THE LEGAL SITUATION OF MATRIMONY AND FAMILY IN HUNGARY

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Abstract: the authors summarized the basic features of Marriage Law and Domestic partnership in Hungary. According to the Constitutional Court criteria developed in interpreting the Hungarian Constitucion, same-sex marriage is legally almost impossible.

Keywords: Marriage Law, Domestic Partnership, Hungary.

Resumen: en este artículo se sintetiza el derecho de familia húngaro en materia de matrimonio y uniones de hecho; ofrece algunos datos sociológicos sobre la situación del matrimonio en Hungría y detalla los motivos que haría inconstitucional el matrimonio entre personas del mismo sexo.

Palabras clave: Derecho matrimonial, Uniones de hecho, Hungría.

Matrimony has not been a subject of ecclesiastical law in Hungary for over a century, as the country introduced a civil marriage regime in the late 19th century. This paper provides an insight into some of the sensitive issues of the legal regulation of marriage and domestic partnerships in Hungary. Marriage and family are protected by the Constitution: "The Republic of Hungary shall protect the institutions of marriage and the family."[1] However, the general constitutional declarations of this type have little normative content.

[1] Constitution, Article 15

1. HISTORICAL REMARKS

The necessity of a civil marriage seemed to be evident in Hungary at the end of the 19th century. Eight various types of marriage laws were in force in that time in Hungary, which depended on the particular own laws of the accepted religious communities.[2] Many difficulties have arrived through the collision of the personal applicability of these particular laws, but the cases of mixed marriages were also very problematic, especially the dispensation given by the proper law of the various denominations. When the secularization developed in Hungary, the Catholic hegemony began to disappear from the field of marriage law. The first step was to legitimize the protestant marriage rules by royal ordinances, what continued by new civil legislation. For this state influence Article 11 of Act XXVI/1790 is a good example: this provision gave decisive authority for the civil tribunals over the marriage cases of Lutherans. However this type of decisions had validity only in the civil law. The legal sources of the marriage law were the various internal laws of the denominations, therefore, the jurisdiction and administration belonged in that time to the authority of the competent religious communities. The new law of marriage (Act XXXI/1894) and the law of the state registry (Act XXXIII/1894) have made a fundamental change. These laws introduced legislative, judicative and administrative monopoly of the state, i. e. the institution of the civil marriage.[3] We only mention here, that the precise separation of the state and ecclesiastical laws was not made in a consistent manner by this law. However, the impediments and irregularities which were listed by the certain religious laws remained in force as the civil legislation accepted them as civil impediments. Such special impediments were the holy order or the solemn professed membership in any religious institute. These cases were recognized by the state, therefore, without the permission of the competent religious authority the marriage was forbidden by civil law in these cases.[4]

Since 1895 Hungary has an obligatory civil marriage regime.[5] Since 1962, however, the separation of church and state is consequent in this regard: the civil wedding does not have to precede the church wedding, so one can enter a marriage in church without any consequences under the state law (in state law such couples may qualify as non-martial cohabitants). Prior to that clergy as-

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[2] GROSSCHMID, B., *A házasságjogi törvény*, Budapest 1908. 324-328.

[3] FERENCZY, R.-SZUROMI, SZ.A., *Die kirchliche Ehe als staatlich anerkannter Ehebund?*, in *Folia Canonica* 6 (2003) 101-111, especially 103-105.

[4] HT 25. §.

[5] Act XXXI/1894 (on marriage law)

sisting at weddings, where the spouses have did not undergo the civil marriage procedure committed a criminal offence – except of the case of the danger of life. Due to the strict separation marriage is not a subject of ecclesiastical law in Hungary.

The marriage law system of the Central-European countries in force before the democratic political change was highly diverse. The legal sources which regulated the marriage law in these countries were mostly introduced in the course of the communist takeover of these countries: in Czechoslovakia in 1949 (1949/CCLXVI),[6] in Yugoslavia in 1946,[7] and in Poland in 1945.[8] Contrary to these countries it is remarkable that the Hungarian civil legislation was introduced at the end of the 19th century. Consequently, based on these data is evident, that the introduction of the obligatory civil marriage in the above listed states was one of the consequences of the new political regimes after the World War II. (The special situation concerning Bosnia – Herzegovina, a territory of Yugoslavia, where the Austrian Civil Code (1878) remained in force, is an exception, but this does not change the basic motive of the Central – European new marriage legislation.[9]) The former communist countries that signed concordatarian agreements with the Holy See in the last fifteen years – which agreements regulated especially the civil effect of the ecclesiastical marriage – changed a system of obligatory civil marriage only wide fifty year long legal tradition.[10] However, this 'tradition' was not an integral element of their traditional legal history. On the other hand, the Hungarian civil legislation on marriage was not linked to the communist era, and had a clear, more than a hundred years legal tradition for the separation between the two types (civil and religious) marriage form.[11] In countries where civil marriage law dates back to pre-communist times (like Hungary and Romania) the system of compulsory civil marriage has not been changed. In Hungary centre-to-right politics (not a church or a religious community) has brought this topic into discussion prior to the parliamentary elections in 2002, but it got soon off the agenda, as the marriage system is rooted in the Hungarian law from 1894, and there is no urging necessity arguing for a change. The strict separation of the civil law and the religious form (which has an effect only in the particular internal laws of the religious communities) has proved to be functional.

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[6] PRADER, G., *Il matrimonio nel mondo*, Padova 1986.[2] 131.
[7] PRADER, G., *Il matrimonio*, 352-353.
[8] PRADER, G., *Il matrimonio*, 474.
[9] PRADER, G., *Il matrimonio*, 352.
[10] Like Croatia, the Czech Republic, Latvia, Lithuania, Poland or Slovakia
[11] FERENCZY, R.-SZUROMI, SZ.A., *Die kirchliche Ehe*, 110-111.

2. SOCIAL REALITY

Although the majority of the population lives in marriage and the majority of young people still marries one can speak about a crisis of marriage. The background of this tendency is a consequence of growing individualism, the fragility of the human being and of the society.

The number of weddings was close to (in post-war periods over) 100000 a year. A radical decline in this figure began in the 1970s (1970: 96612, 1980: 80331, 1990: 66405, 2000: 48110, 2004: 43791). The number of divorces exceeded 10000 after World War II, and 20000 by 1970. Despite the decline of the number of weddings the number of divorces remained almost constant since the 1970ies (about 24tousand a year). Roughly every second marriage (not necessarily being the first marriage of the spouses) ends with a divorce.

The age entering a marriage (better said: the first marriage) is rising, especially the age of the brides, as the age gap between the spouses is decreasing. On the other hand people not only marry at a later age, but more and more do not marry at all. The rising number of children born out of wedlock may demonstrate this: in the mid-war period this percentage was 8-9%, in the post-war period even less (5-6%), in 1990 13%, in 1997 it reached 25%, and by now it is over 30% of the newborn – and close to 50% of the first born.

Whereas prior to the communist rule the large majority of marriages was also celebrated at church, by the 1970ies proportion of weddings celebrated at church too dropped below 50% due to the forced secularisation and the rising proportion of civil marriages where (one of) the parties was already bound by a prior marriage in the canonical sense.[12] According to church statistics in 2004 the number of canonical marriages concluded at Catholic churches was 12868. The majority of first marriages of Catholics is still also celebrated at church.[13] The second largest denomination, the Reformed Church blessed 4142 couples in 2004[14] – it s to be noted, that according to the self understanding of most of the Protestant denominations, the marriage itself is concluded at the civil registrar, and the subsequent blessing at church is not a constitutive element of the matrimony. Consequently the Reformed Church provides wedding ceremonies for divorced and remarried couples too.

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[12] Tomka, Miklós: A magyarországi katolicizmus statisztikája és szociológiája = Turányi, László (Ed.): Magyar Katolikus Almanach II. A Magyar katolikus egyház élete 1945-1985, 510, 535.

[13] www.magyarkurir.hu

[14] http://www.reformatus.hu/adattar/eves_jelentes_2004.pdf

3. The regulation of marriage

3. 1. The definition of marriage

Neither the Constitution protecting marriage, nor the Code of Family Law regulating it, provides a definition of marriage. Discipline regards marriage to be a bound of a man and a woman, emerging from formalities defined by law, generally aiming to conduct an enduring common household and founding a family.[15] Monogamy is clearly an essential element for marriage: Polygamy would require the falsification of marriage certificates. In the unlikely case of someone being able to do this, the person would commit the crime of a "dual marriage" as this is still a separate provision of the Criminal Code.

3. 2. The conclusion of a marriage

The marriage comes into effect when the when parties present ahead of the competent registrar, in the presence of two witnesses declare personally that they marry one another. Marriages are registered in the register of marriages. The place of weddings should be the official wedding hall of the municipality. In special cases the wedding can take place out of office as well, and instead of the registrar the major of the municipality can act too. Prior to the wedding the parties have to declare in front of the registrar that their marriage has no legal obstacle, what they also have to certify (with a document issued by the authority keeping the personal data of the population. Parties have to declare their intent to marry at least 30 days prior to the wedding itself. In practice the registrar and the couple agrees upon the date as well as the details of the ceremony. The ceremony is supposed to be solemn – in fact many, especially those celebrating at church too – find the civil ceremony rather ridiculous.

The legal system attaches a number of rights and duties to marriage. Spouses have a wide (and by now gender neutral) range of options to have a common name, they decide on the family name of their future children. They have.

3. 3. The nullity and the dissolution of a marriage

The marriage is null if any of the parties is bound by a preceding marriage. This nullity can be healed with the end of the preceding marriage (death

[15] That is how matrimony is defined by the most current Lexicon of Law = Jogi lexikon, Budapest 1999, 251.

of preceding partner, divorce, nullity). Nullity is also foreseen for marriages of close relatives.

Marriage ceases with the death of one of the spouses as well as with a divorce declared by court. A divorce can be invoked by a joint petition of the parties as well as by one of the parties if the marriage is going to bad and there is no perspective to amend it. The joint decision of the parties qualifies as such a crisis, not needing any further evidence. Lawyers make much of these "simplified divorce procedures" as the parties have to settle almost all relevant issues (the placement and the support of the children, and the contact to them as well as property issues). The court only approves the settlement made by the parties and declares the divorce. Parties can later readdress their agreement. Certainly such agreements are not given in all divorce cases: lacking an agreement it is the court that decides in all the relevant issues. Generally speaking, divorce – especially when parties agree to it – is a rapid and simple procedure.

4. THE STATUS OF COHABITANTS

Since March 1, 1978 the Civil Code contains a provision on cohabitants or domestic partnerships (originally section 578, from January 1, 1989 section 578/G). The Civil Code regulates the institution from the perspective of property, but a number of legal provisions from the most different areas of law (the statutes on criminal, civil or administrative procedures, the social security legislation etc.) rely on the definition provided by the Civil Code.

The institution is based on a de facto common household. Some kind of registration is being discussed at present for reasons of legal certainty, but so far, there is no registration, whatsoever. In legal affairs, the declaration of the parties matters, whereas in some cases the notary of the municipality has to certify that a couple is cohabiting (which is quite awkward, as the notary – especially in urban areas – can only base his certificate on the declaration of the cohabitants themselves). Cohabitants may be married in church: canonical marriage could also serve as evidence for the fact of being cohabitants.

5. THE STATUS OF SAME-SEX COUPLES

In 1996 an amendment changed the wording of the Civil Code on cohabitants, that originally spoke about "a woman and a man living in the same household in emotional and economic community without being married" reads now: "two persons living in the same household in emotional and economic

community without being married".[16] The formula became gender neutral, the sex of cohabitants became irrelevant. They still have to be a couple – a community of people living together would not qualify as a cohabitants.

This amendment is due to a decision of the Constitutional Court on same sex partnerships passed in 1995. The petitioner sought constitutional review of the legal provisions concerning marriage and domestic partnership on the basis of discrimination on grounds of sexual orientation (the constitutional provision prohibiting discrimination is formulated in a general way, prohibiting all kinds of differential treatments when those treated differently are comparable). Concerning marriage the petition was rejected, concerning domestic partnerships the Constitutional Court declared that applying in general the provision of the Civil Code was unconstitutional as "the rights and responsibilities of persons who live together outside marriage in an emotional, sexual and economic community and who publicly uphold their relationship" have to be acknowledged in a gender-neutral way.[17]

Concerning marriage the Constitutional Court left no question that this institution must not be opened for couples of the same sex. "Both in our culture and in law the institution of marriage is traditionally the union of a man and a woman. This union is typically aimed at giving birth to common children and bringing them up in the family in addition to being the framework for the mutual taking care and assistance of the parents. The ability to procreate and give birth to children is neither the defining element nor the condition of the notion of marriage, but the idea that marriage requires the partners to be of different sexes is a condition that derives from the original and typical designation of marriage. The institution of marriage is constitutionally protected by the State also with respect to the fact that it promotes the establishment of families with common children. This is the reason why Art. 15 of the Constitution refers to the subjects of protection together: 'The Republic of Hungary protects the institutions of marriage and family.'"

The Court refers to the cultural trend shared by Hungary, which has lead to the decriminalisation of homosexuality and the elimination of discrimination of homosexuals. On the other hand marriage – especially the durability of marriages – is changing too. "All these are not reasons for the law to diverge from the legal concept of marriage which has been preserved in traditions to this day, which is also common in today's laws and which, in addition, is in harmony with the notion of marriage according to public

[16] Civil Code § 685/A. (inserted by Act XLII/1996. § 2 from June 19, 1996).

[17] Sólyom, László – Brunner, Georg, Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court, The university of Michigan Press 2000, 316-321.

opinion and in everyday language." The Constitution "considers marriage between a man and a woman as a value and protects it. (...) The Constitution only requires equal regulation of the conditions of marriage between persons of different sexes, which excludes the legal possibility of marriage between persons of the same sex."

Whereas concerning marriage the Decision of the Constitutional Court has set a clear signal stating that there was no reasonable way to change the definition of marriage, in respect of domestic partnerships if followed a different approach. The Constitution does not provide for the protection of domestic partnerships, consequently the Civil Code provision requiring that cohabitants should be of different sex, had to confronted with the principle of non-discrimination. What the law does in several areas is that it recognizes, that "an enduring union for life of two persons may constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together." The Court had a look at the concrete legal provisions where domestic partners are acknowledged: these are financial benefits (social security) deriving from the economic union, official incompatibility (relatives cannot be subordinates in public service), exemptions and restrictions of criminal law and procedure concerning the "relatives" – in all these respects there was no constitutional reason to justify that the respective regulations should never be applicable to a permanent union of persons of the same sex. "On the contrary, a constitutional reason is required for any distinction according to the sex of those living in such a union." The Court has left it to the legislator to decide whether it amends all respecting norms one by one, or changes the definition of domestic partnerships, various regulations refer to. Parliament choose the more simple way: it opened the definition of domestic partnerships for same-sex couples: to ensure that homosexuals living in couples do not testify in each others case, do not become subordinated to each other in public service, are entitled to social security upon their partner etc. It can be noted that only a part of these legal consequences may be beneficial to the couple.

CONCLUSION

Hungarian law seems to be firm at the point that marriage is an institution only parties of opposite sex can enter into. It is not only the public opinion that would hardly tolerate a new definition of marriage, but having the given authentic interpretation of the Constitution by the Constitutional Court this would be legally almost impossible. In the case of cohabitants there is no

distinction between homosexual and heterosexual couples. Creating a special legal form just for same-sex couples did not come into discussion in Hungary. Probably such a form would be regarded as discriminative towards cohabiting couples of different sex.