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Socialist Remains in Hungarian Family Law

Exploring the Roots of Dogmatic Defects in the Family Book of the Hungarian Civil Code

In Hungary, similarly to other post-socialist countries, during communism a socialist family law had been forced on the legal system. This had broken with the previous civil law tradition, building on a socialist ideology, and although the dictatorship ended more than 30 years ago, a similar break with socialist law has not happened in this area. One relic from the socialist era is the structure the Hungarian Civil Code adopted on marriage law. After regulating the existence and invalidity of marriage it goes on to regulate the dissolution of the marital bond. Rights and duties, financial and personal consequences of marriage are left for later. This reflects an attitude towards conflict management unlike any other legal institution not only in the Family Book but in the entire Civil Code. There are a few grounds of invalidity of marriage that are conspicuously missing from Hungarian family law. The reasons behind the terminological confusion in marital property law also has its roots in history. Socialist family law has also left its mark on marriage stability with early no-fault divorce rules. The socialist separation of family law from civil law might also explain the fact that cohabitation is regulated in contract law rather than family law.

How is it possible that these mistakes made their way into a Code that was accepted in 2012, 22 years after the democratic transition? The paper argues that the consequences of this historical inheritance for family law contribute to the lack of elaborated dogmatics in this field, especially in comparison with classic civil codes of western legal systems.

Keywords: *family law, socialist family law, law reform, Hungarian Civil Code, post-socialist legal system*

1. Introduction

There is a special feature of the legal systems of post-socialist countries, a communist heritage that is still present in the law. Even though in Hungary the Civil Code was recodified a decade ago, socialist traces remain and impact its institutions. This article undertakes a historical review of how and why we have the rules that regulate family in our civil law today. We will focus on some of the major issues of family law, mainly marriage; however, our goal is not to give an exhaustive list of all family law institutions, but to map out notable problematic legacies of the socialist era.

I argue that the consequences of this historical inheritance for family law contribute to the lack of elaborated dogmatics in this field.

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2. Socialist family law

Marxist theory had a unique vision of family. Family was presumed to fade away and collective upbringing of children coordinated by the state would take over its functions. Law was also supposed to wither away.[1] Further, as private property would cease to exist, there would be no need for family relations to pass on wealth or title like in bourgeois societies.[2] Therefore, in Soviet Russia after the revolution of 1917, one of the first acts was a new regime for the family.[3] During the Bolshevik Revolution, in the process of transforming traditional society into a Soviet society, family law was changed drastically. In communist ideology family was somewhat a suspicious entity; some theoreticians wanted to abolish family and have children raised by the communist state, others thought material nurturing should remain with the families but ideological upbringing should be taken over by the state and still others would use children to influence parents in the transformation to a communist society.[4] To these ends traditional family law had to be revised. Most importantly civil marriage, equality of the sexes, no differentiation of children born in or out of wedlock, and separation of family law from civil law were adopted. Although intended as temporal regulation soon it was discovered that law would not wither away; in fact, would become a strong tool for dictatorial control and the transformation of society. A new family code was accepted[5] that introduced the notion of "de facto" marriage: equal consequences were available for registered and unregistered marriage, or cohabitation.[6] Divorce became a surprisingly easy administrative matter[7] that resulted in a huge number of single-mother families, many children without parents or guardians at all, and high juvenile delinquency.[8] This catastrophic social tendency soon had to be stopped. This resulted in the rehabilitation of family law.[9] This is the socialist family law that was forced on Eastern Europe under the influence of the USSR after the Second World War.

3. Continuation of socialist law

A common feature of post-communist countries (Czech Republic,[10] Poland,[11] Slovakia,[12] Romania,[13] and Bulgaria[14]) is that the civil codes did not contain family law during and immediately after communism; it was regulated separately. In some countries when a new

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1 Juviler, Soviet Marxism 388.

2 Glass, Stolee, Family law 893; Horváth, A szovjet család 56; Berman, Soviet Family 36.

3 Decree of the All-Russian Central Executive Committee and the Council of People's Commissars on Civil Marriage, on Children, and on the Maintenance of Books of Status Acts December 18 (31), 1917 online: http://www.hist.msu.ru/ER/Etext/DEKRET/17-12-18.htm (11. 11. 2023.); Decree on Divorce of Marriage 16 December 1917, Soviet Code of Laws on the Documents of Civil Status, and on Marriage, Family, and Guardianship Law 16 September 1918.

4 Glass, Stolee , Family law 894–896.

5 Code of Laws on Marriage, Family, and Guardianship of 19 November 1926.

6 Osipova, Soviet Family 75.

7 So-called "Postcard divorces" Glass, Stolee, Family law 898.

8 Horváth, A szovjet család 60.

9 A new Code of Family Law was enacted in 1934–1936.

10 Králíčková, On the Family 81.

11 Family and Guardianship Code of 1964; Act of 23 April 1964.

12 Act no. 36/2005 Family Act, but family law has been separated from the civil code since 1950 as Slovakia was part of Czechoslovakia. Garayová, Protection of Families 223.

13 Until the entry into force of the New Civil Code (Law no. 287/2009 on the Civil Code) a separate act: Law no. 4/1953 (Family Code) Legea no. 4 din 1953 (Codul familiei) used to regulate family law in Romania.

14 Bulgarian Family Code Promulgated State Gazette 41/1985.

civil code was drafted family law was reintegrated, in others the separateness is still a phony heritage of the past.

However, family law cannot be seen as a completely separate area either within civil law or outside it, as it is subject to rules from many related branches of law.[15] In Hungary, the new Civil Code includes family law, which is thus explicitly brought back into the private law system. In defining the subject of private law, Károly Szladits identified two main areas: "Private law is essentially property law and family law".[16]

In the first half of the 19th century lack of autonomy in the Monarchy hindered civil law codification, but from 1867 power of jurisdictional autonomy marked the beginning of codification processes. Before a comprehensive civil code was elaborated the most urgent areas of civil law were codified separately with the intention of integration once a civil code would be codified. This is how the 1877 XX. Act on Guardianship and the 1894 XXXI. Act on Marriage Law were adopted, the latter regulating matrimony secularly for the first time. Béni Grosschmidt and the codification committee had the intention to break away from ecclesiastical law[17] and create a harmony between the rules of the marital bond and other general civil law rules.[18] Therefore, old Hungarian marriage law has a contract law foundation for its dogmatics with attention to the peculiarities of a family law institution. The 1928 Private Law Proposal would have included not just the bond but the hole of marital and family law. It never came into effect until of the aftermath First World War and the loss of two thirds of Hungarian territories. This complex view and comprehensive concept of a code was abandoned as a bourgeois idea and private law codification followed in the footsteps of the Soviet example. However it must be noted that not the original soviet form of marriage was transplanted into Hungarian law. This formless cohabitation without declaration of the intention and unilaterally dissolvable "marriage" was in force from 1926 to 1944.[19] Literature of the time praises the socialist ideal of family and characterizes the Act IV of 1952 on Marriage, Family, and Guardianship as a fine tool for building a socialist society.[20]

The Civil Law Codification Committee was set up in 1999 and the final law was passed in Parliament in 2012. Emilia Weiss – professor of family law at a prominent state university – considered it justified in today's circumstances to regulate family law "separately from civil law, not in the new Civil Code".[21] András Kőrös, supreme court judge of the family division, who led the recodification of family law in the new Civil Code, admitted that he had considered separation of family law at the beginning of the work, but later became convinced that it is, in fact, the most intimate private law and should be regulated in a comprehensive civil code.[22] This resistance of judges to give up 50–60 years of tradition of the separate family law is apparent in other

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15 See: Hegedűs, A családjog 182–184.

16 Szladits, Magyar magánjog 38.

17 Family law is special because due to its ecclesiastical roots, secular legislations have chosen a number of different ways to regulate this area. For example regarding the marital bond the French Code civil intentionally created an autonomous solution for invalidity on neither ecclesiastical nor contractual basis, while the German BGB stands on contractual grounds. Nizsalovszky, A család jogi 422.

18 Nizsalovszky, A család jogi 423.

19 Idem, Magyar családi 18.

20 Although the honesty of these praises is highly doubtable in the darkest days of the dictatorship eg: Szladits, Az új családjogi 12.

21 Weiss, Az új Polgári Törvénykönyv 7.

22 About oposing oppinions see: Hegedűs Házassági vagyonjogi rendszerek 217–219.

post-socialist countries too. Interestingly judges turned into defenders of regulations conceived in Stalinist times.[23]

According to Tamás Lábady – judge and member of the Drafting Committee –, the differences between civil law and family law do not provide an adequate basis for separating family law from private law.[24] Likewise, Gábor Jobbágyi – professor of civil law –, takes note of the historical separation and special character of the material of family law, that it has specific features which do not prevail in other areas of civil law. In his opinion, the separation is not justified and the legislature and jurisprudence had to return to civil law.[25] The systematization of the classical codes also includes family law.[26] Finally, the concept of the Drafting Committee acknowledged that family law in fact regulates the most intimate private law, and its comprehensive regulation should therefore also be included in the Civil Code.[27] The greatest achievement in family law is without a doubt terminating its separation from civil law by returning the body of family law to the Civil Code.

However, the long decades of isolation have left their mark on the letter and the spirit of the law. In the recodification process the return to tradition from before communism was more explicit,[28] and the abandonment of socialist ideology was less transparent because ideology was less transparent in the law.[29] In Hungary overall the lack of an explicit intention to correct ideologically based rules in family law has led to some embarrassing remains from the socialist era.

4. Structure

A missed opportunity for dogmatic sophistication is the structure of the law concerning marriage. The new Civil Code just like the old Family Law Act[30] talks first about the formats of a marriage, then lists the reasons that lead to invalidity, and then goes on to deal with the dissolution of marriage. Only after the rules of divorce does the law regulate personal rights and duties and financial consequences for the spouses. For all other institutions in family law, the regulatory structure is logical: first formation, then rights and duties, consequences, and only then dissolution. For example a parent-child relationship: first who is a parent (paternal presumptions, maternal status), rights and duties of a parent, and only then, in the highly unwanted situation when the parent is not fit, the termination of custody. This is also true for other areas of civil law, a contract for example: the formation of a contract, who are the parties of a contract, what are their rights and obligations, and only then in the case of breach or other facts the termination of a contract. So the law stipulates that people make contracts to live up to their obligations and fulfill the contract and not to breach and terminate them without performance.

The structure of the legislation also says a lot about the legal system's approach to marriage. Old family law dogmatics discussed marriage in the classical system,[31] following the structure of the life of marriage: after the bond has been formed, its legal effects, the personal and property relations of the parties,[32] and finally, how the marriage is dissolved.[33] The Act of Marriage[34] itself did not regulate

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23 Fiedorczyk, Zemke-Gorecka, Polish Family Law 378.

24 Lábady, A magyar magánjog 37.

25 Jobbágyi, Személyi és Családi Jog 193.

26 E.g.: the French Code civil 1804 or the Austrian ABGB 1811.

27 Kőrös, Múlt s jövendő 11.

28 Králíčková, Family 81.

29 Fiedorczyk, Zemke-Gorecka, Polish Family Law 374.

30 1952 Act IV on Marriage, Family and Guardianship.

31 Szladits, A magyar magánjog vázlata 314–340.

32 Ibid. 340–358.

33 Ibid. 358–369.

34 1894 Act XXXI on Marriage Law.

the rights and obligations of the spouses, but there were scattered legal provisions on the personal and property relations of the parties, and they were shaped by judicial practice.[35] However, the proposed Private Law Code would have regulated rights and duties the classical way,[36] while the rules of the bond were already regulated in the Act of Marriage. The Codification Committee took note of the question but rejected a better structure on historical grounds. They said that the Act of Marriage only regulated the marital bond, because ecclesiastical law had regulated it before, so the structure is the inheritance of old Hungarian law.[37] However, as I have shown, this is not completely true.

European civil law codes follow the classical system. Book IV of the German Bürgerliches Gesetzbuch (BGB)[38], where the family law book (§§ 1297–1568b) starts with the celebration of marriage after the engagement and the remarriage, then the annulment of the marriage and the declaration of the death of the former spouse. This is followed by the general effects of marriage and matrimonial property law, and finally the rules on divorce. Title V of the French Code civil[39] deals with marriage (Art. 144–227) and Title VI deals separately with divorce. Similarly, Title IV, Chapter I of the Spanish Código Civil (CC)[40] addresses the promise to marry, II the requirements and obstacles to marriage, III the conclusion of the marriage, IV the registration, V the rights and obligations of the parties, VI nullity, VII separation, VIII divorce and IX to XI the consequences of the latter. Since the law of matrimonial property is not characterized by mandatory rules, it is regulated under the law of obligations (CC Art. 1315–1343). Even in other post-communist countries, for example, the Polish Family and Guardianship Code of 1964, the structure is logical.

Now, what does this tell us about marriage in Hungary, what does the legislator think about this most fundamental legal relationship, this building block of society? That the second most important thing to know about it, after tying the knot, is how to be freed from the bond. It is understandable someone to think that the place of regulation in the code does not make a huge difference, even if it was structured after the rights and duties, just as many people would get a divorce probably. Nevertheless, it surely sends a message. When, in 1951, the Family Law Act was drafted and family law was going to be regulated in a unified way it should have been structured logically, but even if not then, it is puzzling why this mistake was not rectified in the new Civil Code either.

There were, however, important changes concerning marriage. One of them is the dogmatically defined difference of non-marriage and invalid marriage,[41] another is that some minor failures of form, not by the spouses, do not result in invalidity anymore, and minor changes in the marriage impediments were also implemented. However, the system of invalidity rules from the socialist era was no revised – another missed opportunity for dogmatic excellence.

5. Invalidity

5.1. Roots

In Hungary, secular marriage appeared with the 1894 Act XXXI on Marriage Law. This act had several dogmatic questions settled with traces of canon law and contract law in mind. This theoretical distinction had been left behind with the socialist law of 1952, Act IV on

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35 See: Almási, Házassági jog 265–293.

36 Rights and duties, consequences of marriage in 1928. Private Law Proposal (§ 111–173).

37 Az új Polgári Törvénykönyv koncepciója 35.

38 Bürgerliches Gesetzbuch, Reichsgesetzblatt 18. August 1896.

39 Le Code civil des Français, 21 mars 1804.

40 Código Civil Español (Real Decreto de 24 de julio de 1889).

41 Hungarian Civil Code HCC § 4:5. (1).

Marriage, Family, and Guardianship and has not entirely been resurrected at occasion of the recodification of the Civil Code.

The two types of nullity, void and voidable acts, might be understood as having two reasons for depriving someone 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.[42]

Where the law recognizes the difference between void and voidable marriages it means that a void marriage is regarded by any court as null without the need for a decree of annulment. By contrast, in the case of a voidable marriage, this is reversed: such a marriage is presumed to be valid as long as no decree of nullity has pronounced otherwise.[43] Dogmatically the problem with the current Hungarian law is that it mixes the legal effects of the two. Firstly, there is a need to petition for annulment, secondly, if this does not happen in the cases where there is a time limitation for petitioning, the marriage becomes valid retrospectively, therefore we can assume it was regarded null up until this point. This is ambiguous for several reasons – one is that it would act against legal certainty and interrupt the ordinary course of trade, so it is not followed in practice. The original policy rationale 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 (this was the 1894 Act XXXI on Marriage Law[44]) – as grounds for marriages being void 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 on the specific grounds (15. §)."[45]

In practice, it obviously means that when a nullity proceeding is concluded and nullity has been determined, this has an effect dating back to the conclusion the marriage, therefore the presumption of validity seems more logical.

Marriage impediments are not listed in the Civil Code, grounds for annulment are basically what other systems would consider impediments: defect in the capacity to consent, parties related in the prohibited degrees,[46] and one party having a prior marriage or registered partnership.[47] However, other reasons can cause the invalidity of a marriage in other systems. Grounds for invalidity might be grouped similarly to contract law dogmatic: fault in form, fault in the capacity of rational decision-making, and fault in the aim of marriage.

5.2. Form

Requirements of form may serve different purposes in law, therefore their violation causes different degrees of sanctions. Form requirements may be in place for cautionary reasons or evidentiary reasons. Cautionary means 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 furthermore 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.[48] No wonder that marriage is one of the few legal acts that

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42 Scalise, Rethinking 670.

43 Void and voidable marriages. Bromley, Douglas, Lowe, Family law 78.

44 Ht. § 41–50 void (matrimonium nullum), voidable (matrimonium rescissibile) § 51–62.

45 T/57. számú törvényjavaslat indokolása – a házasságról, a családról és a gyámságról szóló 1952. évi IV. törvény. Policy rationale of proposal no. T/57. adopted as Act IV of 1952 on marriage, family and guardianship.

46 The reasons behind prohibiting close relatives from marriage and sexual relationships are analyzed in Stubing v. Germany (Application no. 43547/08) 13 April 2012 ECHR.

47 In HCC § 4:13. there is no mention of registered partnership as a marriage impediment. However according to the 2009 XXIX. Registered Partnership Act 3. § (1) a) all effects of marriage shall be employed for registered partnerships.

48 Scalise, Rethinking 693.

require a certain time for consideration, from acquiring the license, before actually contracting it, and then it is performed in a solemn form.

In Hungarian law non-compliance with form causes either non-existence or does not bring invalidity, whereas on the old law it led to void marriages. If the wedding is not celebrated by the registrar in their official capacity, this does not lead to invalidity, and exemption may be granted from celebrating the wedding at the civil registry office. Failure to sign the marriage schedule also results in an administrative error but not the invalidity of marriage. The requirement of two witnesses if missing does not cause the non-existence of the marriage but is a formal error. From these, we can deduce that these requirements are not of a 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 validity.[49] However, if the marriage is not celebrated with the cooperation of the registrar but in some other form, this causes non-existence rather than invalidity.

5.3. Capacity

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,[50] incapacity of an adult under guardianship,[51] or a state of incapacity at the time of contracting the marriage.[52] Age is an important limitation to marriage to prevent child marriages,[53] because full capacity is needed to commit to 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, only they can bring proceedings for invalidity within 6 months of them reaching majority. 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 interested party before this deadline, but if the concerned party reaches majority or, the guardianship has ended prior 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.

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[49] UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10 December 1962, Art. 1 Para. 2: "Notwithstanding anything in paragraph 1 above, it shall not be necessary for one of the parties to be present when the competent authority is satisfied that the circumstances are exceptional and that the party has, before a competent authority and in such manner as may be prescribed by law, expressed and not withdrawn consent."

[50] HCC. § 4:9.

[51] HCC. § 4:10.

[52] HCC. § 4:11.

[53] Art. 16 (1) of the Universal Declaration of Human Rights, 10 December 1948, requires full age to enter marriage, whereas Art. 23 (2) of the International Convention on Civil and Political Rights 1966 requires marriageable age for a wedding to take place, as does Art. 12 of the European Convention on Human Rights of 1950. According to Art. 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 7 November 1962 to stop child marriages, a 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.
Art. 16 (2) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1975 stipulates that child marriage has no legal effect.
For more on child marriage in Hungary see: Szeibert, Child Marriage 63–71.

Retrospective validity is peculiar;[54] 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 other systems 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. In Hungarian law however this is reversed, and a marriage becomes retroactively valid if no invalidity proceeding was initiated within the timeframe. Therefore, in cases of voidable marriages, there is a subjective element of whether the wedding was valid or not, and the fact that it is voidable flows from the presumption of validity that may be rebutted this way. This could have easily been corrected if the Civil Code provided for such marriages to be voidable until the given timeframe, and if such proceedings were initiated the marriage would become retrospectively null.

It is rather puzzling that Hungarian law does not have such grounds for annulment as mistake, misrepresentation, or duress. Conversely, the first law on marriage, Act XXXI of 1894 used to have these grounds too and these led to voidable marriages.[55]

The reason behind the change that the 1952 Act brought seems so pitiable that it is almost hard to believe. According to the original policy rationale given by the ministry:

"The proposal assumes that marriage and family law's different nature from property law must be the point of departure, and therefore coercion, mistake, and deception cannot be considered as circumstances affecting the validity of marriage. Forced marriage is unlikely to occur in our socialist society of free people; also the number of marriages invalidated 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 this way is unbearable for them, they can file for divorce. Therefore, the proposal does not provide for annulment on the grounds of coercion, mistake, or deception."[56]

Not only is this absurd and cynical wording a reflection of the era, but it is also truly perplexing that this is still the rule after a long course of recodification of the Civil Code that aimed for dogmatic excellence.[57] One can only wonder what reason might be behind leaving an anachronistic, arguable deficit in the law. One reason might be that this is how the practice has been shaped over the last 60 years, which on the one hand might be a weighty, but questionably a weighty enough reason. It might also be argued that marriages contracted under coercion, mistake, and deception might be invalidated through the rules of error in the contractual intention – mistake, misrepresentation, and duress.[58] This broad interpretation of the law has not been employed in the jurisdiction as no petition sought these grounds for nullity. Also, as mistake, deception, and unlawful threats are explicitly mentioned in the Family Law Book of the Civil Code, for example in the context of paternity rules,[59] therefore silence about these the marriage rules must be intentional. Hence, it is unlikely that the court could give such a broad interpretation to contractual invalidity rules in the case of marriage validity.

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[54] HCC § 4:9 (4), § 4:10 (2), § 4:11 (2).

[55] Act XXXI of 1894 on matrimonial law Ht. § 53–55.

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

[57] Vékás, A Polgári törvénykönyv 103.

[58] HCC § 6:90–6:91.

[59] HCC § 4:107, § 4:109.

During the recent codification process, the question was answered briefly by stating that it had been decided in 1952 and this had not causendany problems since.[60]

6. Rights and obligations

First of all the terminology of marital property is very confusing both due to customary law influenced by the ABGB and the BGB during the second half of the 19th century, and then socialist family law trying to break with any tradition. Unfortunately, the new Civil Code has inherited this terminological confusion.[61]

Personal rights and obligations of spouses were missing from the 1894 law on marriage but would have been included under a civil code.[62] Since historical circumstances had hindered the codification up until the 1946 Act XII, financial consequences were regulated separately and differently depending on social class. Upper-class spouses would have a separation of property system, where the husband did not represent the wife in general, and others could contract to this system as well.[63] Middle and lower-class citizens fell under the participation in acquisitions regime, which from the first draft civil code[64] meant that during the marriage they owned property separately and at the dissolution of the regime both participated equally in the acquisitions of the other. This system protects the third parties of the market while ensuring participation in the wealth acquired. Originally this customary law marital property institution was not understood as a claim of obligation from the acquired wealth during marriage but there was some debate to understand it as community of property.[65] Its name is "közszerzemény" a word-for-word translation of community of acquisitions, and it was much closer to today's community of property, the default system in the Civil Code. However, due to the aforementioned reasons "közszerzemény" became a participation of acquisitions institution and was therefore rejected by the socialist Family Law Act of 1952, and community of property was introduced.

According to the original policy rationale[66] this change of property regime served to abolish inequality of the sexes and promote the position of women, who were suppressed in bourgeois society. There is no doubt the equality we have today was not achieved before the Second World War, however in old Hungarian law women had much more power than fellow women did in Western legal systems.[67] In customary Hungarian law, the husband had neither the Roman manus nor the Germanic Munt over the wife.[68] In the 1874 Act XXIII on women's full legal capacity[69] women had full capacity to act from the age of 24 or from getting married. Also from a financial point of view under the drafts of the civil code from the beginning of the century women had equality. This manifested itself in the drafts through separation of property and participation of acquisitions, and Grosschmid explicitly rejected the solution of the BGB where the husband had administrative power over the property of the wife.[70] Separation of ownership during the regime was to

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60 Az új Polgári Törvénykönyv koncepciója 37.

61 Herger, A modern magyar 374.

62 1928 Private Law Proposal § 111–173.

63 Herger, Kötések és törések 22.

64 Magyar Általános Polgári Törvénykönyv tervezete 1900.

65 Herger, A modern magyar 213–216. and Kriston, Szerződési szabadság 62.

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

67 Herger, A modern magyar 359.

68 Szladits A házastársak közötti 118–120.

69 1874. évi XXIII. törvénycikk a nők teljeskoruságáról.

70 Herger, A modern magyar 247.

provide for women's autonomy in property law.[71] In connection with the fact that the parties were independent owners of their assets, which they could administer themselves, this provided adequate security vis-à-vis third parties, but also entailed a risk as regards the claim of the economically weaker party to a share. Interestingly, early soviet law deprived women of administering freely their acquired property in the 1926 Family Law Act, when community of property was finalized.[72] Therefore, the assumption that in contrast to earlier law, communism greatly advanced women's rights[73] should be viewed with reservations.

A shared feature of ex-socialist countries is the regime of community of acquisitions, but the term used is community of property. Dogmatically it should have been called community of acquisitions, but because this had tradition and roots in old Hungarian civil law it was rejected.[74] It was claimed that a community property regime was a better solution because it protected the equality of men and women, unlike other regimes.[75] While it has some merit that community of acquisitions is it extends the marital community to a personal and property union and was therefore employed in several Western jurisdictions like the French, Italian and Dutch. It is also true that it has some disadvantages in a market economy; However, the communist block was not a market economy, entrepreneurship was not encouraged and family law in general was supposed to be separated from bourgeois economic interests, as we have seen. This idea on the one hand was never fully realized and some minimal private ownership remained. On the other hand, after the transition from communism in these countries, community of acquisitions was adjusted to address conflicts of property management, but it is still the default regime.[76]

Although the old Hungarian law already provided for the possibility of concluding marital financial agreements, it was not typical.[77] In the Hungarian socialist legal system, although contracts between spouses were not prohibited, the marriage property contract in the narrow sense only reappeared in 1986, since under Art. 27 (1) of the Family Act, the community of acquisitions could not be completely excluded. However, the 1986 amendment was prompted in vain – even if more and more people had property worth contracting for, the vast majority still did not think ahead or did not find it sufficiently advantageous to depart from the statutory property regime. It does not seem like the new Civil Code, with its emphasis on the primacy of the will of the parties, its clearer conceptualization, the exemplary detailing of property regimes, and the introduction of registration of agreements is sufficient to make such agreements popular.[78]

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[71] Eadem, A közszerzemény intézménye 565.

[72] Eadem, A modern magyar 356.

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

[74] Herger, A modern magyar 360.

[75] Nizsalovzsky, A család jogi 158.

[76] Fiedorczyk, Zemke-Gorecka, Polish Family Law 382.

[77] Jancsó, A magyar házassági 808 writes that such contracts are not common among the Hungarian population, but are more common among urban populations of other nationalities, who are from other legal cultures. Although this is considered to be an exaggeration: Herger, Adamkó, A családjog jövője 3.

[78] According to the information received on 21 January 2021 from the Legal Department of the Hungarian National Chamber of Notaries, the number of cases received in 2014 regarding the registration of marital financial agreements including amendment, cancellation, andtermination in the electronic register of marriage and civil partnership contracts was 427, in 2015 – 724, in 2016 – 930, in 2017 – 1064, in 2018 – 1137, in 2019 – 1058, in 2020 – 828.

7. Divorce

Socialist law abandoned the separation of bed and board as a bourgeois institution[79] that had its roots in canon law. The lost institution of separation serves as the formal termination of cohabitation, which exists in ecclesiastical law. Divorce is not recognized in canon law, and separation serves as an optional step in the law of dissolution, but also exists in some jurisdictions, in Spain for example. Separation does not terminate the marital bond, which can be more easily restored in the event of reconciliation, while other legal consequences (joint acquisition, etc.) are suspended during separation.[80] The effectiveness of this can be seen in our pre-socialist case law.[81] In addition to divorce a vinculo matrimonii, divorce a mensa et thoro could be reintroduced as was done in Poland in 1999, with a restorative function for marriages.[82] If the marriage ends in divorce, this stage can also provide an opportunity to reach an agreement on issues concerning custody, alimony, and division of property, which also has social utility and enables the parties to better fulfill a voluntarily reached compromise.

As we have seen in early soviet family law, postcard divorces had caused catastrophic consequences and in 1936 the rule for divorce were made much stricter. This was the state of things when Hungarian law fell under the influence of the USSR, therefore – although from a point of view of the previous regime of divorce, a liberal system was introduced – it was not as extremely liberal as early Soviet family law. Fault-based divorce was changed into no-fault divorce[83] and this led to a rise in break up sof families in the long term.[84] The original wording of the law said that divorce must be granted when serious and well-grounded reasons are shown in court, but the interest of the child had to be taken into consideration from early on. The rule was further specified in 1974 as either spouse could petition for divorce if their marital life had irreversibly broken down. This is considered proven especially if the spouses file a joint divorce petition and have agreed on the custody of the child, visitation rights, alimony, and use of the marital home, or they petition the court to decide these questions. This was slightly restructured in 1987 when as a proof of irreversible breakdown two factual situations were defined.[85] So if the spouses jointly requested a divorce and had agreed on custody, visitation, alimony, marital home, and division of property, then divorce was granted without further inquiry into the breakdown of their relationship. The other factual situation that led to easy divorce was if they jointly petitioned and had lived apart for at least three years and proved that child custody was agreed upon according to the interest of the child. What we can see here is that the "despised bourgeois" separation sneaked back partially, or rather the question of living together or apart had taken over this role. Moreover, several rights and obligations are tied not to the marital bond itself but to whether or not the spouses cohabit. In the Civil Code, this has been passed on. There is no need to prove the irreversible breakdown in case of a joint petition and agreement on custody, visitation (unless joint custody is agreed upon in which case domicile has to be agreed on), child support, use of the marital home, if requested spousal alimony.[86] The irreversible breakdown is supported by the spouses having lived apart for an extended period of

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79 Ht. § 104–107.

80 Código Civil Español (Real Decreto de 24 de julio de 1889) Art. 81–84.

81 Herger, A házastársi hűség 154.

82 Fiedorczyk, Zemke-Gorecka, Polish Family Law 376.

83 As early as 1945; see: 6800/1945. M. E. sz. rendelet (Hr.)

84 Szabó, Az állami házasság 54.

85 1986 IV. Act amending Act IV of 1952 on marriage, family, and guardianship § 5.

86 HCC § 4:21 (3), (4).

time or the reason there of and there being no chance of reconciliation but unless there is a joint petition and agreement about the above, the court has to order an evidentiary procedure to prove the breakdown.[87]

Current divorce rules do not greatly diverge from socialist divorce law; indeed, they are rooted in them. There was no need for substantial modification after the democratic transition as the rules were liberal enough. Some claim these rules, which are based in the Soviet era, today are somewhat conservative, and further liberalization is rejected.[88] The heritage of the Soviet era in this regard is that no-fault divorce became the exclusive rule, and this happened much earlier than in Western Europe. Therefore, family breakdown started earlier (from the 1950s, not the 1960s or 1970s), and although not to the degree as it happened at the time of postcard divorces in early Bolshevik Russia, but on a much bigger scale than at the time of fault-based divorce rules.[89]

Although the division of family law from civil law in socialist legal dogmatics has been emphasized it was through the Civil Code of 1959 that cohabitation became a private law institution; therefore it is obvious that even in the socialist era the connection between the two areas could not be denied. Interestingly enough this separation has remained in the new Civil Code, as cohabitation was not placed in the Family Law Book but in the Book of Obligations. The reason behind this is that cohabitation became a genderless notion in 1995[90] and only cohabitations where a child was born to the partners are regulated in Book IV of the Civil Code.

8. Adoption

In classic civil law adoption as a private matter served to provide for both inheritance right and family relationships, therefore both adults and children could be adopted. Under old Hungarian rules, adoption was done through a contract that was confirmed by the authorities.[91] After the world wars primacy of adoption as a family relationship became prominent, as both parents wanted to have a legal relationship after losing their children in the war and there were many orphaned minors.[92] Increasingly, only contracts with established family relationships were confirmed in case of adult adoption, until it was banned in the 1952 Act.[93]

It is possible to adopt an adult in some Western countries like Italy, and Germany, if it is morally justified,[94] but not in the post-socialist block. Although the vast majority of adoptions today are to provide family upbringing to minors, there might be family situations where the lack of this option is a loss of auto-

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87 HCC § 4:21 (1).

88 Fiedorczyk, Zemke-Gorecka, Polish Family Law 387.

89 In 1904–1906 2–3 % was the divorce rate in versus the marriages constracted that year, Hungarian Statistical Yearbook Magyar statisztikai évkönyv, új folyam XIV. 1906. Budapest 1907. 448, in 1949 still under the old rules 12 % Magyar statisztikai évkönyv, új folyam XL. 1932. Budapest 1933. 324., in 1960 19 %, however in 1980 32 % Central Statistical Office https://www.ksh.hu/stadat_files/nep/hu/nep0019.html
Compared with 7 % in England and Wales, 8 % in France in 1953, 5 % and 6 % respectively in 1962, see: Glendon, The transformation 193.

90 14/1995. Hungarian Constitutional Court Decision, ABH 1995, 82, 84.

91 A gyámsági és gondnoksági ügyek rendezéséről szóló 1877. évi XX. törvénycikk gyakorlatáról, see: Beke-Martos, Az örökbefogadás 19.

92 Beke-Martos, Az örökbefogadás 20.

93 Katonáné Pehr, Örökbefogadás 5. [9].

94 BGB § 1767.

nomy. This can only be substituted partially by a will or a change of names; nevertheless, the codification committee rejected the idea.[95]

9. Concluding thoughts

To sum it up, there are unfortunate pieces of inheritance from the socialist area and unless they are brought to light, they become an 'unconscious transgenerational trauma' to the law as has happened to the Hungarian Civil Code. The influence of this historical legacy on family law has resulted in a lack of sophisticated dogma in this important area of law. Hopefully, a better understanding of the roots and background of the inconsistencies will enable future legislative efforts to avoid such mistakes.

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