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PERSPECTIVES OF THE INSTITUTION OF MARRIAGE

*In the light of challenges concerning the bond, the rights and obligations and
the contracting parties*

Abstract of Doctoral Thesis

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I. SUBJECT AND RESEARCH OBJECTIVES

Marriage is one of the most complex social phenomena, fundamental medium of the birth and development of the individual, the family and of the society. Our starting point from a legal perspective is also its complexity: fundamental institution for the individual, for personal life, family as well as a social, constitutional and common good.

That the institution of marriage is of high value, that it is for the benefit of both society and individuals is well grounded by the fact that not only international conventions recognize it as a fundamental right, but it is also declared as a constitutional value and recognized by the State. Surveying effects that can be observed by the law it is outlined that if the definition of marriage is not dogmatically precise marriage is doomed to be redefined. This issue is addressed through three challenges. If the notion is reinterpreted a paradigm shift will occur, the signs of which already bring many contradictions and consequences are unpredictable. Is there a universal concept of monogamous marriage? From a regulatory point of view the question is: what is exactly the protected value and how is marriage protected by the constitutional system? First and foremost we are seeking the answer to what the essence of marriage is, until what point can we talk about marriage, omission of which elements eliminate its *differentia specifica*. This field is completely restructured by new forms of partnering consequently their impact on marriage may be examined, whether there is a relationship oversupply and what the consequences are.

Can it be analyzed legally what is the correlation between the legislation and the fact that the number of marriages is decreasing and that citizens increasingly choose cohabitation over traditional family based on marriage? The past hundred years has brought about more changes in legally regulated partnerships than the previous centuries.

Since the conceptual framework of the institutions is challenged that is the aim, the content and the form of marriage, our starting point is chosen accordingly, the most fundamental, conjunctive elements of marriage are discussed in the following scheme. Marriage is complementary, exclusive legal bond of the parties based on equality, which is established by their statement of intent. Thus creating an institution recognized by the law from which rights and obligations derive to the parties and by which they appear as a unit towards the society and the legal system. Hence they undertake each other and the common life, endeavoring to foster stability in a community of solidarity, creating a family that is their relationship is structurally directed towards the birth and upbringing of children.

Of course when analyzing the legal instruments the objective of the legislation always considered primarily that is served by content and form. So the underlying question is always how a specific rule attend to the purposes of marriage. The conceptual analysis thus involves three questions according to the three challenges of marriage: 1. The framework of marital bond, the institution constructing legal commitment. 2. The rights and obligations of spouses that is the institutional character emerging from the content. Since these two are related more deeply and because of the challenges of competing partnerships, marriage and other relationships are analyzed in separate chapters. 3. The challenge concerning marriage as a complementary relationship of the parties aiming reproduction and formation of family.

One conclusion from the historical perspective of the institution of marriage can certainly be deducted: marriage is a successful legal institution. Although through the course of history a variety of forms of companionships have unfolded in different societies but there has been marriage and marriage will exist. The essence of marriage, its model required for good function has not changed, although the circumstances have refined the institution. The question is, if the legislature is making changes that affect the notion itself, can we still talk about marriage in the future?

II. METHODOLOGY

When analyzing the conceptual elements of marriage the parties to the marriage are being dealt with as spouses – marriage as a covenant created for the benefit of the parties - rather than dealing with them primarily as co-parenting partners. However, we do not deny, and expressly refer to the fact that one of the highest good, both in the relationship of the parties and in a social perspective is birth and raising of children.

Thus, we examine marriage as an institution of legal commitment that guarantee the achievement of legislative objectives by the rights and obligations of the parties. From the three challenges the first two, due to their mutual impact, are closely linked. First, it is examined whether its regulation complies with its internal institutional ordinance. Second, it is questioned to what extent is the institution's system upset by the external challenges that certain effects can be obtained without legal bond. The interaction between the framework of legal commitment and legal content are examined parallel in the chapters on marriage and other competing partnerships. Third is how the purpose of marriage, its direction to reproduction, its nature of different-sex, its complementary character is being challenged. Naturally just as the conceptual elements, the challenges are interrelated.

Given that the regulation of marriage and partnerships affects many areas of law it is necessary to narrow the research, so it is primarily in private law, family law and in constitutional law, fundamental rights. The reason for this is that marriage as an institution simultaneously considered to be the most personal and private institution and an institution of basic constitutional significance for society. Therefore parties and their relationship are not primarily considered as taxpayers or subjects to social rights or procedural exemptions but these serve as background, as means to the realization of the constitutionally protected private institution.

1. It was subject to doctrinal analysis how the regulation in the internal and external relations of the parties at the beginning and at the end of the relationship fosters the success of marriage. Since the protection of marriage and family life – declared fundamental values – in everyday life, is carried out through the rules of family law so it is an important issue whether this prioritization is accomplished by family law. It is the evident interest of society to produce solid relationships and families on stable base for society's basic element is the community of "woman and the man created for the purpose of procreation" that is family, where personality may unfold. Therefore it has been considered how regulations of celebration and termination of marriage affect the durability of marriages as a legislative goal.

2. In terms of content we analyzed the effects of the expansion of marriage rights to other partnerships. Thus the weakening effects of expanding regulation of cohabitation and appearance of registered partnership is reviewed. Three more aspect may enhance the examination of the legal reform: extent, coherence and time. In other words how many rules involving partnerships are implemented, are these coherent with each other and with the objective of family law legislation and to what extent do these follow social changes and needs and how much is induced by them. As a method for this legal institutions were compared and evaluated, namely that in the regulation of marriage and other forms of partnership what legal technicalities, substantive similarities and differences can be observed. In addition to the substantive rules, critical analysis of literature also it helped to explore solutions. Furthermore analysis of practical problems, comparisons and dogmatically researched conclusions also promote finding solutions.

Naturally for extent and practical reasons the scope of the research has to be narrowed down. Legal systems were named to observe distinct and corresponding reactions given for similar

social challenges. Also this gave a chance to classify different partnership regulation categories employed in those different systems. The main directions of the research, besides the Hungarian legal system, were chosen from the Germanic, Nordic and Napoleonic as well as the Anglo-Saxon legal families underlining unique solutions important in certain respect. The Germanic legal family – especially the German legal system – has had great influence on the Hungarian legal system and in particular on private law which alone would provide enough explanation, however its European impact makes it dominant for the comparison. From the perspective of civil marriage the importance of the Napoleonic Code – and those civil codes based on it – is prior to any other. The Spanish legal literature discusses the topic of marriage and other relationships in a vivid manner. In addition the especially strong effect on the canon law can be emphasized, which is exemplified by the fact that indissolubility of marriage had been maintained until 1981. Consequently, in some cases, civil legal elaboration strongly adheres to canonic dogmatics, particularly so with terms. On the other hand, the changes coming at high speed to a not fully elaborated area. The development of Nordic countries is interesting because of the advanced level of harmonization especially in the area of family law may serve as an example to European legislation.

The Anglo-American legal family is important due to its unique nature and the heterogeneity of its systems. Also its specific solutions, particular approach to legal thinking with regard to marriage may also significantly influence. England and Wales are discussed, important from a European perspective and some US solutions are also considered.

Thus, the international scope covers from countries (Sweden) of full state regulation of same sex marriage through registered partnerships to *de facto* cohabitations to states (Germany) regulating marriage to different-sex couples, but having registered partnership and some countries (France) where the private autonomy of the parties is favored as well as the lack of regulation of the partners (Poland) in order to enhance understanding of the effects of these systems and their jurisprudence. The analysis of the Spanish legislation has been chosen on the one hand because of the particularity of regulation of cohabitation, on the other hand marriage is open to same-sex couples so the system cannot be considered homogeneous.

The study of partnerships is divided to structural and functional analysis that is a after describing the regulation of a model its operation and current problems and social functions can be examined.

3. Considering the aim of marriage legislation we face that marriage and its nature for a childbearing is challenged by redefining the institution as an emotional bond of two people recognized by the state when marriage is opened to partners of the same sex or when marriage-level rights are available through registered partnership.

The right to marry as declared international conventions and the Constitution is analyzed along with its jurisprudence complemented by the constitutional protection of marriage and family and its interpretation of the Constitutional Court. The practice of the European Court of Human Rights has been studied. Additionally considering US Supreme Court's gradual shift - and the legal reasoning used to - in extending the definition of marriage seemed to give a profitable perspective.

After analyzing the regulation and practice of those countries the European Union and its gradual advance – particularly through the right of free movement – in private law and effects on marriage and cohabitation is focused on. Since Hungary cannot exempted from the influence of European law, therefore the possibilities of harmonization and the specialty of family law in EU law and the practice of the Court of Justice of the European Union is being looked at. It is important due to the European context to have a look at European trends which could influence the direction of legislation of partnerships. Thus, both the EU competences and the Charter of

Fundamental Rights of the European Union as well as family law legislation formed the basis of the analysis, along with the relevant judicial practice. Furthermore, both to the harmonization and to the comparison comparative literature like the Commission on European Family Law's work and some provisions of the Model Family Code.

III. THE RESULTS AND THE APPLICABILITY OF THE RESEARCH

The answer for the question what place, role and future has marriage in society as a result of the changes around and in its legislation and jurisprudence was pursued. The prerequisite for the legislation of civil marriage is to think about what kind of interest the legislature has in regulating. Also where the limit is on regulation without violating rule of law principles such as the protection of private life, legal certainty or the legal guarantees of fundamental rights. If the state protects marriage as an institution it certainly means that the essential elements of marriage its framework, all that makes marriage a marriage are considered important and whatever does not fall into this is not. That is a choice of values and so it has been a question under what conceptual content are those values meant and if the legislator is changing those and can change them.

A complex consideration of social aspects was intended where public opinion, social perception can form part of however they cannot be sole components it is also built on culture, history, and social realities. It has been found that if marriage and family as a stable, legal bonding, institution to birth and rear children are disrupted the state must enter to replace some of the functions. If marriage breaks up, or never contracted the social network steps in to roles where marital based family is best, most effective and least expensive.

Three basic aspects of the notion of marriage have been the center of the study with the thesis that the lack of any of them leads to the cease of marriage as an institution of special private and public protection.

1. The legal commitment: marriage is the legal bond of parties constituted by their statement made before the community that cannot be time limited or conditioned, that is dissolubility is not a conceptual element.

1.1. Stability is one of the basic elements of marriage, therefore, it has been reviewed what could foster lasting marriages. The conclusion was that neither rapidly contracted marriages nor the disappearance of engagement helps. It is also highly doubtful if the legislator in certain aspects identifies marriage and cohabitation preceding marriage the consequences for marriage will be beneficial.

1.2. Since international human rights instruments do not stipulate that the parties only have right to conclude civil marriage but since marriage is contracted by their statements there can be systems where religious marriage has civil law effects. There is a legitimate interest to jointly exercise the fundamental right to marry and the fundamental right of religious freedom. In some countries the state acknowledgement can be delegated without violating to the separation of church and state.

On the one hand this gives a better understanding of the essence of marriage as a private institution that is only recognized by the state, or the community, on the other hand the importance of this declaration.

1.3. In addition, the ongoing simplification of divorce already decreases stability to more or less durability which is further decayed by administrative divorce. Consequently this would raise the question of the aim of state regulation and legal effects would rather have to be linked to time spent living together and as a result the distinction of marriage and cohabitation would become pointless. These tendencies are reflected in unilateral divorce, elimination of the waiting period before concluding marriage, that the terms and effects are related to cohabitation and that the legal effects of short-term marriages are different. It has been observed that the high ratio marriage breakdown is interplay and consequence of complex socio-legal factors.

Hence where divorce law became no-fault the number of breakdowns only started dramatic a growth when the new concept of marriage had become widespread. Alternatively where marriage was indissoluble or fault divorce persisted due to the high number of cohabitations by the time no-fault became available marriage breakdowns did not jump. Questions raised by disappearance of fault divorce – thus reemerging breach claims – are discussed in the rights and obligations section. However, covenant marriage as a legal experiment to restore stability of marriage in some states of the United States is examined to discuss the means to defend marriage ties.

So on one hand divorce regulations alone – however strict they may be – cannot ensure the stability of marriages if partners may live in other partnerships. On the other hand, infinitely liberalizing divorce rules makes marriage a very risky undertaking to commit to and leads to the redefinition of marriage as permanence fades away. The marriage bond is created only if it is concluded unconditionally and without time limit, so the marriage, which had been contracted until the eventual divorce is subject to conditions (therefore nonexistent). The dissolution can only occur under the legally not supported cases when a marriage is completely and irretrievably broken down.

1.4. The fact that it is easier to divorce and despite this fewer and fewer people are getting married and more and more people are living in cohabitation is illogical, because if it is easier to leave a marriage, then why not get married, why opt for cohabitation? In cohabitation there is no need to commit even that much, no living together no cohabitation.

Due to contribution theory it is difficult to determine what the parties are entitled to in a cohabitation which is consequence of its contractual character. Furthermore, it is also difficult to establish to what scope should the legislator extend regulations for ex-cohabitees.

It is important that the sociological notion of cohabitation will always cover a broader scope than the legal notion of cohabitation, and in relation wide frame of legal consequences are not necessarily supported by legal facts. The Hungarian legislation – which is rather criticized in the literature – provides fairly broad range of rights and neither is it unique that more rights are offered to cohabitations that form a natural family in a European comparison.

2. Rights and Responsibilities: it has been examined what balance is required in the regulation taken into account the social position of the marital relationship and marriage as a private life institution.

2.1. The subject of the marriage is the common life, the legislature declares the minimum obligations of the spouses for its functioning. Although fulfilment of these obligations belongs to the private life of the parties and are unenforceable but are deriving from the nature of the relationship.

The fact does not make rights and obligations less legal, however the most recent case law sanctions if their violation is so serious that it constitutes a violation out of the scope of family law and the legal system reacts to it anyway. The family law responses aim the termination of community life or common property. Hence with abolishing the fault based divorce some claims are left without response unless privacy sanctions are used however their adequate use is doubtful.

2.2. When reviewing the rules of the different countries of horizontal comparison on marriage and vertically the various partnership forms it has been found that marriage cannot be understood without the context of other relationships so cohabitation and registered partnerships were examined in detail as well.

2.3. This paper provides an overview of the main types of European property regimes and analyzes the doctrinal background of those various systems. The property regimes are culturally, historically firmly embedded, which conveys society's image of marriage in the crossfire of modern marriage equality and individualistic approach. In this comparison the Hungarian limited community system balances well between community, solidary and

requirements of individual autonomy in marriage. The Civil Code concerning marital property agreement gives free way for spouses to contract differently from the default regime with very few limitations of family protection rules which could be more pronounced according to the comparison. Naturally, family law principles of equity and protection for the weaker party can help the jurisprudence to elaborate which marital agreements are found unjust in view of the constitutional protection of marriage and family.

2.4. National registry of marital property agreements and cohabitation property agreements as public registers is doubttable to prove efficient. At least if a real estate is involved in the agreement spouses should be obliged to register it to the land register.

2.5. The theoretical background of the material systems has been analyzed to see whether partners are benefitted from the property on an approach based on solidarity and community or individualism and autonomy. Examining that property acquired during the common life will be property of both spouses some issues have been raised. This is especially important in the case of real estate property which is acquired in this case out-of-the-registrar that naturally, acts against the public credibility of the land register. The approach of the law is protecting third parties by an independent norm of disposition of the collateral in the new Civil Code. The number of such acquisitions is incomparably greater than adverse possession and the balance between the two interests has been discussed. Hence it could be indicated in the land register that the real estate has been acquired jointly by the spouses, which is the case from a substantive law point of view as a special case of common ownership.

2.6. The classification of marital property regimes aims frequency which is definitely an achievement however the code owes correcting the terminology of the matrimonial property. This is the consequence of that incorrect terminology has been incorporated into practice, however one can only lament the missed opportunity in the otherwise dogmatically profound concept of the Civil Code. Of course, this does not diminish the achievements in areas such as marital property law's comprehensive system.

2.7. Furthermore interaction can be observed between the rules of cohabitation and marriage, so this is a two-way effect rules for partly similar situations interact. On the one hand, marriage rules, especially the rights, are gradually extending to the partnership regulations making them very juristic which may not concur with the intention of all partnerships and empties the content of marriage. On the other hand, the alternative of partnership models' affect marriage consequently the conceptual elements of marriage are weakened, and marriage also shifts towards cohabitation: the legal consequences are connected to life community not the marital bond, it is suggested that the contribution theory be applied to distribution of property of parties at the end of marriage. On the long run either the osmosis of marriage and cohabitation leads to their indistinguishability, that can lead to strengthening of the social role of marriage according to religious rites, if only for a minority, or somehow returning to primacy of the marriage and the cohabitation regulated not as a *sui generis* relationship, but rather through the civil legal relations arising from it.

2.8. It can be observed that different countries regulate in very diverse way in the field of extra-marital relationships, whereas it is detected by the legislature that there is an increase in the number of such relationships and disputes arising from them so some sort of legal response is crucial, but it is also observed that the family law legislations give ad hoc responses to social needs, a unified vision of family law is missing. Rights should flow from purpose and function of the institution.

2.9. It has been concluded that the institution of marriage, a private law institution, operates as a system. That is its own internal regulatory system seeks balance, according to the principles of coordination, equality and cooperation in order to maintain its character of solidarity and to achieve its community objectives. An ideal regulation guarantees the realization of this. It is mistaken to suppose that there are fewer marriages because people are more individualistic, and

prefer to keep their autonomy, consequently rules should be more individualistic, when in fact it has become riskier to enter a marriage so it is self-protection to enter a less burdensome partnerships instead. The legislature needs to decide which partnership form is supported which should not be a question since the constitutional protection.

If the system of the institution is tilted by the regulation the institution becomes destabilized and so it is more difficult to fulfill its aim. As a consequence of easy divorce the system is destabilized in one direction and it is too risky to enter the system, because the "investments" efforts made by the parties may easily lead to imbalance and disadvantage if the other spouse exits the relationship. On the other hand the framework of the system is loosened by the expansion of the rights of cohabitation, as certain privileges are available without undertaking certain obligations. A private law institution will always seek balance, so the current situation can be balanced by rights and obligations to some extent. However if it is further imbalanced even fewer will enter the system, but obviously regulation must adapt to the changed circumstances. So as to foster conscious decision at celebration of marriage, waiting time at divorce or property rights that enhance the balance of the institution, rather community of property than separate property, inserting additional family protecting rules. There could be a more profound elaboration of the legal nature of the rights and obligations and their sui generis family law consequences when violated. The tendency that the legal effects of marriage are extended to other partnership forms is undesirable.

3. The aim of regulating marriage, family relationships, and reproductive orientation as a conceptual element: Deriving from the complementarity of the spouses and taking into account relevant facts, and human nature marriage is fundamentally directed towards reproduction. The implementation of the fundamental right to marriage and the constitutional protection of the institution of marriage are examined in comparison with foreign and international regulations. To do so, however, the important question is what the aim is and therefore the consequent protection, ultimately, what is the role of the legal institution of marriage in society, once the concept properly defined.

3.1. The different constitutional interpretations of the fundamental right of marriage lead to different results. Certain interpretation may lead the forum to contradiction, whereas with the right interpretation rules deriving from the nature of marriage will make sense. Undivided interpretation of right to privacy and right to family life leads to finding such rights that, with an originalist interpretation, were not intended by the authors with a dynamist interpretation do not flow from social change, the nature of things, the legally relevant facts. This interpretation of marriage redefine the notion, changes its essence.

3.2. From a constitutional law analysis it can also be observed in comparison that states that do not declare the right to marriage or its protection in their respective constitutions on the one hand are more willing to give rights to other partnership forms and on the other hand sooner change the concept marriage and extend it to the same-sex relationships. However, where there is constitutional declaration with "advanced" dynamic interpretation the concept of family and partnerships may change. Despite of the relative similarity of societies this is an issue of public opinion, politics and, ultimately belief.

3.3. Removing the link between marriage, procreation and sexual relations structurally – not referring to a relatively small number of specific cases of legal or medical intervention – terminates the original sense of the term marriage. The link between procreation and parenting is also loosening, so same-sex partners claim the right of parenthood in alternative ways unable otherwise. Consequences of such interpretations and changes as generally in family law legislation are difficult to be predicted in advance. However serious questions are raised already concerning freedom of thought and freedom of religion, or child's rights and interests. It also brings about a paradigm shift as to the reasons of regulation.

3.4. The paper also examines the possibility of European harmonization of the rules on marriage and other partnerships, from unification attempts of conflict of law rules to the principles of the Commission of European Family Law. Examining the possibilities of European harmonization, it was observed that both the Council of Europe and the European Union in spite of considering these to be member state competences directly and indirectly affect national legislation of marriage and other partnerships. It has been established that regulations are very mixed and the rights granted are not in line with the nature of partnership forms. In this respect, the fundamental obstacle to the harmonization is conceptual clarity on the objectives and the lack of coherence of the rights given. The phenomenon of competition of legal systems has a significant role in family law. Consequently liberalization of regulation occurs, which does not only mean fewer rules but weaker protection and conceptual redefinition. Additionally there is a competition of relationships since short and long-term individual and societal costs and benefits are not reflected in the rights granted. These dynamics directly and indirectly erode national family law principles and lead to more liberal approach to family law.

3.5. Among the further applicability of the research are the issues of dogmatic structure and terminology that need to be further elaborated, and that it explores the impact of fundamental rights to private law dogmatic and private law dogmatic theoretical issues. It was observed – in comparison – that the structure of the regulations is conflict based oppositely to guarantying the realization of the regulatory objective of marriage. The partial elaboration of dogmatic and erosion in an area which particularly requires precise dogmatic leads to many contradictions. In the absence of the first element of the concept the relationship is a less committed, more fragile one and stability so important for society and individuals - especially children - is threatened, which is reflected in the sociological reality of cohabitation. In the absence of the second conceptual element a less characteristic, less contoured marriage itself becomes less communal, more contractual, individual, uncertain. In the absence of the third element marriage as the basis of family and its social and the private function disappears.

The peculiarities of the legal field is its value based character – which had been given in religious dogmatic – but the legislator seems to become uncertain so the vision of family legislation seems blurred. There seems to be no goal, no unified vision of family and marriage. Therefore reforms respond to political needs, are contradictory, trying to treat the symptoms rather than considering the whole picture. Thus, this impacts jurisprudence which somehow condenses on family life, which disadvantages both the family, society, marriage and ultimately the individual. That is why so many solutions are generated to similar problems in various jurisdictions. These are the fundamental issues for future society concerning marriage, partnerships and families.