– KÖNYVISMERTETÉSEK –

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Freedom's Orphans. Contemporary Liberalism and the Fate of American Children

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"Come, liberty! Give a birth to order for me, teach him with good words, and let also play your beautiful and serious son!"[1] – these are the words of Hungarian twentieth century poet Attila József in 1935. Although we can read out a high expectation towards freedom, for it is considered as the source of order, some years later and a continent further we are witnesses of a turning point in the jurisprudence of the American Supreme Court[2] where all these expectations turn in vain. When formulating constitutional rights such as freedom of speech, freedom of press and right to privacy – we can see that it is not only the order that can hardly be considered as son of liberty, but freedom many times leaves also children as orphans.

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Tubbs both in his book and in his lecture on it seeks to present the controversies between adult rights and the children's welfare in American constitutional law. His starting point is to compare the classical with the contemporary liberalism. We are witness of a change in both theory and practical consequences of it. While the American legislation and constitutional jurisprudence develops new and putative rights for adults, many times we can see that the legal interests of children (the most vulnerable members of the couminty) are not any more protected. He underlines that the personal freedom of adults in the United States is a political value that outweights all competing interests, including welfare of children. He investigates the historical background, the reasons and explanation behind the disregard of infants in contemporary liberalism. There is a great contrast how American liberals can be sensitive to vulnerable people, to minorities, but they often neglect children.

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[1] Final rows of the poem "A breath of air! (Levegőt!)". Quotation in Hungarian: "Jöjj el, szabadság! Te szülj nekem rendet, /jó szóval oktasd, játszani is engedd/ szép, komoly fiadat!". In *József Attila összes versei*. (The complete poems of Attila József). Budapest: Magyar Helikon Szépirodalmi Könyvkiadó, 1965, 323.

[2] Some important Supreme Court decisions: Winters v. New York (1848), Butler v. Michigan (1958), Ginsberg v. New York (1967), Paris Adult Theatre v. Slaton (1973), Erznoznik v. City of Jacksonville (1975), New York v. Ferber (1982), United States v. Playboy Entertainment Group, Inc. (2000) and Ashcroft v. American Civil Liberties Union (2004). Details of all these decisions are in the book.

In the first chapter of the book Tubbs explains us an important distinction in the political philosophy, that sources from Isaiah Berlin's essay on the "Two Concepts of Liberty",[3] that marked a turning point in the political theory. According to Berlin's essay there are two ideas of freedom: the negative freedom, as unhindered choice, and the positve freedom, as self-control or self-government. Today's American liberals mainly accept the idea of freedom in the negative sense, describing it as more humane or dignified. According to Tubbs it results with some morally intolerable outcomes. There is a great difference between the antropological basis[4] of the classical, nineteenth century liberals[5] and the contemporary ones. While according to the classical view in liberal society children do not have the same rights, abilities, and it was admitted that they must depend on adults, contemporary liberalism has a serious mistake–for example based upon the writings of Dworkin–, adults and children deserve equal concern and equal respect. Nineteenth century liberals spoke frankly about responsibilities and possible abuses of freedom, contemporary liberals are silent.

Tubbs in his lecture drew the attention to a book, namely "The repeal of reticence", by Rochelle Gurstein.[6] This book depicts how modesty is disappearing, and it shows the debate between reticence and explosure (mainly about private life). The writer shows how certain avant-garde artists invoke free-speech rights to justify violent, dehumanizing or pornographic works in the United States. She describes how "reticent sensibility" valuing tact, discretion, good taste and politeness is disappearing from public discourse. According to Tubbs the moral reticence presents a danger to a society like ours and poses children to a threat. As he presents the liberal postulate according to which there is no good life (mainly by citing thougths of Gutmann, Kateb and Shklar), he raises our awareness of the liberal indifference to the excercise of personal freedom.

The second chapter gives light to liberal "dead ends". The author depicts the false charms of liberal feminism, mainly by examining statements of Susan Moller Okin,[7] a political theorist who refers to herself as both liberal and feminist. Okin's aims were to incorporate elements of feminist thought into liberalism, and to eliminate "patriarchal" biases to promote equal opportunity. Athough she is concerned for welfare of children and women, she often fails to anticipate how certain freedoms, when excercised,

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[3] This opus was described by Ronald Dworkin as the most famous twentieth century essay on liberty. Ronald Dworkin: What Rights Do We Have? In *Taking Rights Seriously.* Cambridge: Harvard University Press, 1978, 267.

[4] We must not forget about how crucial the account of the human person can be both in political and legal world. The antropological basis is relevant also in constitutional law, it serves as a solid background for example for human rights. We can read about the concerns of the importance of the antropological basis of the European Chart of Human Rights in the study of János Frivaldszky: Gondolatok az emberi jogok radikális szemléletéből fakadó problémákról. (Thoughts about the Problems Sourcing from the Radical View of Human Rights). In *Egy európai alkotmány felé*. Budapest: JTMR Faludi Akadémia–OCIPE Magyarország, 2003.

[5] For example Benjamin Constant (who distinguished ancient liberty from modern liberty), Alexis de Tocqueville (whose important writing is Democracy in America) and John Stuart Mill.

[6] Rochelle Gurstein is a professor of history at the Bard Graduate Center, she teaches history and other subjects.

[7] Liberal feminist political philosopher and author (1946, Auckland /New Zeland/ – 2004, Lincoln /Massachusets/)

affect children. In fact a common error in liberal theory is that its archetypal figure in political society is adult citizen living in a world where only adults are present. In a world where obscenity, abortion rights, and reproductive privacy are stoned notions, Okin still alledges that contemporary political theory remains mired in the Dark Ages. At the same time, Okin wanted to expand our notions of marriage and family so that they encompass same-sex couples.

In this chapter Tubbs also speaks about the phenomenon that the social contract philosophy came back to life by writings of Ackerman, Dworkin, Homes, Kateb, Nozick, Scanon, and mainly by A Theory of Justice of John Rawls. Tubbs gives a summary of the theory of John Rawls, explaining its basic principles. Then he presents Okin's criticism on it, for example Okin thinks that Rawl's theory pays insufficient attention to gender.

Okin uderlines that children and women are exposed to economic vulnerability. She takes account of different material problems, and she seeks the remedy in the benign welfare state. An interesting point is that according to Okin children are influenced by what they see at home, and the injustices associated with gender can be easily perpetuated across generations. She qualifies the family as "the first school of justice", but she is not concerned about disadvantages and risks that a child who is adopted by a same-sex couple must tackle or bear. In my opinion, parallely to what Okin says, it is likely that a child during his or her socialization process notices that there are inequalities between genders, but I believe it is better to have a picture about differences between genders (although sometimes it means injustly devided duties and rights) than not to have knowledge about gender differencies at all (see: in case of same-sex couples).

Tubbs cites thoughts of other liberals, just as Nussbaum and Minow. They and Okin all regard as solution to problems of familes the expansion of the welfare state, they favor a larger catalog of sexual and reproductive freedoms and the expanded understanding of family.

In this chapter we can read a moral framework for marriage: "A marriage between a man and a woman is a union of two persons, characterized by love and fidelity (i.e., sexual exclusivity). In a just marriage, the domestic duties (including child-rearing) will be evenly shared by husband and wife. Spouses must share such work because they owe this to their children and because a just society requires such sharing."[8] Tubbs refers also to the rural America where the traditional division of labor had a real biological basis. Speaking about traditionalism, in Okin's eyes "traditional" many times equates with "irrational". She has a strong revulsion towards Christianity, considering religion as sexist,[9] misogynist[10] and elitist.[11]

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[8] Tubbs op. cit. 82.

[9] Speaking about connection between religion and sexsism, I would like to recall a verse from the Bible, from the letter of Saint Paul to the Ephesians, 5:21: "Submit to one another out of reverence for Christ". (Submit to one another, so it is duty of both husband and wife – mutually).

[10] And another verse, from the letter to the Ephesians gives light to the relationship between religion and misogyny: 5:25: "Husbands, love your wives, just as Christ loved the church and gave himself up for her." And last but not least, some verses later, 5:33: "However, each one of you also must love his wife as he loves himself, and the wife must respect her husband."

[11] Let's see another verse of the Holy Script that can be an answer for the charge of elitism, namely the words that Jesus addresses to the rich young man (Matthew, 19:21–24): Jesus answered, "If you want to be perfect, go, sell your possessions and give to the poor, and you will have treasure in heaven. Then come, follow me."

At the end of this chapter, David L. Tubbs summarizes the achievements and shortcomings of Okin's political theory. On the one hand Okin deserves credit for emphasising the need to give more attention to the family and for stressing the political relevance of family life. Moreover, she added complexity to contemporary debates about social justice and life prospects of women and children. On the other hand she simplifies and obscures fundamental questions, she sees irrational or sexist prejudice issues that are considered as problems by others. Her presupposion is that interests of women and children coincide. Although she examines family life and sexual freedom, she fails to acknowledge that sexual freedom many times contributes to vulnerability of women and children.

In the third chapter of the book Tubbs examines the "Right to Privacy" and some forgotten interests of children. Now he changes aspect: after canvassing theoretical problems, now he seeks concreteness upon the judgments of the Supreme Court of the United States. He documents contemporary liberalism's inattention to children, when they are hardly visible in legal or social controversies. In this part of the book we are witnesses of how the Supreme Court ignored various interests of children when it was formulating the right to privacy.[12] The author presents the constitutional preliminaries, and explains the important notion of "police power". This power of the State does not only include the protection of public order, but it has a wider scope: it covers also the reserved powers which ensure a constitutional authority to promote public health, safety and morals. Then Tubbs presents Supreme Court's decisions about the State's regulations of contraceptives, for example the Griswold case,[13] which came to mark a new era in American constitutional law, since the Court affirmed "sexual freedom", without saying anything about sexual responsabilities. Later on Tubbs explains the consequences of the Fourteenth Amendment of the U.S. Constitution (Equal Protection Clause), that is often seen as a legal base for judges to widen the content of constitutional rights, by formulating, for example the right to engage in sexual intercourse.[14] He presents also the thoughts of Jarvis Thompson in his essay "A Defence of Abortion", and of Kenneth Karst explained in the essay "The Freedom of Intimate Association", where Karst wants to extend constitutional protection to casual intimate associations. Tubbs speaks about another writing, "The Children of Choice: Freedom and the New Reproductive Technologies" by John Robertson, who fails to mention the potentially grave problems of the popular

[12] It is painful that we have to face that the formulation of the right to privacy in American jurisprudence did harm on children and so their interests were injured, in the meantime, in today's society we are talking about the disappearing of privacy, because partly due to the dramatical technical development the total surveillance is becoming reality (see book of a professor of political science at Toronto's York University, Reg Whitaker: The end of privacy. New Press, 2000), so privacy in some aspects it is more like a virtual value now. Moreover, another part of the privacy is vanishing mainly because of the exposure, due to invasive journalism, realistic fiction and sex reform: they opened the public sphere to once private matters. (see for further details the above mentioned book of Rochelle Gurstein „The repeal of reticence")

[13] Other cases mentioned in this section are for example *Eisenstadt v. Baird* and *Carey v. Population Services International.*

[14] David L. Tubbs is explaining Justice Brennan's argument on p. 127.

collaborative reproductions, when he builds his discussion on "the presumptive primacy of procreative liberty".

In Chapter Four Tubbs makes us face with the conflicting images of children in First Amendment jurisprudence. Here he introduces the reality of confusion in judicial circles about children's moral and developmental needs. The Supreme Court adopts a double attitude: sometimes it regards children as morally and psychologically fragile beings, but in other issues judges state that they are essentially indistinguishable from adults.

First of all Tubbs explains the process of how the common understanding of Bill of Rights has changed: while at the beginning it was understood as a statement of freedom of individual citizens in relation to the new national government, following the Civil war most of the provisions of the Amendments were binding on the States. By the sixties of the twentieth century the Supreme Court has nationalized almost all of the provisions of the Bill of Rights. Tubbs shows the consequences of this phenomenon in cases of the Supreme Court. Parallely to this, Tubbs lets us know how the wall of separatism was put between Church and State, and how religious excercises disappeared in public schools. As a result, when the Court decides cases involving young persons and state-sponsored religious exercise, it depicts them as frail and impressionable, and as ones who are likely to suffer real psychological damage from the pressure to partecipate in the exercise. But, at the same time, when the highest level of the American judiciary has to decide a case in which children are "incidentally" exposed to pornography or other 'adult' stimuli, the Supreme Court sometimes assumes that the young are "morally resilient beings whose welfare is not going to be affected by coarse language, gratitous nudity or hardcore pornography."[15] Here again we can see the absence of a unique and consistent antropological image, which would include that of the infants. David L. Tubbs documents this inconsistency and he shows the Court's indifference to some legitimate interests of children, by examining a series of well known school prayer cases and the obscenity jurisprudence[16] of the Court. The verdicting body vindicated Free speech claims for adults while it acknowledged the possibility of children being exposed to pornographic or other inapropriate effects. A striking argumentation of judges is that whenever a child comes to an adult stimuli, just as obscene content, children have the right "to look away", to avert their eyes. Here emerges the question: where is the protection? At the same time, according to the Court's view, the compulsory salute of the national flag in a school violates the children's freedom of conscience.[17] Several decisions made sure that a common prayer, or reading of the Bible are unconstitutional in schools and are against Establishment Clause. Unfortunately it is only in a dissenting opinion[18] where we can read that "a doctrinaire reading of the Establishment Clause leads to an irreconcilable

[15] Tubbs op. cit. 149.

[16] The author describes the old jurisprudence, when Supreme Court used the Hicklin test, and after the no prior restraint and the bad tendency test lived for many years in American constitutional law. He cites federal cases just as United States v. Bennett, United States v. Clarke and United States v. Harmon, and leading cases just as Butler v. Michigan, Roth v. United States and Miller v. California.

[17] Gobitis v. Minersville School District.

[18] Dissenting opinion of judge Steward in Abington School District v. Schempp.

conflict with the Free Exercise Clause". The dissenting judge Steward held that the central religious value in the First Amendment is "the safeguarding of an individual's right to free exercise of his religion". So the positive freedom again loses against the negative freedom. Furthermore, we can see that based on the principle of indirect coercion, according to the American Court a religious benediction of a rabbi in a graduation ceremony is against the American Constitution.[19]

In the last chapter David L. Tubbs reviews Ronald Dworkin's book: "Freedom's Law: The Moral Reading of the American Constitution" where we get to know the different theories of constitutional interpertation.[20] According to Tubbs, Dworkin fails to probe the limits of negative freedom. Dworkin's theory is based on the "equal concern and respect" but he understands it as the freedom for adults to "behave eccentrically or coarsely, whatever the consequeces".[21]

On the last pages of the book Tubbs underlines that his aim has been to document contemporary liberalism's inattention to different interest of children. He reveals that the American judiciary has done much to transform the moral environment, which is "a transformation that we should lament, not celebrate."

At the end of this review I would like to share an observation from a point of view of comparative constitutional law. Having read the Constitution of the United States, this more than twohundred-years old document, it comes out that neither the Articles, neither the Amendments contain any reference to children, to the protection of the young or of the family. A prompt explanation for this issue can be that the regulation for child and family does not belong to federal competency, but it is the regulating area of single States. But, it does not mean that their rights do not merit defence at federal level! By glancing at the Constitution of another federal State, that of Switzerland, we can find this provision in the chapter on Fundamental Rights.[22] "Children and young people have the right to the special protection of their integrity and to the encouragement of their development. They may personally exercise their rights to the extent that their power of judgement allows."[23] We can read another allusion to the young, namely in the Preamble of the Swiss basic law: "The Swiss People and the Cantons, […] conscious of their common achievements and their responsibility towards future generations, […] adopt the following Constitution […]". Paralelly to this we can cite the Preamble of the

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[19] Lee v. Weisman, 1992. According to the majority opinion the State's involvement in religion in this case was pervasive in the public school.

[20] He explains the "moral reading[21]" and the "originalism". "The moral reading refers to a set of interpretative principles to guide scholars and jurists when cosnidering real constitutional cases." TUBBS op. cit. 198.

[21] TUBBS op. cit. 209.

[22] Swiss Constitution, Title two, Chapter One, Article 11. Find on official website of the Swiss Federal Authorities, www.admin.ch.

[23] Let me cite also the dispositions of the Hungarian Constitution, Art. 67 regarding the rights of children and families:
(1) In the Republic of Hungary, every child has the right to enjoy the care and protection on the part of their families, and by the State and society, that is necessary for satisfactory physical, mental and moral development. (2) Parents are entitled to the right of choosing the kind of education their children are to receive. (3) Special provisions contain the responsibilities of the State in regard to the position and protection of families and of youth.