UNMARRIED PARTNERSHIP IN HUNGARY – TODAY AND DE LEGE FERENDA

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1. The history of the regulation on unmarried partners in Hungary since the 1940s

Neither our Civil Code nor our Family Act – which were historically the first and comprehensive codes on these issues – provided any regulations regarding unmarried partnership[1] at the time of their enactment in 1952 and 1959,[2] respectively. The first regulation of this form of community life came in 1977.

1.1. The legal position of cohabitation up to 1977

A book which was published in 1963, on the tenth anniversary of the Family Act's entry into force and which analyses and describes in great detail certain theoretical and practical family law issues (family law is an independent branch of the law), made a very clear assertion concerning the proper place of cohabitation: those relationships between the two genders that are not legally recognised as a marriage do not belong to the legal order of the family.[3] This analysis of unmarried partnership effectively shows that the contemporary – and we should carefully add not only the contemporary – jurisprudence and case law are largely ineffective when it comes to regulating cohabitation's proper legal position.[4]

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1 The Hungarian name for this kind of partnership is „élettársi kapcsolat". The terms „unmarried partnership" and „cohabitation" and also „unmarried partner" and „cohabitant" are used in this text interchangeably.

2 The Civil Code is Act No. IV. 1959, which entered into force in 1960, the Family Act is the Act No. IV. 1952, which entered into force in 1960.

3 ENDRE NIZSALOVSZKY, *A család jogi rendjének alapjai (The basis of the family's legal order)*, 1963, p. 62.

4 This is reinforced by ESZTER FÁBIÁN TÓTHNÉ, referring to the fact that judicial practice resorts to both the rules of civil law and of the family law because of the Family Act's „silence condemning the cohabitation". TÓTHNÉ FÁBIÁN ESZTER, *Az élettársi kapcsolat jellegéről és*

During the early 1960s two institutions were recognised under Hungarian law as amounting to a relationship between a man and a woman outside marriage and were therefore not part of family law: an unmarried partnership and an engagement[5] (the latter was unambiguously quite an important family law institution earlier). Consequently it was primarily emphasised that cohabitation is not a marriage. The fact that a community of life is established between the parties was only subsequently recognised.

Concerning the financial consequences of cohabitation, women could claim a payment as an employee at the end of the relationship. The concept of the common assets of the parties and the fact that both of them acquired it was recognised both before the Civil Code and after it entered into force. Some years later this judicial practice changed: an unmarried partnership was considered to be an employment relationship and a payment could be claimed by women regardless of whether the conceptual elements of the employment relationship could be applied to the relationship and whether any increased assets were the result of the activities of both partners.[6]

It was stressed that cohabitation is a condemned institution which cannot be recognised even concerning the resulting assets when the partners have later married. This community of life could not bring about the legal consequences of a marriage and a family, but it could not be denied even in the 1960s that certain civil law consequences are attached to cohabitation – and it was this that gave rise to theoretical doubts.[7] There was an inherent contradiction: cohabitation endangers the ideal form of matrimony by its mere existence and it is at the same time a condemned relationship, but it is clear that some rights do emanate therefrom.

Comment No. 103 of the Supreme Court's Civil Board repeatedly emphasised that cohabitation – defined as a community of life outside marriage – cannot be legally equated with marriage. The following sentence in the comment goes on to state that cohabitation does not establish a family relationship and neither the consequences of matrimonial property, nor family law maintenance or inheritance law are applicable thereto.[8]

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szabályozása mikéntjéről" (About the character and regulation of the unmarried partnership) in: *Magyar Jog (Hungarian Law Journal)* 1977, 8, p. 705.

5 This differentiation was made by NIZSALOVSZKY - supra n. 3. - in the first section.

6 Supra n. 3, pp. 66 and 68.

7 Supra n. 3. NIZSALOVSZKY states that the aim should be the elimination of the unmarried partnership or its formulation as a marriage.

8 *Court Decisions* 1973/9. 323. *(Court Decisions – a monthly periodical published by the Hungarian Supreme Court)*

Comment No. 94[9] of the Supreme Court's Civil Board aimed to regulate the unmarried partners' legal position in much more detail. This comment made an effort to harmonise the law and reality where men and women do live together in a community of life and subsequently terminate such cohabitation. The comment refers to this social phenomenon by admitting that there are relationships not only between spouses and blood relatives but also between heterosexual partners and such relationships have to be evaluated.[10] The comment struck a balance: although it admitted that these communities of life „exist in a respectable way for decades in many cases" and „children are born and grown up within these frames", these relationships cannot result in a family in a legal sense because of the state's condemnation; they only amount to a „family-like social relationship". According to the comment, it can be determined that the basis of the family and family law is the eventual marriage[11] and although cohabitation creates a family-like relationship, only certain elements thereof require regulation.

It can be concluded from the above that the protection of unmarried partners' interests cannot be complete and their regulation cannot equate to the protection offered in the case of marriage; the two legal relationships differ from each other to such an extent that the rules of matrimonial property cannot be applied by analogy to the financial relationship between unmarried partners. However, as the substantive law did not regulate the financial relations between unmarried partners, the Supreme Court was forced to make use of an analogy:[12] by regarding cohabitation as a civil law relationship, it looked for a type of contract where the property rules can be applied to the special contractual relationship between cohabitants.

Although no type of contract seemed to be suitable, as the financial claims of an unmarried partner did not fit within any existing contract, on the basis of the economic criteria of cohabitation the Supreme Court adopted the notion that „the unmarried partnership, for the most part, contains the elements of a civil law companionship". By looking at the will of unmarried partners, the Civil Board stated that the cohabitants implicitly agree that the property acquired during their cohabitation as the result of their common economic activities

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[9] It was modified by the Comment No. 369 by the Civil Board.

[10] Comment No. 94 is described in detail in: *A Polgári Törvénykönyv Magyarázata 2 (Commentary to Civil Code 2)*, 1999, pp. 1680-1682 and ÉVA CSŰRI, *A házassági vagyonjog gyakorlati kérdései (Practical issues of the matrimonial property)* 2002, p. 34.

[11] KÁROLY SZLADITS, *A magyar magánjog vázlata II. rész (Outline of Hungarian Private Law Part I.)* 1933, p. 310.

[12] A „careful analogy" – as GYULA EÖRSI writes – GYULA EÖRSI, *Összehasonlító polgári jog (Comparative Civil Law)* 1975, p. 520.

becomes their joint property. A special so-called „community property of cohabitants" was established and, although it substantially deviated from matrimonial property, its practical effects could be very similar.

1.2. The legal regulation of the unmarried partnership from 1977 onwards

1.2.1. The Amendment of the Civil Code in 1977

Act No. IV. 1977 amended certain regulations in the Civil Code so as to modernise them in order to meet the requirements of social development and within the framework of this amendment the judicial practice as laid down in the Comments was transposed to the Code. In practical terms this meant that the Civil Board's Comment No. 94 was given legislative force.[13] The Act's explanation stressed that the special regulation of the financial relations of persons living in a common household was justified by this lifestyle's frequency and importance and that it most often occurs between unmarried partners. (Exactly the same rule is to be applied to the financial relations of any other dependants living together – excluding spouses.)

In one section the Civil Code contained both the definition of cohabitation and the rules on the partners' community property from 1977 to 1996. This community property was akin to a civil law companionship, i.e. it was not purely joint ownership.

1.2.2. The Amendment of the Civil Code in 1996

The amendment of the Civil Code in 1996 was the consequence of the Constitutional Court's decision in 1995[14] which highlighted the differences between the two forms of communities of life. In this case, the petitioner requested the Constitutional Court to declare two statutory rules unconstitutional: according to the petitioner both the rule in the Family Act stating that only a man and a woman can enter into a marriage and the rule in the Civil Code stating that only a man and a woman can cohabit give rise to discrimination based on sexual status. Consequently, the petitioner argued, these regulations are contrary to the Constitution, both the rule guaranteeing equal rights to men and women and the rule against discrimination.

In its decision the Constitutional Court drew a sharp distinction between a marriage and cohabitation. In its explanation the Constitutional Court first dealt with marriage. It developed – by referring to the constitutional protection of

[13] *A Polgári Törvénykönyv Magyarázata (Commentary to Civil Code)* 1999, p. 1682.
[14] Decision of the Constitutional Court No. 14/1995. (III. 13).

marriage – what it considered to be the twofold purpose of a marriage: primarily, and typically, the birth of common children and their upbringing within the family and at the same time providing a framework for the spouses to support and to take care of each other. Concerning children the Constitutional Court held that although the ability to procreate and to give birth to a child is neither a conceptual element of nor a condition for the marriage, it is nevertheless the original aim of marriage, the heterosexuality of the spouses thereby being one of the terms of a marriage. This opinion was fortified by referring to the following: the tradition in Hungarian culture; common knowledge; the international human rights conventions (which guarantee rights in connection with marriage not for human beings but especially for men and women); and the fact that the equal rights of the two sexes does not mean that the natural difference between them can be ignored.

In another part of its explanation the Constitutional Court analysed whether cohabitation can be made available for same-sex partners. Before coming to this point it is worth noting how the Constitutional Court interpreted the definition and the phenomenon of unmarried partnership. In answering the question whether marriage can be made available to same-sex partners, the Constitutional Court's point of departure was the aim and the function of marriage. However, the Constitutional Court did not deal with the real function and purpose of cohabitation at all. In its analysis it started with the differentiation which is made in the Constitution itself in that the family and marriage are both protected, while the unmarried partnership is ignored. It referred to the fact that the legal recognition of the unmarried partnership has a much shorter history than marriage. Concerning the legal status of cohabitation, the Constitutional Court was satisfied with the direct legal consequences under Hungarian law: partly the rules on marriage, but mostly the rules on dependants, are to be applied to unmarried partners. Following this not uncontroversial point of departure, the Constitutional Court examined whether cohabitation between same-sex partners could be recognised by the law.

It examined which legal rules contain rights or obligations for unmarried partners and it arrived at the conclusion that the law – within these bounds – considers a cohabitant to be just like a dependant and in these cases the differentiation between partners according to their gender violates the constitutional prohibition of discrimination, with certain exceptions. (The Constitutional Court referred to certain social security benefits concerning which no distinction can be made according to the gender of the partners who live together in a community of life.)

The aforementioned exception will apply if the law has been created with regard to either common children or to marriage with a third person. In these cases it is important to distinguish between the forms of cohabitation according to the gender of the partners. The Act on Public Health can be cited as one such exception where a differentiation has to be made concerning the gender of the partners: it makes artificial insemination available subject to certain conditions and the presumption of paternity is based on the common written request of the partners. The couple in question can be spouses and even unmarried partners, but only heterosexual unmarried partners according to the Act.

The Constitutional Court stayed the proceedings in the 1995 case discussed above so that the legislator could put an end to this unconstitutional situation and extend the definition of an unmarried partnership to cover same-sex partners. This occurred in 1996, so now even same-sex partners can legally cohabit according to the Civil Code.

The indirect evaluation of cohabitation cannot be regarded as a positive step. The fact that the Constitutional Court made cohabitation available to same-sex partners – in an indirect way – means purely, as can be clearly read in the Court's explanation, that it took into consideration the fact that homosexuality is no longer a crime and there appeared to be a strong demand for recognising the relationship of same-sex partners. (However, it was mentioned that cohabitation is considered to be a relationship between a man and a woman as in the case of a marriage according to the general belief.) Although the Constitutional Court tried to keep up with reality, the aforementioned clear distinction between a marriage and an unmarried partnership in general places cohabitation in a less advantageous legal position in comparison to marriage.

While analysing the institution of marriage, the Constitutional Court took as a starting point its function and traditional content – the raising of common children and the spouses supporting one another. In doing so the function of cohabitation was ignored. The starting point concerning unmarried partners is the fact that this situation is regulated by civil law as a special type of contract. The stressed aims of marriage are undoubtedly real aims but it can be questioned whether cohabitation has just the same objectives: the raising of common (or perhaps not common) children and support for each other. The provision of maintenance to each other even by cohabitants is the normal judicial practice in Hungary. The possibility of having a common child is even mentioned by the Constitutional Court itself (by denying the recognition of an unmarried same-sex partnership as far as a child is concerned).

Cohabitation is mentioned in the Constitutional Court's explanation as a long-lasting community and obviously certain duration is inseparable from cohabitation; in developing the definition of a marriage the Constitutional Court's view is unambiguous: a marriage is a long-lasting institution as the raising of children and supporting each other amounts to a lifelong commitment. Be this as it may, this situation does not reflect reality as the number of divorces is increasingly rising.

The Civil Code regulates cohabitants in two provisions:

„Unmarried partners – if there is no rule of law regulating the situation differently – are two persons who live together, without entering into a marriage, in a common household, in an emotional fellowship and in an economic partnership."[15]

„Unmarried partners acquire common property in proportion to the contribution they have made in acquiring such property. If this proportion cannot be calculated, the property is considered to have been equally acquired. Any work done in the household is considered to be a contribution in acquiring this property."[16]

2. The regulation in force concerning unmarried partners

While describing the rights of unmarried partners, the position of married spouses will also be taken into account.

2.1. The rights of unmarried partners under the Civil Code

2.1.1. The „community property" of unmarried partners

The financial relations of spouses – if they have not entered into a marriage settlement which deviates from the statutory matrimonial system – are regulated in the Family Act as statutory matrimonial property. According to this system the assets which have been acquired during matrimonial life, either jointly or by either of the partners amount to undivided joint property, with the exception of the spouses' own personal property. The assets which can be owned by each of them separately are listed in the Family Act and these have been supplemented by judicial practice.

[15] § 685/A. of the Civil Code.
[16] § 578/G. (1) of the Civil Code.

The financial relations of unmarried partners are regulated in the Civil Code. In 1977 it was emphasised that this rule expressly differs from the matrimonial property of spouses. According to the main rule, unmarried partners also acquire joint ownership, but this is a somewhat intermediate position between simple joint ownership and the matrimonial property of spouses. While spouses are owners in an equal proportion in all cases, cohabitants are owners according to the proportion of their contribution in acquiring the property. Classifying any work done in the household as such a contribution has been a positive step. It is especially important as this tends to protect the weaker party.

If the parties cannot prove the actual amount of their contribution in acquiring the assets, there is a legal presumption that the property has been acquired equally. In that case the position of unmarried partners will be the same as that of spouses in relation to property.

2.1.2. The unmarried partner's right of inheritance

According to Hungarian inheritance law the spouse is the deceased's legal heir. In contrast, an unmarried partner can only inherit by will. It is worth mentioning that a spouse can be excluded from succession – under certain conditions – if it can be proved that there was no longer any matrimonial community between the spouses. The legislator considers the inheritance of the spouse to be only justified if there was not only a mere bond, but also a real matrimonial relationship.

2.2. The rights of unmarried partners according to the Family Act

2.2.1. Parental responsibilities

There is only one very important family law issue where unmarried partners have the same rights as spouses, and this is the relationship between the parent living in an unmarried partnership and the child which has been born from this relationship, in other words the parental responsibilities of parents living in an unmarried partnership. The Family Act does not provide any special rule for this situation, because from the time when the paternal presumption is established, the rights and obligations of the parent living in cohabitation are the same as those of a married parent. The same is mostly true if the parents dissolve either their marriage or their unmarried partnership. The main difference can be the necessary intervention of the courts. The court has the power to decide on parental responsibilities if a marriage is dissolved and it can also decide ex officio. This is not the case when cohabitation ends as this is a factual legal

situation in Hungary. The court cannot intervene ex officio merely because the cohabitation comes to an end.

The Family Act does not differentiate according to the form of the community of life but according to whether the parents live together – either within a marriage or in an unmarried partnership – or, alternatively, do not live together.

The equalisation of the status of a child from a marriage and a child born out of wedlock is not wholly an achievement of the Family Act. Already Act No. XXIX. 1946, six years before the Family Act, provided a legitimate status for children born out of wedlock.[17] The system within the Family Act is based on this Act, as the legal status of the child is not connected with the status of its parents: it is the same not only for children of spouses and of unmarried parents, but also for children whose parents have never lived together.

The only difference is created by the establishment of paternal presumption. While the husband will automatically be the father of the common child, based on the fact that a marriage existed – even without matrimonial life –, the unmarried partner has to take steps to establish a paternal presumption, he has to make a voluntary recognition of paternity which has certain requirements under the Family Act. This can nevertheless cause a problem, e.g. if the mother not only has an unmarried partner but also a spouse even if there is no matrimonial community between them. The unmarried partner can recognise his paternity if the paternal status is not fulfilled by anyone else.

2.2.2. Rights which cannot be claimed by an unmarried partner

The Family Act does not guarantee additional rights for unmarried partners. It provides some rights for spouses during the marriage, but much more importantly it regulates rights which can be claimed after the ending of a relationship.

The spouse has the right to use the surname of his/her partner during the marriage and mostly thereafter. It seems to be a less important right, but it is worth mentioning for at least two reasons: firstly, in Hungary it is a tradition that wives use the name of their husbands and secondly, the number of cases dealing with the use of a surname is continuously growing. This is demonstrated by the number of cases before the European Court of Justice and even the European Court of Human Rights. The new Hungarian rules which modernised the use of surnames during the marriage entered into force in 2004.

[17] Supra n. 3, p. 255.

The real problem is that an unmarried partner cannot claim maintenance if the cohabitation terminates (in contrast to the spouse living apart from his/her partner and the divorced spouse who can claim for maintenance even if the marriage has not lasted for a long time, even if there is no child from the marriage and even when the spouse is cohabiting with another person after the divorce – subject to certain conditions).

The use of the common dwelling is one of the most painful issues in Hungarian family law, especially in divorce law. The Family Act provides detailed rules for divorced spouses as to how they can agree on this issue and how the court can decide in the case of disagreement – a minor child has a special right to remain living in the parental home. This is not the case for cohabitants, as the cohabitant's right to use the dwelling terminates with the end of the relationship.[18]

2.2.3. Other legal rules guaranteeing rights for unmarried partners

There are more than one hundred legal sources which deal with the situation where two people – either heterosexual or same-sex partners – live together in an unmarried partnership. Here are some examples. The Act concerning Family Support in connection with maintaining the child; the Act on Public Health in connection with information about the medical treatment given not only to the spouse but also to the cohabitant; and the Act on Social Insurance and on Health Insurance. One Act should, however, be emphasised: that is the Act on Pensions in Social Insurance. According to this Act not only the widow(er), but also the unmarried partner has the right to the widow(er)'s pension either if they had lived together for one year without interruption before the death and they had a child or if they had lived together for ten years without interruption before the death. In this case the pension of the unmarried partner is the same as that of the widow(er).

These Acts – which belong neither to family law nor to civil law but to public law – have two features which are important for our subject. One is that they give the unmarried partner the same right as the spouse in some cases and the other is that they mostly do not define the concept of an unmarried partnership.

[18] ÉVA CSŰRI supra n. 10, p. 37.

3. The judicial practice concerning the legal status of unmarried partners

3.1. The Definition of Unmarried Partnership and the Examination of its Existence

3.1.1. Definition

As it has been mentioned, none of the legal rules containing rights and obligations for cohabitants define the concept of unmarried partnership. This justifies an analysis of the definition in the Civil Code. This definition has a great deal of importance for other reasons as well: the guaranteed rights can only be enforced if it can be established that the cohabitation really existed. As there is no registration system for unmarried partnerships in Hungary, the court's task is to decide whether or not the relationship in question had reached the level of cohabitation. Evidence therefore plays a decisive role concerning the existence, the beginning and the end of cohabitation. The lack of any registration system means that in Hungary an unmarried partnership is devoid of any form and reference can only be made to a „factual model."[19]

Three of the requirements of the Civil Code definition approach the issue from the positive side: living together in an emotional fellowship, living together in an economic partnership and living in a common household; the fourth element of the definition actually serves to set a demarcation line between cohabitation and marriage: living together outside marriage. This enumeration has been complemented and developed by judicial practice. There are some further elements which are investigated in every dispute: the partners' intention to live together; the appearance of belonging together towards third persons; a long-lasting relationship; and the sexual relationship between the cohabiters.

Before analysing the recent judicial practice, it is worth examining how the Hungarian legal literature defines cohabitation and which elements of this concept are stressed.

Until the Civil Code definition, an unmarried partnership was merely described as a long-lasting community of life outside marriage, the pure existence of which was explicitly condemned.[20] Nevertheless, even in 1959 – when the Civil Code was enacted – it had also been determined in the legal literature that

[19] MIGUEL MARTÍN-CASALS differentiates between the factual model and the formal model in: *Mixing-Up Models of Living Together*, Working paper p. 5. (*ISFL* European Regional Conference October 2003.)

[20] Supra n. 3, p. 66.

cohabitation means considerably more than merely a sexual relationship; it is a community of life „which is essentially identical to the matrimonial community, the essential difference being the lack of a marital bond."[21] At that time cohabitation was considered to be an absolutely negative social phenomenon.

Cohabitation was a wholly unregulated institution at that time and judicial practice had not yet adopted a unified stance. This can be observed in the judicial practice during the 1950s: while one decision considered the difference between the two institutions to be minimal, the Supreme Court referred at the same time to the requirement that marriage should be protected at all costs against sexual relationships outside marriage.[22]

Some years later decisions can also be found which approach this issue in a more balanced way. In a judgement delivered in 1963[23] the court stated that a cohabitation presumes emotional, economic community and the community of interests. It generally assumes that a sexual relationship exists, but this relationship in itself does not result in an unmarried partnership. However, a sexual relationship is not an indispensable condition for cohabitation. Similarly, it is important to investigate whether the parties have lived in the same dwelling, but the lack of this element does not prevent finding that there is, in fact, an unmarried partnership. The court stated that it would also look at whether the cohabitants support each other, manage their financial matters together, use their income together and accept responsibility for each other towards third persons.

In the late 1960s and early 1970s there were quite a few decisions dealing in detail with the conceptual elements of an unmarried partnership, so the regulation of the Civil Code in 1977 was in harmony with the judicial practice at that time.[24] These judgements examine several factors of cohabitation.

3.1.2. What is an unmarried partnership according to judicial practice?

The conceptual elements of an unmarried partnership which became crystallised in judicial practice have not essentially changed since the above-mentioned decision from 1963. Exceptionally, either for lack of a sexual relation-

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[21] PÁL BAJORY, *Az élettárs és az élettársi viszony a polgári ítélkezésben (Cohabitant and Cohabitation in Civil Case Law)*, in: *Magyar Jog* 1959, 7, p. 208.

[22] BAJORY, supra n. 21, pp. 208-209 refers to the two cases with the remark that the courts declare their unfavourable decision against the unmarried partnerships, although it would be justified. In his opinion it is the task of the courts to express their view and condemn the cohabitation.

[23] The judgment of the Court of Budapest Nr. 44. Pf. 22320/1963. Published in: supra n. 13, p.1682.

[24] Supra n. 13, p. 1983.

ship or in case of living apart, the court can state that an unmarried partnership existed during a certain period of time. Real importance is attributed by the court to three factors: the emotional fellowship, the economic partnership and whether the partners' belonging together was obvious to third persons. The emotional part of the relationship can be measured subjectively, so the other two factors carry great weight.

The Supreme Court stated in one of its decisions in 2000[25] that the relationship between the plaintiff and the defendant could not be qualified as cohabitation. Their relationship was close, more than that which could exist between friends, but the plaintiff lived in Germany, the defendant in Hungary and the plaintiff resided in Hungary on rare occasions and intermittently so that it could not be regarded as cohabitation according to the general belief. (The lower courts had already delivered judgements in the opposite direction when an emotional fellowship and economic partnership were not taken into consideration and the lack of a common household could not in itself mean that there was automatically no cohabitation.) However, the Supreme Court attaches a great deal of importance to the existence of an economic community which could not be proved in the case at hand as the parties had only planned to enter into a common undertaking.

The criteria for the existence of an economic community have also been developed by judicial practice. An economic community means economic co-operation and it serves as ground for cohabitation if the parties co-operate in the interest of achieving a common aim, maintaining a common way of living and using their income for this common aim.

The economic criterion plays a decisive role in many cases. In the case of a dispute one of the partners often denies that there has been any cohabitation arguing that there was no economic relationship between them. It very often occurs that the economically stronger party – which is often the defendant (see the facts below) will argue along the following lines:[26] they have lived together for five years in his – the defendant's – apartment and the plaintiff has regularly assisted in his business activities although there was no real cohabitation. According to the defendant there was an emotional and sexual relationship between them but no economic community, as the plaintiff's assistance was compensated in the way of gifts. The lower courts upheld these arguments and decided that there was no unmarried partnership. This view was reinforced by the argument that the assets of the undertaking were managed by the defendant.

[25] Judgement of the Supreme Court No. Pfv. II. 20104/2000. Published in*: Közjegyzők Közlönye (Gazette of Notaries)* 2002, 4, pp. 18-19.

[26] Judgement No. P. törv. II. 20854/1987. Published in: *Court Decisions* 1988. Case No. 184.

In contrast, the Supreme Court emphasised the following: the details concerning the parties' relationship have to be fully investigated and it cannot be narrowed down to the management of assets. The Supreme Court concluded that the plaintiff had regularly assisted in the business without remuneration, the gifts being mostly consumer goods which were considered as necessities. Consequently, the source of the plaintiff's maintenance was the income from the undertaking which resulted from both the defendant's and the plaintiff's work, so there was indeed cohabitation between the parties during the five years in question.

A similar question emerged in another case:[27] each of the elderly partners had his/her own income, the defendant managed her own business – where the plaintiff also assisted – and both parties disposed of their own income: the defendant benefiting from the undertaking's income and the plaintiff benefiting his pension. The lower courts held that both parties had retained their economic self-sufficiency, there was no economic co-operation and, therefore, it did not amount to cohabitation. The Supreme Court stressed that the parties had lived in an emotional fellowship and even in a common household: the defendant took care both of herself and her partner, managed the household and their relationship was obviously an unmarried partnership in the eyes of third persons as well. Besides, it was emphasised in the reasoning that although both partners disposed of their own income independently, this was in order to achieve a common aim: to contribute to their common way of living. As their common will could be determined, it was irrelevant who actually managed the assets.

This judicial standpoint increasingly appears in several decisions. In one case the court referred to the fact that the method of managing the assets cannot be decisive because it can differ according to the particular circumstances of the cohabitants;[28] in another case it can be read in the reasoning that concerning such economic issues it cannot be expected of unmarried partners that they should fulfil more requirements than spouses.[29]

Of course, self-sufficiency in managing assets can be investigated and interpreted in connection with the other conceptual elements: in one case the court dismissed the action and denied any cohabitation when the parties not only

[27] Judgement of the Supreme Court No. Legf. Bír. Pf. V. 20816/1981. Published in: *Court Decisions* 1982. Case No. 142.

[28] Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20528/1995. Published in: *Court Decisions* 1996. Case No. 258.

[29] Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20759/1993. Published in: *Court Decisions* 1994. Case No. 252.

managed their own income, but their relationship was limited to common entertainment and journeys, the costs of which were met by one partner only.[30]

3.2. The connection between the matrimonial property of spouses and the community property of unmarried partners

Unmarried partners often enter into a marriage at a later date. The change in the partners' real community of life is not that great. Nevertheless, it is a great change in a legal sense: the unmarried partners' community of life is transposed into matrimony in a matter of seconds. As the courts should apply two sets of rules for this continuous and homogeneous community of life in case of its termination, there is a presumption in legal practice that the spouses transfer their common property acquired during cohabitation into the matrimonial property with an implicit agreement. The two communities of life create a unity so the beginning of the matrimonial community – which results in matrimonial property – is the actual beginning of their community of life.[31] (This principle is not applied where the spouses cohabit after divorce.)[32]

The question emerges whether a person can maintain a marriage and cohabitation with different partners at the same time. This is not excluded in the Hungarian system when looking at the factual model of cohabitation. In these cases it is fairly typical that the marriage is a mere bond and as it lacks the necessary matrimonial community there is no matrimonial property according to the Family Act. (If a marital bond and cohabitation co-exist, the law can provide some protection for the weaker party in any given situation.)

However, in one case the judge had to decide in a situation where the man practically had two „families", but, „of course", there cannot be two families in a legal sense: he lived by sharing his life between his spouse, with whom he lived together in a matrimonial community, and his cohabitant with whom he lived in a community of life in another household. He had children in both „families". The court stated that if the matrimonial community and matrimonial property had not terminated, their existence excluded the possibility of cohabi-

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30 Published in: *Court Decisions* 1994. Case No. 79.

31 ANDRÁS KŐRÖS, *Házastársi közös vagyon, közös lakás (Matrimonial property, common dwelling of spouses)* 2002, p. 36.
This viewpoint is not condemned in the legal literature. However, in the early 1960s NIZSALOVSZKY did not agree: according to him the court considered cohabitation to be an unvalid marriage and did not take into account that there was a huge difference between cohabitation and marriage). Supra n. 3, p. 70.

32 As emphasised by the court in the case No. P.törv. 21154/1992. Published in: *Court Decisions* 1993. Case No. 502.

tation and the establishment of joint ownership between the unmarried partners. In its reasoning the court referred to the fact that cohabitation has a presumption of living together with the intention of finality and this cannot be realised when one of the „cohabitants" still lives in a matrimonial community with someone else.[33] This „living together with the intention of finality" would create an element of cohabitation, although it is no longer an inherent element of either marriage or cohabitation.

According to the Supreme Court's viewpoint, cohabitation was created between the parties as its conceptual elements had been realised, but the application of the Family Act – there was matrimonial property – led to the result that there was no community property between the cohabitants.[34]

3.2.3. Arranging the unmarried partners' financial issues

Matrimonial property and the community property of cohabitants are distinguished from each other very sharply and expressly in judicial practice. Although the principle of equity is applied in settling financial disputes, it cannot be applied with the result that there is a deviation from the main rule of matrimonial property, namely, that, upon the termination of the matrimonial property, the common property has to be divided into two equal shares between the spouses. In one case which demonstrates this,[35] there was a division of the common property at the end of a relatively short marriage. The husband claimed that he should be given a greater share by arguing that the costs of everyday life – on a higher level – had been met by him alone as his wife was not employed and did not even work in the household.

The lower courts allowed this claim but the Supreme Court later overturned it: the spouses owned an equal share of their common matrimonial property and their contribution in its acquisition was irrelevant. The principle of equity is only to be applied in exceptional situations and – as was stressed by the Supreme Court – matrimonial property cannot simply be dealt with as cohabitants' community property.

Nevertheless, as the Civil Code only provides rules on financial issues relating to cohabitants on a limited basis, this regulation has been complemented to and developed by the courts on a case to case basis primarily by paying attention to the matrimonial community rules. So the cohabiters' common property and

[33] Judgement No. II. Pfv. 21375/1999. Published in*: Családi jog (Family Law Periodical)* 2004, 3, pp. 25-26.

[34] Mentioned by ÉVA CSŰRI, supra n. 10, pp. 39-40.

[35] Judgement of the Supreme Court No. Legf. Bír. Pf. II. 20800/1993. Published in: *Court Decisions* 1994. Case No. 34.

their own property are distinguished just like in the case of married partners; the requirement of equity is taken into consideration by the court; it is the intention that neither of the cohabitants should be wronged[36] and that their financial claims should be fairly and finally settled.[37]

Before the division of the unmarried partners' community property a balance sheet has to be drawn up – just like in the case of dividing matrimonial property – and the court has to state which assets have been acquired during their community and how they have contributed to it.

In one case[38] the plaintiff requested the division of the common property and had noted proportions of each of them, but the defendant counterclaimed that the plaintiff had only lived in her flat as a tenant, contributing towards his board and lodging and helping around the house and in the defendant's business. The court declared that cohabitation had been established based on the concrete circumstances of the case and regarded the following to be established in a detailed way: the actual financial situation – the income from the undertaking, the pension of the plaintiff, the household costs, and the actual activity of the partners: the household chores carried out by the defendant and the work done in the undertaking by both of them. The court stated that it could only decide on the basis of express and unambiguous facts.

3.3. The obligation of unmarried partners to maintain each other during cohabitation

Concerning spousal maintenance, the Family Act expressly regulates only the maintenance of the spouse living apart and that of the divorced spouse, but does not contain any express rule on spousal maintenance during the marital community. Instead of this the Family Act has provisions on covering the common household costs. Concerning cohabitants, there is no possibility of maintaining the cohabitant living apart from his/her partner (if the community of life is intentionally terminated), as living together is an immanent element of the factual model and the maintenance of the ex-partner is not possible.

[36] The reasoning in the judgement No. P. törv. II. 20616/1983 expressly refers to this. Published in: *Court Decisions* 1984. Case No. 225.

[37] The reasoning in the judgement of the Supreme Court No. Legf. Bír. Pfv. II. 23218/1995 expressly refers to this. Published in: *Court Decisions* 1997. Case No. 24.

[38] The reasoning in the judgement No. Eln. Tan. P. törv. 21467/1979. Published in: *Court Decisions* 1980. Case No. 245.

However, according to the court, the maintenance and taking care of each other in the course of the community of life is an element of the cohabitation which is inseparable therefrom, just like in the case of marriage. This confirms that the matrimonial community and the cohabitant's community of life are very similar. (It should be reiterated that in some cases Hungarian law only provides for spousal rights when the actual community itself is maintained.)

The basis of a case[39] dealing with this issue was that the partners who had cohabited for three years had entered into a contract under which one partner was wholly obliged to maintain the other, the latter being obliged to transfer the ownership of his immovable assets. During the next five years the defendant ran the household and carried out work around the house, while the plaintiff partly covered the costs of the public utilities and both of them contributed towards the costs of necessities. The lower courts stated that although they had entered into an agreement, they also lived together in cohabitation at the same time, which is available according to the law. The Supreme Court referred to the fact that the partners' relationship remained that of cohabitants and although unmarried partners can enter into a contract on maintenance, the obligor can only claim compensation upon the termination of their contractual relationship only if he/she has covered the costs of maintenance from his/her own property and the services rendered went above and beyond the sphere of activity which is inseparable from the cohabitation itself.

Similar to this was another case[40] where the partners had entered into a contract[41], under which one of the cohabitants was obliged to maintain her partner. The Supreme Court stated that although cohabitants are not obliged to maintain each other statutorily, the conceptual elements of cohabitation assume the obligation of taking care of each other. Consequently, the contractual maintenance could not apply if the value of the services rendered by the obligor did not exceed the level of activity which forms part of the cohabitation according to the general belief.

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[39] Judgement of the Supreme Court No. Legf. Bír. Pfv. II. 22557/1999. Published in: *Court Decisions* 2002. Case No. 268.

[40] Judgement of the Supreme Court No. Legf. Bír. Pfv. II. 22066/2001. Published in: *Court Decisions* 2004. Case No. 280.

[41] It was a so-called „contract to inherit", the main obligation under which is to maintain the another contractual party.

4. The regulation of the unmarried partnership – de lege ferenda

A new Civil Code is currently being prepared in Hungary and within the framework of this process the Concept of the new regulation and the Regulation Programme were published in February 2003.[42] The reform has been motivated by the great changes in the field of private law resulting from the social and economic developments over the last few decades which have made new and more suitable private law regulations a matter of necessity.[43]

During the creation of both the Concept and the Regulation Programme several viewpoints were taken into consideration, for example the legal situation in the European Union and foreign codifying experiences. Regarding the latter, the Concept emphasised that the solutions adopted by some major codifications – the ABGB, BGB and ZGB – were already taken into consideration in the current Civil Code. Emphasis was placed on the Civil Code of the Netherlands, which „can serve as an example primarily regarding the sphere of the regulated relationships and their structure" in the course of the codification but it is not going to be a regulation model as a whole. The Concept relied on the results of the Vienna Convention, the UNIDROIT Principles and the European Contract Law Principles.

It is planned that the Code will contain five books, the second of which will contain family law regulations. (As a consequence of which family law will be regulated within the framework of civil law – albeit with special principles – and not by a separate act.) As one of the greatest changes in family law, the unmarried partnership will be removed from the contractual rules of the Civil Code and will be placed in the Family Book. The importance of this step was demonstrated by the Concept which also dealt with this issue.

Three years later, in March 2006 the Proposal of the Third Book of the Civil Code, namely the Family Law Book and its Commentary was also published. It contains the proposed legal rules – in harmony with the intentions of the Concept but taking into consideration the experts' different viewpoints, too. The Proposal provides an indication of the same careful balancing which could be seen earlier in both the case law and the legal literature. According to the Pro-

[42] *Az Új Polgári Törvénykönyv koncepciója és tematikája (Concept and Regulation Programme of the New Civil Code)*, published in: *Hungarian Official Gazette (Magyar Közlöny)* Febr. 2003.

[43] Supra n. 42, p. 7.

posal there is a need to guarantee further rights for cohabitants, but only in a way which does not weaken the institution of marriage.[44]

Already the Regulation Programme dealt in detail with the cohabitation's regulation itself,[45] as this is one of the most debated issues and although the Programme referred to the fact that the current solution which considers cohabitation to be a form of contract is no longer suitable, based on public opinion and also the number of persons cohabiting, there is still a great fear that if we extend the unmarried partner's rights, it will result in the weakening of marriage. The Programme admitted that cohabitation is very similar to marriage and it arrived at a compromise: the unmarried partnership has to be regulated according to the viewpoints of family law, but it cannot result in the same regulation for cohabitation and for marriage.

The main changes would be the following:

I. The definition of the cohabitant's legal relationship will mostly be formulated as today. Nevertheless, some restrictions will be introduced: the cohabitant is not allowed to live in another cohabitation or in a matrimonial community with a third person at the same time, whereas the mere matrimonial bond does not preclude the creation or the maintenance of an unmarried partnership. This means the preservation of the judicial practice. It will be formally prohibited for the closest relatives namely both for the (grand)parent and child and for the sisters or brothers to live in cohabitation as their marriage is also punished by the Criminal Code.

II. It was a hotly debated issue whether there is a need to set up a register for the unmarried partners. The Proposal does not plan to introduce a general registration system for cohabitation, the aim being to avoid the creation of „another kind" of marriage. Nevertheless, unmarried partners would get the opportunity to register their relationship although the existence of cohabitation would not depend on this registration, but it would make the proving of cohabitation easier. Cohabitation would preserve its factual character and the legal consequences of the registered cohabitation are to be the same as those of the non-registered version. The institution of registered partnership which is known in several legal systems is not planned to be introduced at all. The cohabitation would be available for same-sex partners as well, who want to maintain a relationship recognised by the state.

[44] Supra n. 42, p. 14. Since the Regulation Programme was accepted and published in 2003, the proposal have been continuously discussed by experts.

[45] Supra n. 42, pp. 50-51.

III. As a consequence of the fact that cohabitation would be part of the family law, while recognizing its family-like character the Proposal contains obligations for the cohabiting partners: they are obliged to cooperate for the sake of their common aims and to support each other. The requirement of solidarity is in harmony with the judicial practice which considers the mutual maintenance during cohabitation as one of its immanent elements.

IV. With respect to the financial consequences of cohabitation the differences between the financial scheme of the spouses and of the cohabitants would be retained: the rule according to which a cohabitant would acquire ownership or can claim compensation only in the proportion of his/her contribution in acquiring the assets would not be altered and the cohabitant will also not be the legal heir of his/her partner. The cohabitants can arrange their financial relations by contract just as the spouses living in matrimonial community. This is in harmony with the experts' and the Proposal's idea which is to promote the self-determination of the partners.

Nevertheless, as the Hungarian partners living either in marriage or in unmarried partnership enter into agreements on their own affairs relatively rarely, we can expect that mostly the courts will have to decide in financial issues. As there have been quite much uncertainties in the judicial practice how to judge some financial matters, the aim of the Proposal is to give unambiguous answers. An important difference between the rules of the marriage property law and the property law of the cohabitants can be realised at this point: whereas the Proposal endeavours to give detailed rules for the spouses, it does not aim at providing so particular ruling for the cohabitants.

V. Two fields can be named where the law would give new and detailed regulation of the financial issues, namely, maintenance and the use of the common dwelling in the interest of a minor child. Both of these institutions are well known – also – in the Hungarian family law for the spouses after divorce. The maintenance of the ex-cohabitant would not be an automatic right as the Proposal, besides other requirements, necessitates certain duration of the partnership. It is an important point – and would not be a Hungarian unique – that the existence of the common child makes it possible for the partner to claim for maintenance after one year of cohabitation. If there is no common child, the maintenance can be demanded after only at least ten years of cohabitation.

The use of the common home could be arranged by contract between the partners and lacking of agreement the partner can ask the court to decide about the use. The decisive principle of this institution is the same as that of maintenance, it can be granted to a cohabitant following a long-lasting relationship and/or in the interest of the minor.

5. Conclusion

Many questions emerge while examining cohabitation, and not only under Hungarian law. Several of them cannot be answered either by the statutory law or the case law. These are the questions of legal policy. One of these questions is whether it is really the best solution to provide the same rules for cohabitation between heterosexual and same-sex partners. Although it is true that both relationships are based upon cohabiting with each other, it is nevertheless the case that heterosexual partners – at least most of them – can also enter into a marriage, while same–sex partners can not.

The analysis of why heterosexual partners do not marry is not the task of jurisprudence but of sociology, the results of which cannot be ignored by family law. The continuous increase in the number of persons cohabiting is clearly indicated by the Hungarian statistical data: in 1990 5 percent of partner-relationships were in the form of cohabitation, in 2001 this proportion was 11 percent. According to the results of a demographic investigation a quarter of all persons who have ever lived in a partner-relationship, have lived or live in an unmarried partnership. The number of persons up to 29 living in an unmarried partnership has been increasing since the 1990s.[46]

A marriage and an unmarried partnership serve the same function. Even if this question does not emerge in Hungarian statutory law, judicial practice has developed the concept of the matrimonial community and the community of life of cohabitants with the same result. The next question can be that while spouses without children are considered to be a family – which is increasingly found by the European Court of Human Rights – can we also state that unmarried partners without children cannot be considered to be a family at all?

The last question can be whether the Hungarian regulation of cohabitants in force provides a satisfactory solution. The answer depends on the starting point: if it only concerns the status itself, our answer is „yes", but if we take into consideration the fact that family law is moving towards a contractual situation and self-determination, then our answer should be "no". The Proposal provides better status to the cohabitants but it is debated and is going to be debated for a while before its acceptance.

[46] ERZSÉBET BUKODI, *Ki. mikor, kivel (nem) házasodik?(Who, when, with whom (not) Marry?)*, 2004, pp. 122-123.

SUMMARY

Unmarried Partnership in Hungary – Today and de lege ferenda

ORSOLYA SZEIBERT ERDŐS

The essay offers a brief overview of cohabitation against the background of relevant Hungarian rules of law currently in force and recommendations on the recodification of Hungarian civil law. The first part of the essay is a historical survey of judicial decisions on disputes between cohabitants in the absence of relevant legislation; then, in 1977, the Civil Code acknowledged cohabitation as a legal institution, and those provisions were amended in 1996 in the wake of a resolution of the Constitutional Court.

The second part of the essay discusses the rights of cohabitants and their status as it is defined in the Hungarian Civil Code and the Act on Family Law. The Civil Code regulates the cohabitants' property relations. Under the present legislation the cohabitants may not inherit from each other. As for their family-law position, they may get custody of children irrespective of their marital status. Under the rules presently in force cohabitation does not qualify as a family-law relationship. In concrete terms it means that cohabitants may not bear each other's name and, in case cohabitation is broken up, neither partner may claim maintenance or tenancy. By contrast, there are some other rules outside the Civil Code that grant certain rights to the cohabitants.

As the provisions on cohabitation in the Civil Code are terse and more and more people in Hungary have been practising cohabitation, judicial practice has had to expand on, and make more precise, relevant legislation. One of the questions that arose right after cohabitation appeared in the Civil Code was what exactly were the criteria for a partnership to qualify as cohabitation. The essay gives a detailed discussion of the judicial decisions on that topic, with attention paid to what degree are the various criteria acknowledged by the courts.

Next the essay examines practical aspects of the shared elements of marital property and the community property of cohabitants. It is pointed out that conjugal community and the cohabitation community are categories that mutually exclude each other. The author cites court cases to demonstrate that, even if it is not explicitly provided for in any Hungarian legislation, judicial practice has

proved that cohabitants are supposed to support each other during their partnership.

Finally, some issues of theoretical importance are raised, and novel elements of the recommendation to recodify Hungarian civil law are presented.

RESÜMEE

Nichteheliche Lebensgemeinschaften in Ungarn – heute und de lege ferenda

ORSOLYA SZEIBERT ERDŐS

Die Studie stellt kurz die Lebenspartnerschaft vor, wobei sie die derzeit gültige Regelung und den Inhalt der im Rahmen der laufenden bürgerlichen Rechtskodifizierung erstellten Empfehlung beachtet. Der erste Teil der Studie ist ein historischer Rückblick, der darlegt, wie die richterliche Praxis Streitfragen zwischen Lebensgefährten mangels einer gesetzlichen Regelung gelöst, wie diese Praxis dann im Jahre 1977 Rechtskraft erlangt hatte, bzw. wie sie im Jahre 1996 als Folge des einschlägigen Beschlusses des Verfassungsgerichtes modifiziert wurde.

Der nächste Teil der Studie stellt die Rechte und die Situation der Lebensgefährten auf Grund des ungarischen Bürgerlichen Gesetzbuches und des ungarischen Gesetzes über das Familienrecht vor. Zwar gibt das ungarische BGB eine Regelung zur Klärung ihrer Vermögenssituation vor, jedoch dürfen sie keine gesetzlichen Erben sein. Was ihre familienrechtliche Position betrifft, so stehen ihnen die elterlichen Aufsichtsrechte bezüglich eines Kindes unabhängig davon zu, ob sie verheiratet sind oder nicht. Gleichzeitig aber gilt ihre Beziehung zurzeit nicht als familienrechtliches Rechtsverhältnis, das heißt, sie haben kein Recht zur Namenstragung, nach der Auflösung der partnerschaftlichen Beziehung keinen Anspruch auf Unterhalt, bzw. kein Wohnungsnutzrecht. Demgegenüber werden den Lebensgefährten durch sonstige Rechtsvorschriften, die keine Rechtsvorschriften des bürgerlichen Rechts sind, bestimmte Berechtigungen gewährt.

Die wortkarge Regelung im ungarischen BGB hat die Erweiterung und Präzisierung des Rechtsmaterials bezüglich der Lebensgemeinschaften auf dem Wege der richterlichen Praxis nach sich gezogen. Dabei ist derjenige Aspekt

insbesondere hervorzuheben, dass die Zahl der nichtehelichen partnerschaftlichen Beziehungen auch in Ungarn stetig steigt. Eine der Fragen, die sich praktisch sofort ergab, war, wann sich genau der Begriff im ungarischen BGB, der die nichteheliche Lebensgemeinschaft bestimmt, realisiert, das heißt, ab welchem Punkt wir über eine nichteheliche partnerschaftliche Beziehung sprechen können. In diesem Themenkreis gab es mehrere Entscheidungen, über die uns die Studie einen detaillierten Überblick gibt. Sie zeigt schrittweise auf, in welchen Fällen die Realisierung der einzelnen Elemente der erwähnten Definition von der richterlichen Praxis akzeptiert wird.

Die Arbeit stellt ebenfalls mit Hilfe einer praktischen Analyse die Schnittpunkte der ehelichen Gütergemeinschaft und der nichtehelichen partnerschaftlichen Gütergemeinschaft vor, bzw. erläutert denjenigen Punkt, dass die eheliche und die nichteheliche partnerschaftliche Beziehung einander ausschließende Erscheinungen sind. Ebenfalls auf Grund von Rechtsfällen wird dargelegt, dass – obwohl die Rechtsvorschrift dies nicht ausspricht – die Praxis eindeutig den Standpunkt einnimmt, dass die Lebensgefährten einander während des Bestehens ihrer Beziehung unterstützen müssen.

Schließlich gibt die Studie – neben der Skizzierung einiger theoretischer Fragen – einen Überblick über die wichtigsten Neuerungen der im Rahmen der Kodifizierungsarbeit erstellten Empfehlung.