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Marriage Invalidity – A Comparison of English and Hungarian Rules

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Abstract: Through a dogmatic comparative lens, the paper scrutinises the nuanced criteria for determining marriage invalidity through a comparative analysis of English and Hungarian legal frameworks. It explores the divergent historical trajectories and legal traditions that have shaped the conceptualisation of marriage in these two jurisdictions, noting the transition from ecclesiastical to secular regulation. It highlights the impact of recent legislative reforms, such as the ongoing revision of marriage law in England and Wales led by the Law Commission and the incorporation of family law into the Civil Code in Hungary. Furthermore, the analysis includes insights from the jurisprudence of the European Court of Human Rights, providing a common frame of reference for evaluating fundamental rights within both legal systems. By illuminating the complexities surrounding marriage invalidity, this study contributes to a deeper understanding of the intersection between legal tradition, social norms, and individual rights in the context of marital relationships.

1. Introduction

A line can be drawn between two traditions of understanding marriage in Western law: one views marriage as a contract, the other as a covenant. Consent is needed in both cases but a contract aims at an exchange of rights and duties while a covenant is a bond with more dimensions. Whether seen as a contract or a covenant, the existence and the validity of concluding

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the legal relationship has broad consequences that are both similar and dissimilar to those of contract law. The ancient Roman legal principle "Consensus non concubitus facit nuptias," while aiming at legal certainty, is not without its criticisms. This paper aspires to explore the complex issues of invalidity by analyzing English and Hungarian marriage law from a dogmatic comparative perspective and supplementing the substantive law with a glimpse at the fundamental rights viewpoint of ECtHR jurisprudence as a common frame of reference for both jurisdictions.

The reason for singling out these two legal systems is that both had a customary law tradition. Still, marriage had been regulated by canon or ecclesiastic law and then this area was secularized. This historical tradition is also the cause for the fragmentation of the law, however, the origins of this are different in the two jurisdictions and derive from the nature of common law in England and Wales. It has a distinct historical origin in Hungarian law that became part of the continental legal tradition but its development of marriage law is not characteristic of other continental legal traditions. In several other aspects, these two systems are not alike: In England and Wales, (some) religious marriages[1] are acknowledged besides civil ceremonies while in Hungary, civil-only marriages are recognized by the law. English legislation is contemplating a revision of its marriage law, through a project led by the Law Commission,[2] while Hungarian rules for marriage have relatively recently been revised when the recodification of the Civil Code allowed family law to return to the private law codex.

1.1. Point of Departure

In the UK – in England and Wales – the Law Commission started the project of revising rules for marriage in 2015. As these rules are very complex, marriage can be concluded in both a secular and a religious setting. The government gave the mandate to the Commission in 2018 and the project was

1 Which brings its own problems – see: Rebecca Probert, Rajnaara C. Akhtar, and Sharon Blake, *Belief in Marriage – The Evidence for Reforming Weddings Law* (Bristol: Bristol University Press, 2023), 2.

2 Law Commission reforming the Law: Weddings. Current project status: https://lawcom.gov.uk/project/weddings/ full report published by Law Commission for England and Wales, "Celebrating Marriage: A New Weddings Law, Report no. 408," 18 July 2022, London, accessed July 30, 2024 , https://tinyurl.com/5exy69r7.

launched in July 2019, but soon the global pandemic brought several additional questions to light.[3] The main subjects of the undertaking are legal preliminaries, types of weddings, venues of celebration, the wedding ceremony, and marriage validity.

In Hungary, most recently marriage was revised as part of family law in the grand project of the recodification of the Civil Code. The Civil Law Codification Committee was established in 1999 and the final law was passed in Parliament in 2013. Concerning marriage, the most important changes were the dogmatically defined difference between non-marriage and invalid marriage:[4] some minor failures of form, not attributable to the spouses, do not result in invalidity anymore, and minor changes in the marriage impediments were also implemented. However, the system of invalidity rules of the socialist era had not been revised, which is a missed opportunity for dogmatic excellence.

1.2. Genesis

The concept of nullity is one of the most common institutions that is applied through wide areas of private law that divest legal actions of their legal effects.[5] In ancient Roman law, there was no coherent dogmatically elaborated concept of nullity but some defects led to automatic nullity and others gave rise to an action in nullity. About rules of nullity concerning marriage, Modestinus notes, "It is always necessary to consider not just what is lawful but also what is decent."[6] The two types of nullity, void and voidable acts, therefore, might be understood as having two reasons for depriving of legal effects: void acts that are *ab initio* null are to safeguard public order while voidable acts are to protect the private interest of one of the parties.[7]

There is no denying that many features of marriage are contract-like, most prominently the act that creates marriage is the consent and

3 Nicholas Hopkins, Elizabeth Welch, and Sam Hussaini, "The Law Commission's Project on Weddings Law Reform," *Ecclesiastical Law Journal* 23, no. 3 (2021): 267–79, https://doi.org/10.1017/S0956618X21000351.

4 2013. évi V. törvény a Polgári Törvénykönyvről – 2013 Act V. Hungarian Civil Code (hereinafter: HCC) 4:5. § (1).

5 Ronald J. Scalise, Jr., "Rethinking the Doctrine of Nullity," *Louisiana Law Review* 74, no. 3 (2014): 664.

6 Digesta Iustiniani 23.2.42.

7 Scalise, "Rethinking the Doctrine of Nullity," 670.

the intention behind it. The problem with placing so much weight on intent is that marriage is "too intimate a matter to be left to the crudities of the law, yet it is also too public a matter to be left to the private convictions of the parties."[8] Therefore, civil law can only rely on the uttered form of the intent declaration of will, however, as will be shown below, sometimes hidden intent might cause invalidity in marriage. In canon law, this civil understanding that consensus in itself constitutes the marriage is not accepted, besides, this consent has to be proven by words rather than deduced from the actions of the parties. Subsequently, the exchange of words has to be followed by intercourse to create marriage. Now, this is important because the formalities that the law imposes on the conclusion of marriages reach back to this tradition of catholic canon law when clandestine marriages were to be ended by the Council of Trent in 1545–63. In England this happened later – in 1753, under the Marriage Act, common-law marriages came to an end.

Hungarian law has taken a different path, secular marriage appeared with the XXXI Act on Marriage Law of 1894. This act had several dogmatic questions settled much like English law with traces of canon law and contract law. This dogmatic excellence was left behind with the socialist law of the 1952 Act IV on Marriage, Family, and Guardianship and has not entirely been resurrected at the recodification of the Civil Code.

Free and full consent of the parties to marry is a fundamental prerequisite that appears in international human rights treaties as well. This consent cannot be conditional upon a time limit or otherwise in Hungarian law.

2. The Existence of Marriage

The concepts of valid, voidable, void, null, and non-existent marriage or non-marriage are rather confusing. This is even more evident in ECtHR jurisdiction since, while one marriage contracted outside *lex loci celebrationis* may still entail consequences, another similarly contracted regardless

8 Christopher Brooke, *The Medieval Idea of Marriage* (Oxford, New York: Oxford University Press, 1989), 130.

of the civil law procedure is deemed non-existent and without any consequences.[9]

The question of non-marriage shall be addressed first, as dogmatically it is very peculiar. First of all, thinking about a legal act that does not exist is a fairly philosophical task, but legal abstraction besides practicality has been part of the duality of private law for centuries. Obviously, a marriage concluded on the stage by two actors playing Romeo and Juliet cannot be considered to be an existing marriage, which also applies to a similar situation at music festivals, or TV shows.[10]

However, when in a country where only marriage contracted in a civil registry office is acknowledged, a canonic marriage entered into by the parties who are eligible to marry one another, have no previous marriage, are not relatives to one another, etc. solemnized by a priest, creates a lawful marriage in canon law but is regarded a non-marriage in civil law, just like one on the stage.

> Marriages that do not meet the formality requirement should be void rather than deemed to be non-existent: failure to comply with the formalities should not be a more serious flaw in marriage than marriage below a certain age or within the prohibited degrees [of consanguinity or affinity][11]

which would be considered void marriages and therefore financial and other consequences may arise. Nonetheless, this is the case in Hungarian law, where the concept of non-existing marriage is defined by the Civil Code.[12]

The definition of non-marriage does not exist in statute law in England and Wales but has been a developing concept in jurisprudence.[13] So far,

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9 ECtHR Judgment of 8 December *2009*, Case Muñoz Diaz v. Spain, application no. 49151/07 and ECtHR Judgment of 2 November 2010, Case Şerife Yiğit v. Turkey, application no. 3976/05.

10 Depending on the jurisdiction, even some destination weddings at exotic holiday resorts are non-existent because couples would need to give notice in person 28 to 30 days before the wedding and few holidays last that long.

11 Rebecca Probert, "When Are We Married? Void, Non-existent and Presumed Marriages," *Legal studies (Society of Legal Scholars)* 22, no. 3 (2002): 409, https://doi.org/10.1111/j.1748-121X.2002.tb00199.x.

12 HCC 4:5. § (1).

13 Rebecca Probert, "The Evolving Concept of Non-marriage," *Child and Family Law Quarterly* 25 (2013): 314–35.

intention has played a double role in determining the existence of marriage. On the one hand, intention is not enough to turn a non-marriage into a void marriage, much less into a valid one (El Gamal v. Maktoum, Dukali v. Lamrani). On the other hand, however, if the ceremony was consistent with the law, the lack of intention of the parties can transform it into a non-marriage (Galloway v. Goldstein).[14] In determining the existence of a marriage, the precedent Hudson v. Leigh states that four factors should be examined, namely whether the ceremony was aimed to be in accordance with the law; whether it had enough hallmarks of marriage; whether parties played a role, and most importantly the officiating official believed that the ceremony would create a lawful marriage; and whether others attending held the belief that it was a lawful marriage ceremony.[15] Now, some of the problems with this can be shown if one compares two cases: in Gereis v. Yagoub, even though the couple was advised to have a civil ceremony as well, their ordinary Christian marriage that was celebrated in an unlicensed Christian church was regarded void, whereas in A-M v. A-M, a similar Islamic ceremony led to a non-existent marriage.[16] In a later case, this has been rephrased as a non-qualifying marriage.[17]

In Hungary, marriage only exists between a man and a woman who are both present in person at the registrar's office and declare in person that they enter marriage with each other. This declaration may not be subject to conditions or a deadline.

Sham marriages are non-existent according to the Hungarian Civil Code as they are formed with an intent to circumvent the law, therefore under a condition. How can sham marriages be regarded the same as honestly intended canon marriages, especially if intent has such a pivotal role in the common understanding of what constitutes a marriage? On the other hand, there are no rules for forced marriages in Hungarian law. One might argue that these marriages are non-existent as well because they

14 Chris Bevan, "The Role of Intention in Non-Marriage Cases Post Hudson v. Leigh," *Child and Family Law Quarterly* 25 (2013): 90.

15 Idem., 81.

16 Ruth Gaffney-Rhys, "Hudson v Leigh-the Concept of Non-Marriage," *Child and Family Law Quarterly* 22 (2010): 357.

17 Rajnaara C. Akhtar, "From 'Non-marriage' to 'Non-qualifying Ceremony'," *Journal of Social Welfare and Family Law* 42, no. 3 (2020): 386, https://doi.org/10.1080/09649069.2020.1796375.

are contracted under the condition of coercion, however dogmatically this seems weak, and nor does jurisprudence seem to back this assumption.

In other jurisdictions, such as English law, forced marriages are invalid, due to the lack of capacity to consent. This again might be preferable as financial relief might be awarded to an ex-spouse of a null marriage. In this type of invalidity, marriage is not void *ab initio* but merely voidable by one of the parties to the marriage in a 3-year time period.[18] In contrast, in Hungarian private law, all void marriages are voidable, that is either the spouses or the public attorney or a third party with legal interest must bring the matter to court. The entitlement to petition for considering marriage to be void is in some cases restricted to one of the parties lacking the capacity due to age or mental capacity, but nothing is said about coercion as shall be demonstrated in detail soon.

3. The Status of Marriage from the Perspective of Fundamental Rights

Article 12 of the European Convention of Human Rights guarantees the right to marry and to found a family. The ECtHR has dealt with two cases where the existence and validity of the marriage were at stake. The first case came from Spain and the applicant was a widow who had lived with her presumed husband from 1971 after marrying him in a wedding solemnized according to Roma rites.[19] At the time, however, only canonical marriage was available, the law changed in 1978 and although the couple could have concluded a civil marriage then, they did not. The couple believed in good faith that their marriage was valid. The couple went on to have six children together and was awarded the large-family status by the state (for this the parents had to be spouses according to the court proceedings), the man also paid social security contributions supporting his wife and children. After his death, however, she was not awarded a survivor's pension as the couple had not been legally married under Spanish law. At the same time, in other circumstances, Spain has recognized entitlement to a survivor's pension when a couple could not be married according to canonical rites, or a canonical

18 Maebh Harding, "Marriage," in *Routledge Handbook of International Family Law*, ed. Barbara Stark and J. Heaton (Abingdon, Oxon, UK, New York, NY: Routledge, 2019), 19.

19 ECtHR Judgment of 8 December *2009*, Case Muñoz Diaz v. Spain, application no. 49151/07, hudoc.int.

marriage was not registered in the Civil Register for reasons of conscience. The Court attached importance to the fact that domestic authorities did not call into question the good faith of the applicant about the status of their marriage, moreover, her conviction was reinforced by the official documents provided by the local authorities acknowledging her status as the wife of the late Mr Munoz-Díaz. Likewise, it was regarded crucial in the case that the applicant is a member of the Roma community, a minority with its customs and values that has been an integral part of Spanish society for centuries. Therefore, it was considered to be of special importance that, according to their customs, the applicant's marriage was never disputed and this fact and some aspects of this marriage were acknowledged by the Government and other authorities. Therefore, since these beliefs about the validity of the marriage were a collective assumption of the Roma community, the cultural significance of this cannot be disregarded.

Consequently, the Court concluded that it was wrongful of the Government to deny the applicant the survivor's pension, in which she was treated differently to similar cases that were effectively equal because, in those other situations, marriage was believed in good faith to exist. Therefore, despite the marriage being void, the widow was granted a survivor's pension. Now, this understanding of good faith might be criticised. "Ignorantia iuris non excusat" – lack of knowledge about the law's requirements for the validity of marriage does not exempt from the effects of the law. The decision refers to section 174 of the Spanish Social Security Act that stipulates that a survivor's pension be awarded when there was no legal marriage, still a null one has been contracted but was believed in good faith to be valid. However, these rules stand for cases of null marriage, but not of non-existent marriage, which are two different concepts,[20] as have been argued so far. Now, the above mentioned marriage was not performed before any authority, either civil or religious, which is why it can be argued that it did not exist in the eyes of the law.[21]

[20] Cristina Sánchez-Rodas Navarro, "Roma Marriage and the European Convention on Human Rights: European Court Judgment in the Muñoz Díaz v. Spain Case (8 December 2009)," *European Journal of Social Security* 12, no. 1 (2010): 82, https://doi.org/10.1177/138826271001200105.

[21] Ibid., 83.

However, in another case, Şerife Yiğit versus Turkey,[22] a similar situation resulted in a different judgment. Here the applicant was the partner of Ömer Koç (Ö.K.), a farmer whom she married in a religious ceremony in 1976 and with whom she also had six children. When Ö.K. died she was denied survivor's pension on account of them not being married in a civil ceremony. The applicant also acknowledged that before the time of the death of Ö.K., they had been making preparations for an official marriage ceremony, but Ö.K. had died following an illness.

The Court had to rule on whether the fact that their marriage was religious rather than civil would be a difference in treatment, unjustified like in the Muñoz-Díaz case. The Court made some observations. There had been a difference in treatment due to the mere fact that her marriage was religious and not civil. On the other hand, it was noted that she did not act in good faith when she was making preparations to legalize their marriage, because she knew she was not entitled to the benefits. Another important cultural difference was awarded significant weight, namely that secular-only marriage in Turkey was aimed at eliminating potentially disadvantageous treatment of women in Muslim marriages. Civil marriage was accessible all along, the procedure is easy and does not require excessive investment of financial resources or time.

Two conclusions can be drawn at this point from the presented cases. On the one hand, the intention and belief (in good faith) of the parties are crucial in determining the status of a marriage. On the other, it is unclear whether those marriages are void as the Court refers to them, while both of them would most probably be considered non-existent in Hungarian jurisdiction.

4. Invalidity

In Hungarian law, marriage invalidity rules are based on marriage impediments, in other jurisdictions, however, other reasons can cause marriage invalidity. Annulment, nullity, void, and voidable marriages are related terms but by no means are they synonymous, therefore nuances will be examined in what follows.

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22 ECtHR Judgment of 2 November 2010, Case Şerife Yiğit v. Turkey, application no. 3976/05, hudoc.int.

In English law, the difference between void and voidable marriages is that a void marriage is regarded by any court as null without the need for a decree of annulment, while in the case of a voidable marriage, this is the reverse: such a marriage is presumed to be valid as long as no decree of nullity has pronounced otherwise.[23] Dogmatically, the problem with the current Hungarian law is that it mixes the legal effects of the two: first, there is a need to petition for annulment, second, if this does not happen in the cases where there is a time limitation for petitioning, the marriage becomes valid retrospectively, therefore it is regarded null up until this point. This is ambiguous for several reasons, one is that it acts against legal certainty and interrupts the ordinary course of trade, so it is not followed in practice. Even if there is no differentiation between void and voidable marriages and Hungarian law considers only voidable marriages, this retroactively validating effect is problematic.[24] In practice, it means that when a nullity proceeding is concluded and nullity has been granted, this has an effect dating back to contracting the marriage, therefore the presumption of validity seems more logical.

However, most interestingly this has its roots in old Hungarian law and canon law. In canon law, if there is an impediment to a marriage, the impediment might be removed and the marriage made valid. This system of removing impediments is generally applied before the wedding occurs, but in some cases, it might happen after the wedding, for example by confirmation, or reaffirmation of the intent.

In English law,[25] the nullity of marriage can take two forms: void or voidable. In the first case, marriage has never been recognized as valid by the law and, at best, the couple is regarded as cohabitants. The grounds for a marriage to be declared void are threefold: the parties were either related

23 Void and voidable marriages. P.M. Bromley, Gillian Douglas, and N.V. Lowe, *Bromley's Family Law*, 9th ed. (London: Butterworths, 1998), 78.

24 T/57. számú törvényjavaslat indokolása - a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény. The original policy rational given by the ministry for the 1952 Act IV. on Marriage, Family and Guardianship said: The proposal does not differentiate cases of marriage invalidity – as opposed to the law in force (that was the 1894. XXXI. Act on Marriage Law) – as grounds for nullity and voidable, because the differentiation does not bring any practical meaning. The proposal solely knows of grounds for invalidity, nuances that may arise are settled at the specific grounds (15. §).

25 Jonathan Law, *Oxford Dictionary of Law*, 9th ed. (Oxford: Oxford University Press, 2018).

in the prohibited degrees, or at least one of them was under the age of 16, or at least one of them was already married or in a civil partnership.[26] The parties will not be considered cohabitants if they are related, no matter if they live together.[27] *De facto* cohabitants might be acknowledged despite an ongoing marital relationship or civil partnership because numerous rights result from the fact of a community of life rather than the legal bond itself. In the case of underage marriage that is void and underage cohabitation, most countries do not have a set age for forming such a relationship, however, limitations on the capacity to act and child protection must play a role in deciding these cases. Nonetheless, these cases are problematic because no legal marriage was concluded that would protect the weaker party.

In the second case, the grounds for a marriage to be voidable are non-consummation, the respondent being pregnant by another man at the time of the celebration of marriage, one party suffering from a transmittable venereal disease, having undergone gender reassignment, or that one of the parties have not consented to the marriage.[28] Lack of consent might be caused by mental disorder, unsoundness of mind, duress, mistake, etc. An annulment is a decree granted by the court upon recognizing that the marriage was never valid in the eyes of the law. Such a procedure is only available within 3 years of celebrating the marriage (except for non-consummation). The petitioner also had to be ignorant of the facts that constitute grounds for nullity at the time of celebrating the marriage. There are some limitations on granting nullity in cases where the spouse knew about the "defect" but led the other spouse to believe they would not initiate nullity proceedings or it would be unjust to grant nullity.[29]

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26 Section 11 of the Matrimonial Causes Act of 1973.

27 This is not completely obvious under the ECtHR's jurisdiction as in the case of ECtHR Judgment of 13 April 2012, Case Stubing v. Germany, application No. 43547/08, hudoc.int., the court said that criminalising the relationship between half-siblings and therefore hindering the applicant's sexual relationship with the mother of his children may have interfered with his right to respect for family life, but surely has interfered with his right to private life. This ambiguity might cause confusion as to what relationships create a family.

28 Section 12 of the Matrimonial Causes Act of 1973.

29 Section 13(1) of the Matrimonial Causes Act of 1973.

In Hungarian law, on the other hand, the nullity of a marriage must be determined by a court,[30] and there are no two forms of invalidity.[31] Marriage impediments are not listed in the Civil Code, grounds for annulment are essentially what other systems would consider impediments: defect in the capacity to consent, parties being related in prohibited degrees,[32] and one of the parties still remaining in a previous marriage[33] or registered partnership.

Lack of capacity to act as grounds for invalidity is special in the sense that nullity proceedings are limited both in time and as to who is entitled to petition. The defect in the capacity to act might be due to age,[34] incapacitated adult under guardianship,[35] or marriage contracted when in a state of incapacity.[36] Age is an important limitation to marriage as it is aimed at preventing child marriages[37] since full capacity is needed to make a com-

30 HCC. 4:14. § (1).

31 Tímea Barzó, *A magyar család jogi rendje* (Budapest: Patrocinium Kiadó, 2017), 73.

32 The reasons behind prohibiting close relatives from marriage and sexual relationships are analysed in ECtHR Judgment of 13 April 2012, Case Stubing v. Germany, application no. 43547/08, hudoc.int.

33 But not a registered partnership. In HCC § 4:13., there is no mention of registered partnership as a marriage impediment. However according to 3. § (1) a) of the XXIX Registered Partnership Act of 2009, all effects of marriage shall be employed for registered partnerships. According to Tamás Lábady, the existence of a registered partnership is not the same marriage impediment as an existing previous marriage. In his opinion, the Civil Code does not refer to it as such. Moreover, the Civil Code does mention registered partnership along with marriage as an obstacle for a de facto cohabitation in HCC 6:514. § (1), but not for marriage. This would be a too broad interpretation. Tamás Lábady, "Családjog a Polgári Törvénykönyvben," 2014, 18, unpublished.

34 HCC. § 4:9.

35 HCC. § 4:10.

36 HCC. § 4:11.

37 Article 16(1) of the United Nations' Universal Declaration of Human Rights of 10 December 1948 requires full age to enter marriage. At the same time, Article 23(2) of the International Convention on Civil and Political Rights of 1966 requires marriageable age for a wedding to take place as does Article 12 of the European Convention on Human Rights of 1950. According to Article 2 of the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 7 November 1962, for the purposes of stopping child marriages, the minimum age is to be set by States Parties to the Convention and exceptions have to be set for serious reasons and for the benefit of the intended spouses. Article 16(2) of the United Nations Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) of 1975 stipulates that child marriage has no legal effect. See more

mitment of marriage. If the grounds for invalidity is that one of the parties was a minor under 16 or a minor over 16 who lacked the authorization of the guardianship authority at the time of the wedding, proceedings for invalidity might only be brought within 6 months of them reaching majority and then only by this party. Similarly, if the capacity to act is lacking as the adult was under guardianship but this has ended only they can bring invalidity proceedings and only within 6 months from the termination of guardianship over the adult. A proceeding might be initiated by another legaly interested party before this deadline, but if the concerned party reaches majority or the guardianship has ended to their petition the suit has to be ended and the marriage becomes retroactively valid. Likewise, if the grounds for invalidity is a state of incapacity to act, proceedings can be brought within 6 months of regaining the capacity to act but in this case exclusively by this party.

As we have seen, the limitation on time to start annulment proceedings is not unique to Hungarian law, however, the Civil Code sets a dogmatically rather interesting solution. When the spouse who has the right to initiate annulment but lets the 6-month pass by, it yields in the marriage becoming retrospectively valid.[38] In other legal systems, the presumption is for the validity of marriage, but this rule seems to suggest that if there is an impediment, invalidity is the rule, and the validity is acknowledged by conduct, abstinence from initiating legal proceedings, retroactively validating the earlier lack of capacity. However, if Hungarian law could differentiate between void and voidable marriages, this would be less problematic dogmatically. In English law, these grounds for invalidity result in voidable marriages where, if the party wants to continue with the marriage, it means that they did not lack the capacity in the first place, so the marriage was never really null. By contrast, in Hungarian law, this is the reverse and marriage becomes retroactively valid if no invalidity proceeding has been initiated within the statutory timeframe. Therefore, in cases of voidable marriages, there is a subjective element of whether or not the wedding was

on child marriage in Hungary: Orsolya Szeibert, "Child Marriage in Hungary with Regard to the European Context and the Requirements of the CRC," *ELTE Law Journal* 1 (2019): 63–71.

38 HCC 4:9. § (4), 4:10. § (2), 4:11. § (2).

valid, and the fact that it is voidable flows from the presumption of validity that may be rebutted this way.

Grounds for invalidity might be grouped similarly to the contract-law dogmatic perspective: fault in form, fault in the capacity for rational decision-making, and fault in the aim of marriage.

4.1. Form

The requirements of form may serve different purposes in law, therefore their violation causes various degrees of sanctions in law. Formal requirements may be in place for cautionary or evidentiary reasons. Cautionary reasons mean that such a requirement calls attention to the binding legal act and the consequences, rights, and obligations that will flow from it. When such a formal requirement is additionally solemn, this is to further suggest the seriousness of the declaration and therefore give the parties the chance to acknowledge the magnitude of their action.[39] It is not surprising that marriage is one of the few legal acts that require a certain time for consideration, from acquiring the license, before actually contracting it and then performing it in a solemn form.

According to English law, if certain formal requirements such as banns, place of celebration, marriage schedule, and official or registrar are not satisfied, this leads to invalidity.[40] In Hungarian law, non-compliance with form causes either non-existence or does not bring invalidity. If the wedding is not celebrated by the registrar in their official capacity, it does not lead to invalidity, exemption may be granted from celebrating the wedding at the registry office. Lack of signing the marriage schedule also results in an administrative error but not the invalidity of marriage. The requirement of two witnesses, if not fulfilled, does not cause the non-existence of the marriage but a formal error. From these, one can deduce that these requirements are not of cautionary function but their evidentiary nature is also not so severe that failure would lead to invalidity, much less non-existence. The requirement of the presence of the spouses concerns the existence of marriage, not its validity. However, if the marriage is not celebrated with the cooperation of the registrar, but in some other form, this

39 Scalise, "Rethinking the Doctrine of Nullity," 693.

40 Matrimonial Causes Act 1973 Section 11 (a) (iii).

causes non-existence rather than invalidity, as has been shown before. This question is seemingly more complicated in the English system, where some churches are granted the prerogative to solemnize marriages and those marriages have civil effect. These churches are the Church of England[41] or Church of Wales, which is understandable as this is the state religion, others are Jewish denominations and the Society of Friends (Quakers), while other denominations have to be registered places of worship for marriages.[42] This causes significant problems, especially with the growing number of immigrants of Muslim or Hindu backgrounds failing to register their places of worship as places for the celebration of marriage or very often celebrating marriage in a private home, therefore, those marriages do not exist in the eyes of the law.[43] No such restrictions are in place for the three privileged churches. In a culturally diverse society, singling out some religious marriages has the disadvantage for those who are unaware of their mistake and, in the event of separation or death of their partner, are surprised to discover that they were only cohabitants, which has very few financial consequences in England and Wales.[44]

4.2. Capacity

Lack of capacity is also different within the two legal frameworks. Notably, it is observed that the Hungarian legal system lacks provisions for annulment predicated on factors such as mistake, misrepresentation, or duress. An intriguing aspect pertains to the historical evolution of marital legislation in Hungary. The first law on marriage, Act XXXI of 1894 used to specify these grounds.[45] Furthermore, this law would also differentiate between void and voidable marriages.[46]

In English law, the absence of consent renders a marriage voidable, whereas the lack of capacity to marry renders a marriage void *ab initio*.

41 Marriage Act of 1949 Part II.

42 Marriage Act of 1949 Part III.

43 Gaffney-Rhys, "Hudson v Leigh-the Concept of Non-Marriage," 357–8.

44 Russell Sandberg, "Celebrating Marriage: A New Weddings Law," *International Journal of Law, Policy and the Family* 37, no. 1 (2023): 1, https://doi.org/10.1093/lawfam/ebad031.

45 1894. évi XXXI. törvénycikk a házassági jogról (Ht.) XXXI. of 1894. Act on Matrimonial Law (Hereinafter: MLA) 53–55. §§.

46 MLA. 41–50. §§ void (matrimonium nullum), voidable (matrimonium rescissibile) 51–62. §§.

Conversely, under Hungarian law, the latter circumstance leads to voidable marriages, while the former is not addressed within the legal framework. This regulatory distinction has persisted since the enactment of the 1952 Marriage, Family, and Guardianship Act but not in the earlier law. The rationale behind this discrepancy appears so perplexing that it is almost hard to believe. According to the original policy rationale articulated by the ministry:

> The proposal assumes that the different nature of marriage and family law issues in general must be the point of departure, and therefore, coercion, mistake, and deception cannot be considered as circumstances affecting the validity of a marriage. Forced marriage is unlikely to occur in our socialist society of free people, also the number of marriages contracted on grounds of mistake and deception is negligible. If, however, such marriages do occur and the party who lacked consent finds that the marriage contracted in this way is unbearable for them, they can file for divorce. Therefore, the proposal does not provide annulment on the grounds of coercion, mistake, or deception.[47]

This absurd wording reflects the era and prompts genuine bewilderment regarding its persistence as a legal principle, particularly in the context of extensive recodification efforts aimed at doctrinal refinement within the Civil Code. One can only wonder at the underlying rationale for retaining an anachronistic and arguably deficient legal provision. An explanation could be the entrenched nature of legal practice over the preceding six decades, which, while potentially influential, remains subject to scrutiny regarding its substantive justification. One might also argue that marriages contracted under coercion, mistake, and deception might be invalidated through the rules of error in the contractual intention mistake, misrepresentation, and duress.[48] This broad interpretation of the law has never been employed in the jurisdiction, no petition sought these grounds for nullity. Moreover, given that the Family Law Book of the Civil Code explicitly addresses concepts such as mistake, deception, and unlawful threats,

47 T/57. számú törvényjavaslat indokolása - a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény. The original policy rational given by the ministry for the 1952 Act IV. on Marriage, Family and Guardianship.

48 HCC 6:90. §-6:91. §.

particularly in provisions concerning paternity rules,[49] the absence of explicit mention of these factors within the context of marriage regulations suggests a deliberate omission. Consequently, it is improbable that courts would extend the broad interpretation of contractual invalidity principles to encompass challenges to the validity of marriages.

4.3. Aim

Depending on the age and the cultural context we live in, several situations might be considered to be against the aim of marriage. The existence of a previous marriage is against the public policy of monogamy, but this means outlawing parallel polygamy without outlawing consecutive polygamy in our society. If the previous marriage ends in divorce, a new marriage can be contracted. A close blood relationship between the spouses is undesirable for the benefit of the children who would be born of the marriage, but what the prohibited degrees of relationship are and how close a relationship is forbidden depends very much on the cultural context – direct descendants, siblings and descendants of siblings[50] are excluded. Marriage between an adoptive parent and child would also be contrary to the aim of marriage not for the health concerns but social concerns for the family and the aim of adoption. Some grounds in English and Welsh law – nonconsummation, the respondent being pregnant by another man at the time of the celebration of marriage, one party suffering from a transmittable venereal disease, and undergoing gender reassignment – would also be contrary to the aim of the marriage. In Hungarian law, no such grounds exist but the non-existence of marriage is attached to the same sex of the parties, sham marriage, and a condition or deadline for contracting the marriage, and these grounds could be considered to be against the aim of marriage in Hungarian law.

5. Faith as the Key to Validity – A Recurring Theme from a Different Angle

There is a special case for nullity of marriage in Hungarian law when the impediment would be an already existing marriage on the part of one of the parties to the "new" marriage. The reason why such a marriage, despite

[49] HCC 4:107. §, 4:109. §.

[50] HCC 4:12. § (2) involves an exemption from this if there is no risk for the descendants.

all rules, might be formed, is the fact that the parties do not know that the previous marriage still exists. This is because the "former" spouse is presumed to be dead and officially a decree of their death has been issued according to the relevant rules,[51] but in fact, they reappear after a while. This has happened in great numbers after wars, in Hungary most recently after World War II. In this case, the person presumed to be dead does not "die" by the effect of the declaration and so this presumption can be rebutted, but on the other hand, the presumed widow or widower has a just legal interest to continue their life and so might contract a new marriage in complete good faith that their previous marriage has ended due to the death of their spouse. In order not to abuse this option, the new spouse also has to be in good faith about the death of their bride's or groom's previous husband or wife. In the case of both of them acting in good faith, their newly contracted marriage is going to be valid even if the former spouse turns out not to have died.[52]

6. Concluding Thoughts

The three types of concepts that might result in a marriage having no or very limited consequences might be explained by the metaphor of Gaudemet saying that a void contract is like a non-viable organism that is missing an essential organ and is born dead, a voidable one is like a sick organism that will struggle to live if it is confirmed but might die due to annulment.[53] To take this picture a step further, a non-existent contract, or marriage, considered in this paper, is an organism that has not been conceived, there was some form of generative act and the signs of pregnancy were observed but it turned out to be a false pregnancy as no organism ever came into being.

51 HCC 2:5. §.

52 HCC 4:20. § (2).

53 Gaudemet Eugène, *Théorie Générale des Obligations Réimpression de l'édition de 1937* (Dalloz, 2004), 142; quoted in Scalise, "Rethinking the Doctrine of Nullity," 698.

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