, that is, the striving for the goals established by the marriage contract or by the idea of marriage. Of course, here the law alone is insufficient to establish satisfactory rules for what spouses should and should not do. For while the marriage contract does make the duties of love and morality into legal duties, it is not able to impart to them the quality of objectivity demanded by the law. They remain as subjective as before with respect to recognition and fulfilment. Thus, here too, the positive determination must replace – as much as possible – what the merely natural commandment cannot achieve. Now, the idea of the law of society [*Gesellschaftsrecht*] will serve as a guiding light for positive legislation when it comes to determining the relationship that shall prevail between the spouses. Within the sphere of the goals they pursue, the spouses form a society, that is to say, a union of several persons into one united person and a common shared life, whose soul or animating principle can thus be none other than the common will. Now, from this notion will flow, first of all or naturally, the claim that the spouses have complete legal equality; but upon closer inspection, the domination or superior power of the man – which is to be exercised notwithstanding the wife's personal rights – carries the day. In a society of only two members, the otherwise natural superior power of the majority vote has no application. And so, in the case of conflicting opinions, one of the two, through his will, must be decisive if something common is to be undertaken or accomplished. And it is the man who has the natural and considered claim (subsequently also recognized by the marriage contract) to such superior authority or preponderance of voice. For not only is the woman often still under age when a marriage is concluded, and thus incapable of expressing a will that carries legal force, but in general (at least as a rule, and it is only of this one can speak here) the man is also more sensible, stronger, braver, richer in life experience, and specifically also more suited to dealing with strangers than the woman. Consequently, it is proper that in all truly common matters (such as the choice of where to live, managing money, the direction of child rearing, and so on), his voice or will shall be the deciding one in accordance with the natural order of marriage. Love is effective in moderating this unavoidable dominion of the man; moreover, in keeping with the principle of that dominion, the woman has reserved for herself a space for the free exercise of life activities that meet her purely personal interests and rights. Depending on the circumstances, such space may also be set aside – without disturbing the reasonable order – with regards to the possession, enjoyment, and self-administration of property. The most natural relationship with respect to the latter – and the one undoubtedly to be most approved of – is, to be sure, the communality of all that is owned and acquired, and the dominion of the man in administering it. Indeed, it is also said that the woman who, out of love, has given herself or her entire person to the man, will or should also hand over to him the infinitely lesser possession, namely her material wealth. Yet that is more fantasy than reality. The inclination that a woman who loves deeply or passionately may feel does not establish a duty to do so; even if, according to the notion and moral nature of marriage, a commitment of one's own person must take place, it does not follow from this that no provisos may or should be made with respect to property. Experience has shown that such trust is quite often abused, and that the unhappy spouse must then bear, in addition to the pain of not having her love requited, the constant misery that springs from poverty. Depending on the circumstances, prudence may thus demand some proviso – whether asked for by the bride herself, her parents, or her guardians; morality, too, must approve of it, especially in consideration of the children, for whom (indeed, often for the husband himself) that same proviso can become most beneficial. Incidentally, it is obvious that no generally valid rule – especially in terms of the law of reason, but also in terms of positive law – can be established regarding what is good, prudent, or beneficial in specific cases. Yet it is the task of positive law to prescribe such a rule in accordance with the property conditions, customs, practices, etc. that prevail in a nation, and by taking into account the true political –

that is, general – interest, such that it shall be valid whenever those who get married do not arrange anything else amongst themselves by contract, that is, it shall be seen as tacitly accepted by all those concerned; however, those entering into marriage must also be permitted to specify by their own marriage contract something that is more suited to their special circumstances and interests. The chief requirements of such a rule – to be positively established – regarding the property rights of the spouses, as well as their family members or heirs, that should be recognized and protected by the state during the marriage and after its dissolution (through death or separation) are clarity and precision, as well as the greatest possible harmony with the natural order of marriage and a direction aimed at improving or curing the corruption of this order that may have occurred in a nation.

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Children are the true and undeniable property of the parents. No other property right is as well established as this one; and although it deviates from the common property right with respect to its content – because persons in the process of becoming are the object of this property right, not mere things – and is substantially restricted in its exercise by virtue of the nature of its object: nevertheless, this alters nothing in the relationship to all other persons; that is to say, with respect to them it is a strictly exclusive and inviolable relationship. Whoever doubts this right should consider that even spouses are the property, one of the other; that is, they belong exclusively one to the other, and that the connection of the child to the parents is obviously even more intimate and truer than that between husband and wife. The children belong to the parents, just like the parts of their own lives belong to them. Moreover, who would deny the mother the ownership of her child, which she carries beneath her heart, or, after having carried it there, is now nursing it at her breast? Admittedly less obvious, though equally evident to the legal mind and equally understandable by natural feeling, is the mother's continuing ownership – even after weaning – of the child she has born and suckled, whose further – if nothing else, physical – care still demands unceasing attention, effort, and sleepless nights. The same is demanded of the father, merely as the progenitor and then as the natural co-owner and co-possessor of all the goods belonging to the wife, and the ongoing participant in all the worries and exertions to preserve and rear the child, and finally also as the head of the family, and as the person especially burdened with the continually growing and increasingly important matters pertaining to the child's upbringing, education, and care.

Finally, this property right of the parents to their children, defined by its content and limited by the quality of its subject as a becoming person, and constrained not only within these boundaries, but guided in its exercise by natural feeling and the moral law toward the continual well-being of the child, is linked with real legal obligations or duties by virtue of the relationship of the parents to each other, as spouses, and of the two together to the society around them.

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The relationship between masters and their domestics, which we must speak of here as one that belongs to the family, is in no way the common contractual relationship between a person who demands services, and another who provides the same in return for payment (or compensation), and whose content is expressed by the formula: "*do, ut facias*," or "*facio, ut des*;" rather, it sets itself apart from it especially through two unique and essential characteristics. For one, domestics are not only bound to their master by specified (or unspecified) jobs or tasks, like a common wage-laborer or provider of services, but at the same time they have committed themselves to obedience, which means they have assumed a subordinate position towards the master and have given part of their personhood to him. Such obedience or subordination is an indispensable necessity to maintain the order of the house, that is, undisturbed family life, and it is therefore a self-evident (meaning, if not an explicitly then an implicitly established) article of the contract in question. A further factor is that many domestics are still under age when they enter upon their service and, because they are now separated from their parents, by entering

into service they fall, in a sense, under the fatherly (house-fatherly) power of their master. In a simple, natural state of affairs, such a relationship easily turns into a kind of society, in so far as the domestics have close contact with the master, may also receive, for example, part of the common family earnings instead of pay, or are incorporated into the family circle proper by marrying the daughters or sons of their masters. Their relationship to the head of the family is then very much like that of the grown children, though it cannot be defined in general, but depends on special – explicit or tacit – contractual stipulations, and also on the prevailing customs and habits (to which those who do not stipulate otherwise tacitly submit). In any case, even if some social rights are in fact granted to the domestics, they nevertheless remain – like the children – subject to the supreme patriarchal authority of the head of the family.

The second peculiarity of this relationship of servitude is that, precisely because of the duty of submission and also because of the cohabitation, it establishes a kind of material (i.e., material-personal) right of the master, combined with a real right of ownership; a right which, while it leaves untouched the personhood of the servant in all matters that are outside the sphere of the above-mentioned obligation, expresses itself within that sphere, and especially towards outsiders, as a right resembling property. For the master himself can force the domestics in his service to remain in his house for the duration of the contractually agreed-upon time, and by virtue of this right that is clearly evident to all, he excludes all others in the sense that as long as the mentioned relationship lasts, nobody may entice these domestics away or take them into service, or hinder them, in whatever way, from performing a service. If someone does so nevertheless, he has truly insulted the master, that is, he has violated his material right, and what he has done is legally invalid.

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