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CAN CONSTITUTIONS OR LAWS CHANGE MARRIAGE?: REFLECTIONS ON THE “GOODS OF MARRIAGE” AND NATURAL LAW OF JOHN FINNIS

In this article the author examines recent case of the US Supreme Court, namely Obergefell v. Hodges in which a group of academics acted as amicus curiae in explaining natural law grounds for having traditional approach to marriage as a union between one woman and one man. Author shows the connection between teachings of natural law legal theorist John Finnis and his work entitled ‘Goods of marriage’ and endorses the view that ‘marriage’ should be reserved only for heterosexual couples. Heterosexual marriage, according to Finnis, protects the family, the Judeo-Christian concept of monogamy, and other social values that have been attained in the course of social evolution.

Key words: marriage; natural law; social values.

1. INTRODUCTION

The modern world is seriously divided. Perceptions on what is to be defended by public order and which values are fundamental for social existence and preservation of public morals, and therefore eligible for legal protection, are fragmented more than ever. The *Obergefell* case established the federal right for same-sex couples to marry in the United States.¹ By such decision the United States Supreme Court determined that the United States would no longer belong to the majority of nations of the world (including countries with whom the United States shares the Western legal tradition and thought) who recognize ‘marriage’ as a union of a man and a woman. As Chief Justice Roberts discussed in oral arguments, advocates of same-sex marriage did not ask to join the definition of marriage, but to change it.

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¹ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

As a European scholar, I do not intend to jump into a complex legal analysis of the case or the heavy artillery which was fired from all sides before the case was decided, but will try to give a few short and critical points which should not be neglected as we approach this fundamental issue which has divided the United States Supreme Court – and public – maybe more than any other case in modern legal history, the impact of which will be felt globally. My intention is to show that most of the countries that belong to the same legal tradition as the United States have different solutions and views. I do not speak about the legal regulation of marriage, but about the substance of marriage in the first place and the social – not emotional – meaning and influence it has or should have.

While accepting and respecting the factual situation about what the law in a particular country is, I want to point to the definition of marriage given by Catholic scholar John Finnis, one of the most prominent natural law scholars in the world, and the solutions he proposes in “*Goods of Marriage*,” which can be seen in many jurisdictions. My intention is not to reflect an exclusively conservative point of view, but to go beyond current trends to show that marriage, on the grounds of moral philosophy, should “*produce goods of marriage*” as seen by John Finnis and St. Thomas Aquinas, which is reflected in marriage’s perception as the union of a man and a woman in most jurisdictions. By reserving the word “marriage” and its substance according to the moral philosophy of Finnis and Aquinas, one should not neglect the right and freedom to behave homosexually in accordance with free will, especially as all people have (not just deserve) dignity (which is, in my opinion, given to all men and women by birth, and not by law) as human beings who should be understood and accepted, but unions other than heterosexual are not entitled to the same treatment. Marriage, as a union between a man and a woman, produces the possibility to have a responsible partnership which results in having and raising children. This is an external “good” for society – every state has an interest in procreation. That interest is based, if not on moral, then at least on economic grounds. In this sense, even heterosexual relationships that lack commitment or the hope for procreation – for sterile couples – are not to be perceived as giving “*goods of marriage*” to society. This is based upon moral theology, philosophy, and teachings of the Catholic Church which derive from those teachings. Therefore, just like abortion and divorce, good, law abiding Catholics recognize same-sex marriage as legal, but unacceptable.

2. JOHN FINNIS’ “LAW, MORALITY, AND “SEXUAL ORIENTATION”” AND WHAT THE CATHOLIC CHURCH SHOWS AS A PATH

In his legendary essay, John Finnis argues that, “modern theory and practice draws a distinction not drawn in the former legal arrangements—a distinction between (a) supervising the truly private conduct of adults and (b) supervising the public realm

or environment.”² Finnis is arguing that “supervision of truly private adult consensual conduct [which I call a private element of the manifestation of free will] is now considered to be outside state’s normally proper role.”³ “[S]upervision of moral-cultural-educational environment”⁴ (which I describe as a public manifestation of free will) falls under a state’s legitimate interest to intervene.⁵ Although Finnis is discussing the standard modern position through, “the proper role of law and the compelling interests of political communities, and about the evil of homosexual conduct,”⁶ and also writes about Socrates, Plato, and Aristotle, some of whom had strong same-sex inclinations.⁷ I will concentrate on what Finnis considers as “*goods of marriage*,” which are obviously in my opinion connected with the manifestation and role of sex, for which reason states find their *ratio* for intervention.

His first notion is that the commitments of a man and a woman in marriage are “intrinsically good and reasonable.”⁸ Finnis sets up high moral standards based on moral theology which requires relationships between a man and a woman to be oriented towards each other, creating a complete union between them resulting in children, which states have the right to incentivize and protect. Finnis’s conclusions are obviously based on notions of natural law and therefore acts of other kinds can be perceived as unnatural (and contrary to eternal natural law in the perception of Christian, specifically Thomistic scholars) and unreasonable. Human nature under the influence of sin produces unreasonable acts: for example, sexual behavior between a man and woman outside of marriage. The same can be said for masturbation, because there is a lack of commitment to belong physically and spiritually to one body and soul. Strict application of what Finnis describes could lead to conclusions that sexual drives manifested outside of marriage are unnatural (or unreasonable), which I do not intend to say or express in the least, because this is more connected with

² John M. Finnis, *Law, Morality, and “Sexual Orientation”*, 69 *Notre Dame L. Rev.* 1049 (1994). “The importance of the latter includes the following considerations: (1) this is environment or public realm in which young people (of whatever sexual inclination) are educated; (2) it is the context in which and by which everyone with responsibility for the wellbeing of young people is helped or hindered in assisting them to avoid bad forms of life; (3) it is the milieu in which and by which all citizens are encouraged and helped, or discouraged and undermined, in their own resistance to being lured by temptation into falling away from their own aspirations to be people of integrated good character, and to be autonomous, self-controlled persons rather than slaves to impulse and sensual gratification.” *Id.*

³ *Id.*

⁴ *Id.*

⁵ Free will that belongs to free citizens allows them the right to choose what kind of (sexual) conduct they accept and exercise.

⁶ *Id.* at 2.

⁷ *Id.* at 3–6.

⁸ *Id.* at 6.

conceptions of sin and justifications to control oneself.⁹ However, leaving biology and moral theology aside, I want to recognize that Finnis's "*goods of marriage*" have direct external applications, which deserve to be acknowledged and receive support.

Marriage is connected with unification of husband and wife, which forms their "*personal reality*" closely connected with procreation.¹⁰ That union forms a common good, not just for them, as Finnis emphasizes, but also a common good for society and the community they live in. I see the "good" of friendship to be more connected with *their* "good" and the "good" of procreation more connected with "goods" of others. Even if couples are sterile, they still aspire to the responsibilities of being parents with their role of raising children. As Finnis points out, "reality is known in judgement, not in emotion" and "sexual acts cannot in reality be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive—which like Plato and Aristotle and most peoples call marriage."¹¹

This comparison seems to be essential in connection with what has been said above about external giving and the good of procreation for societies and communities. It is different than all other (though legal) behavior, which is not marital in its core since those lack commitment to neighbors and others in the first place children.¹² For me, this seems to be the crucial and central point of Finnis's natural law.

Its value is that it points to the issue of commitment and responsibility for others. Those notions are parallel to the moral obligations of the state to care for society as a whole. All that is then grounded in the Judeo-Christian concept of monogamy¹³ transferred to law through decades and centuries, which puts marriage in the central position in society.¹⁴ It seems that Finnis argues, directly or indirectly, that marriage in this central societal position puts other values in the central societal position as well: union, children, community, and not "self".

⁹ See: Germain Grisez, *The Way of the Lord Jesus* vol. 2, *Living a Christian Life* (Franciscan Press 1993). This American-French philosopher wrote extensively on the natural law concentration of St. Thomas Aquinas.

¹⁰ Finnis at 8.

¹¹ *Id.* at 9.

¹² Compare to Finnis when he is clear about the idea that non-marital sex is unreasonable (and contrary to natural law) in Finnis at 16. "So, any kind of assent - even if conditional - to non-marital sex is unreasonable. (Indeed, all sexual immorality, including all willingness to treat it as a potentially acceptable option, is contrary to love-of neighbor, i.e. of children.)"

¹³ This is a prevailing concept for most Jews who follow Rabbenu Gershom teachings which were introduced to Jewish law around year 1000 (rabbinic ban on polygamy).

¹⁴ The United Nations decided to defend traditional concepts of marriage through a resolution, which has just recently been adopted. See <https://www.lifesitenews.com/news/un-passes-unprecedented-pro-family-resolution-outraging-sexual-radicals> and <http://www.breakpoint.org/bpcommentaries/entry/13/27810#.Vae9E9PeeJl>

All who accept that homosexual acts can be humanly appropriate use of sexual capacities must, if consistent, regard sexual capacities, organs and acts as instruments for gratifying the individual "self" who has them. Such an acceptance is commonly (and in my opinion rightly) judged to be an active threat to the stability of existing and future marriages; it makes nonsense, for example, of the view that adultery is inconsistent with conjugal love, in an important way and intrinsically - not merely because it may involve deception.¹⁵

Finnis is justly pointing at the importance of community to preserve stability and procreative and educative generosity of family life as of fundamental importance.¹⁶ This is Finnis' essential argument. Although he does not explain well enough that this view should not put legally protected individual liberties into question - but obviously not through "marriage". Even if we put religious consideration aside, what I find interesting in Finnis's work is the notion that "sexual acts which are marital are 'of the reproductive kind'"¹⁷ and form communion through good sense and commitment which is central to marriage,¹⁸ in which even couples that are sterile provide strong support to marriage as a valuable social institution by model of fidelity.¹⁹

In the same way the Catholic Church teaches that inclinations are not sinful, but the acts are. In that sense, heterosexual inclinations are not sinful but their consummation before marriage is.²⁰ The Catholic Church is often wrongly accused that it does not condemn homosexuality but condemns homosexual acts. The truth is that the Church condemns any sexual relationships outside marriage and it is morally consistent towards everyone, regardless of what one thinks about the extensiveness and moral validity of these teachings. Catholic teachings on the subject are based on Jesus' teachings on human sexuality²¹ and St. Paul's explanations about complementarity of man and woman and their marriage.²² This principle is elaborated through the legendary writings of St. Thomas Aquinas in *Summa Theologiae* and in modern times mostly in the work of the moral and legal philosopher, Professor John Finnis,²³ who in discussing "goods of marriage" defends the teachings of the Catholic Church: "The Church often speaks about rights of marriage: (1) loving friendship between

¹⁵ Finnis at 12.

¹⁶ *Id.*

¹⁷ *Id.* at 18.

¹⁸ *Id.* at 20.

¹⁹ *Id.*

²⁰ *Catechism of the Catholic Church* 2333, 235-58, 2393 (1997).

²¹ Matthew 19:4, as discussed in John Finnis, *Reason, Faith, and Homosexual Acts*, Catholic Social Science Review, Vol. VI, 61-69 (2001).

²² Romans 19:8, as discussed in Finnis at 63.

²³ See John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford University Press 1998).

wife and husband, and (2) procreating and educating any children who may be conceived from the spouses' marital intercourse."²⁴

3. WHAT IS MARRIAGE IN THE LEGAL SYSTEMS OF THE WORLD?

Just a few months before reaching the decision in *Obergefell v. Hodges*, an *Amici Curiae* a brief from 54 international and comparative law experts from 27 countries and the Marriage and Family Law Research project at Brigham Young University was submitted in support of the Respondent in the case.²⁵

After deep and detailed research it was shown that foreign jurisdictions overwhelmingly reject same-sex marriage. It stated in the brief, "...it is important to recognize that the vast majority of nations, even those protecting LGBT rights, define marriage as solely the union of male-female couples" and "only seventeen non-U.S. jurisdictions currently recognize same-sex unions as marriages." Furthermore it stated, "all of the rest, 176 sovereign nations, retain the understanding of marriage as the union of man and woman."²⁶ When we discuss Europe, a continent that shares the same or similar moral, legal, and social rules and legal traditions, it is to be noted that only 11 countries out of 47 in the Council of Europe permit same-sex marriages. Many of them decided to protect same-sex relationships and unions, but not through marriage.²⁷

²⁴ *Reason, Faith, and Homosexual Acts* at 64.

²⁵ Brief in the Supreme Court of the United States in the *Obergefell et al. v. Hodges et al.*, Nos. 14-556, 14-562, 14-571 & 14-574. The brief was heavily covered by all major press in the United States; see *New York Times*, April 6 2015; http://www.nytimes.com/2015/04/07/us/supreme-court-asked-to-look-abroad-for-guidance-on-same-sex-marriage.html?ref=topics&_r=1

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 9-10. See fn. 29: It is the case with Andorra, Austria, Croatia, Czech Republic, Finland, Germany, Hungary, Lichtenstein, Slovenia and Switzerland. Meanwhile a referendum in Ireland allowed marrying of same-sex couples. It is interesting that two 'Catholic' nations: Croatia and Ireland had completely different results on the referendum. A possible reason for such a different outcome in two historically very similar states is that in Croatia religious life during communist rule was perceived as a 'window into freedom' and religious (Catholic) morals remain deeply rooted in the Croatian people while the Irish, also deeply and devoutly Catholic, were disappointed with the sex scandals in the Catholic Church in Ireland. In 2013, Croatian voters decided to amend the Constitution on the referendum by voting in favor of the norm: "Marriage is a union of a man and a woman", which was subsequently inserted into the document. Although other European states had similar provisions, this was the first time, in European legal history, that family issues in the principal document of the State were amended in such way. Many argued that this actually meant inserting religious and moral norms into the secular constitution. The Catholic Church in Croatia together with all major religious groups (Orthodox, Muslim, and some Jewish) have shown strong support for amending this basic law of the state. As it was proclaimed, that was a reaction and safeguard towards development which have happened in France regarding same sex marriages and adoption rights. It is very interesting that all major religious groups were in favor of the proposed amendment regardless of historical hostilities in their recent history caused by

It was also stated that “all national courts and international tribunals have refused to impose same-sex marriage judicially, with the sole exception of Brazil”,²⁸ but probably the most important issue for American lawyers would be the number of cases in which foreign courts decided that they should “reject broad claims of improper animus and have refused to entrench the debate on same-sex marriage”.²⁹ The German Constitutional Court has extensively discussed the connection between same-sex marriages and well-being of children and concluded that its constitution “guarantee[s] the essential structure of marriage”³⁰ and stated that “marriage in not only a ‘sphere of freedom’ but also a ‘social institution’ and the ‘structural principles that characterize marriage give it the form and exclusivity in which it enjoys constitutional protection as an institution”.³¹ All this shows that European judiciaries still hold a firm position which reflects what Finnis described as “*goods of marriage*,” particularly the external role and effect of those “goods” which are “goods” to communities as a whole through procreation, education and protection of children.

In brief, after the decision in *Obergefell*, the United States departed from common ground regarding moral philosophical values on the existence of marriage.

4. CONCLUSION

We are well aware that constitutional courts are mirrors of particular times and epochs and that the world-views of judges simply cannot be bypassed. But to be clear on one point: if there is something like natural law and “goods of marriage” given by God (or Nature), those cannot be overridden by acts of any court or parliament of any country simply for the reason which lies not in the universality of the norm itself, but in the conscience and the heart. In this article about Finnis’s view on the nature of marriage, I put emphasis on the aspect that is not often taken into consideration but which exists if one examines Finnis’s views on the selfless reasons for marriage.

war. Members of all major groups have shown that despite differences, they share at least one unique identity – a religious and traditional one. That identity is best visible through underlined respect of specific sexual and gender behavior. It is clear that what legal philosopher, John Finnis considered as ‘*goods of marriage*’ could, in practical terms, be best protected by the safeguards of the Constitution. It is the guardian of the most valuable moral values which should exist in society. A similar referendum was held in Slovakia, but under Slovak referendum laws more than 50% of registered voters have to come to the polls in order for the referendum to be valid. Pope Francis supported this initiative, which was completely neglected in world news. See <http://www.catholicnewsagency.com/news/pope-francis-backs-traditional-marriage-as-slovakia-vote-looms-37102/>

²⁸ *Id.* at 11.

²⁹ *Id.* at 21. See *Schalk and Kopf v. Austria*, No. 30141/04 (ECtHR, 24 June 2010); *Hämäläinen v. Finland*, No. 37359/09 (ECtHR, 16 July 2014).

³⁰ *Id.* at 24, fn. 99 (Civil Partnership Case 105 BVerfGE 313 (2002)).

³¹ *Id.* at 24.-25., fn. 103. Similarly, the Italian Constitutional Court recognizes the “potential procreative nature of marriage.”

Finnis's elaborations, obviously based on the teachings of the Catholic Church, highlight that marriage as a union between a man and a woman requires special protection of the state for the sake of procreation, education of children, and at least economic reasons if not moral and ethical ones. Every state has an interest in the birth of children, which is closely connected with biology, but also parents' dedication and willingness to contribute, as individuals and as one to the other and to community as a whole. It is this aspect of the "goods of marriage" that I find appealing for law, legal theory, and political science.

Heterosexual marriage protects the family, the Judeo-Christian concept of monogamy, and other social values that we have reached through social evolution. Finnis is right when he argues that after (potential) legalization of same-sex marriages, there are no other logical obstacles which might prevent further degradation of traditional concepts upon which our civilization stands. "Goods of marriage" should be essential; for the sake of our community that is the fortress for protecting the concept of the traditional family in which children and community have a significant place, that is in the center of society, which is based on, as Finnis said, the "natural intercourse which is not simply heterosexual, but marital".³²

Since the times of Roman law, citizens have obeyed the law and they should in this case also, but there is a difference between obeying and practicing it. Regardless of Constitutions and laws, for those who follow the moral doctrine of the Catholic Church, as perfectly described by Finnis, marriage remains a union between a man and a woman - not in state law, but in natural law. *Non omne quod licet honestum est.*³³

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³² *Reason, Faith, and Homosexual Acts* at 68.

³³ *Not everything which is allowed is honest.*

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Sažetak

MOGU LI USTAVI ILI ZAKONI MIJENJATI BRAK?: OSVRT NA DJELO "GOODS OF MARRIAGE" I PRIRODNO PRAVO JOHNA FINNISA

U ovom djelu autor prikazuje nedavni slučaj iznesen pred Vrhovnim sudom Sjedinjenih Američkih Država Obergefell v. Hodges u kojem je skupina znanstvenika priložila podnesak, kao prijatelji suda, u kojem su zagovarali zadržavanje tradicionalnog koncepta braka kao zajednice jednog muškarca i jedne žene. Autor povezuje učenja teoretičara (prirodnog) prava Johna Finnisa i njegov rad 'Goods of Marriage' sa zahtjevom da se bračna zajednica rezervira samo za heteroseksualne parove. Heteroseksualni brak, kao judeo-kršćanski koncept monogamije, prema Finnisu čuva obitelj i ostale društvene vrijednosti koje su postignute kroz društvenu evoluciju.

Ključne riječi: *brak; prirodno pravo; društvene vrijednosti*

