Hungary

COHABITATION, REGISTERED PARTNERSHIP AND THEIR FINANCIAL CONSEQUENCES IN HUNGARY

Dr Orsolya Szeibert[*]

Résumé

Le nombre de couples non mariés est en constante progression, ce qui a conduit les juristes à se pencher sur leur statut juridique. Le Code civil hongrois prévoit des dispositions spécifiques en la matière. Le code reconnaît l'union de fait des couples de même sexe et des couples hétérosexuels, alors que le mariage est réservé à ces derniers. La Cour constitutionnelle a confirmé plusieurs fois que le mariage hétérosexuel jouissait d'une protection constitutionnelle et que cette protection excluait la possibilité de reconnaître le mariage entre personne de même sexe.

Le processus de réforme du Code civil hongrois a commencé à l'aube du 21e siècle et il entend créer un nouveau régime visant à répondre aux nouvelles réalités sociales et économiques. Étant donné que cette réforme englobe le droit familial, il était nécessaire d'en revoir les principes. Même si l'opportunité de revoir le statut des conjoints de fait a provoqué de nombreux débats, le projet de loi sur le nouveau Code civil prévoit des dispositions détaillées qui renforcent le statut de l'union de fait, tant dans ses aspect personnels que financiers. Ce projet est actuellement à l'étude au Parlement.

En décembre 2007, une loi sur le partenariat enregistré fut adoptée et elle devait entrer en vigueur en janvier 2009. Cette loi, qui ouvre le partenariat enregistré aux couples de même sexe et aux couples hétérosexuels, fut cependant annulée par la Cour constitutionnelle en décembre 2008.

Une autre loi fut adoptée en avril 2009, visant la reconnaissance du partenariat enregistré (mais limité aux couples de même sexe) et la facilitation de la preuve d'une union par l'instauration d'un registre des déclarations de cohabitation. Cette loi a été signée et promulguée le 8 mai 2009.

* Assistant Professor, University of Eötvös Lorand, Budapest, Hungary.

I GENERAL OVERVIEW

(a) Legal regime being in effect in spring of 2009

In Hungary marriage is regulated in the independent Family Act with all of its legal consequences, including the property relations of spouses. The Family Act is Act No IV 1952, which entered into force in 1953 and has been revised and modified several times. Marriage is the only kind of partnership which is regulated in this Act in harmony with our Constitution, which protects the family and marriage. However, another kind of partnership, namely informal cohabitation, is accepted according to the Hungarian legal system currently in force. Not the Family Act, but the Civil Code (Act No IV 1959 which entered into force in 1960) contains some rules, only really brief legal provisions with regard to cohabitation. Only the definition and some property consequences have been defined laconically since 1977.

Different-sex partners can marry each other and also can live together as cohabitants. This is not true for same-sex partners, as they are permitted to live in unmarried partnership within the frames of cohabitation but cannot enter into marriage. Originally, in 1977 cohabitation was restricted to different-sex partners but later, in 1996 the gates of this partnership were opened to same-sex partners. This opening was the consequence of one the decisions of the Constitutional Court, namely Decision No 14/1995. According to the arguments of the Constitutional Court, marriage has to be maintained for different-sex couples but cohabitation does not deserve such strong constitutional protection as it is not a familial relationship but only an institution of the civil law.

(b) The 2009 Act concerning unmarried partnerships and its preliminaries

Parliament accepted a new Act on 20 April 2009 (Act No XXIX 2009) on registered partnerships, modification of the legal rules in connection with registered partnerships, and the facilitation of the proof of cohabitation. Although it seems to be a really new piece of legislation, it has actually a relatively long background.

(i) The Bill on the new Civil Code

The recodification of the Civil Code has been going on since 1998. It has been a long process until now with different steps and events during these 12 years. As the Family Act would be one part of the Civil Code, this process has involved the modernisation of family law and the revision of the legal regime of partnerships. The proposal of the new Civil Code contains important modifications affecting both cohabitants and registered partners. According to this proposal the Family Law Book would have rules primarily on marriage and

afterwards also on registered partnership and cohabitation. This Bill was submitted to Parliament in June 2008. Its regulations have been debated several times, but it has not been accepted yet.

(ii) The 2007 Act on Registered Partnership[1]

More or less in line with this process stronger and stronger efforts were taken to introduce a marriage-like institution for same-sex partners which would guarantee a protected legal position for them especially in case of termination of the partnership. On 27 December 2007 an Act was approved on registered partnership. Act No CLXXXIV 2007 on Registered Partnership made it possible for both different-sex and same-sex partners to enter into this kind of partnership. Although some differences between marriage and registered partnership on the one hand, and between registered partnership of different-sex partners and registered partnership of same-sex partners on the other hand were maintained, this Act ordered the application of rules on married partners and marriage to the registered partners and registered partnership as a general rule.

This affected all financial consequences of the partnership. The aim of the Act was to provide the same property rights and obligations to registered partners which are guaranteed for spouses. As the property consequences were intended to be entirely the same, a statutory property regime was introduced for registered partners, namely the community of property regime. (It is the statutory regime also for spouses from which they can derogate in contract.) Besides, both for maintenance of the registered partner and for the use of the common dwelling, the rules to be applied for registered partners were identical to the legal rules governing spouses. An important point was the succession. This Act modified the rules on inheritance in the Civil Code and ruled that the registered partner succeeded just like the widower or the widow.

(iii) The Decision of the Constitutional Court in 2008

This Act which contained some direct rules and a lot of regulations altering the legal rules in connection with the registered partnership – among others the Act on Maintaining the Register and the Family Act – was to enter into force on 1 January 2009. However, it never entered into force. In early 2008 the annulment of the Act was initiated before the Constitutional Court and the decision was handed down on 17 December 2008. Decision No 21/B/2008 declared the unconstitutionality of the Act on Registered Partnership. The Constitutional Court stated that the registered partnership for different-sex partners and for same-sex partners has to be distinguished and cannot be treated in the same

---

[1] For more on same-sex partners in Hungary and Act 2007 on Registered Partnership in English, see Orsolya Szeibert-Erdős 'Same-Sex Partners in Hungary. Cohabitation and Registered Partnership', in Katharina Boele-Woelki (ed), *Debates in Family Law around the Globe at the Dawn of the 21st Century* (Intersentia, 2009), pp 305–318. On Act 2007 on Registered Partnership in German, see Emilia Weiss 'Gesetz über die registrierte Partnerschaft in Ungarn' (2008) FamRZ 18, pp 1724–1725.

way. It admitted and emphasised in the first sentences of its argument that the creation of a registered partnership for same-sex persons is not unconstitutional as they cannot enter into marriage. The fundamental premise of the Hungarian Constitution that marriage can exist only between one man and one woman was also confirmed. (This was declared also in 1995 when the petition, according to which marriage should have been opened to same-sex partners, was refused.)

Concerning the constitutional possibility of the registered partnership for different-sex partners, the Constitutional Court considered the protected position of marriage and the content of the new institution. As a result it concluded that the registered partnership for different-sex partners was a special non-marital partnership in name but actually it was (almost) the same institution as marriage. Although the Constitutional Court admitted that there were some differences between marriage and registered partnership between a man and a woman, these were relatively slight ones in comparison with the equal consequences and almost equal status. (Concerning the issue of status, the process of a registered partnership's establishment would have been just the same as in the case of marriage. The partners would have declared their intention to enter into a partnership before the registrar and the institution would have been established by the declaration of the parties' identical intention before the registrar. So, the registration would have been only a declaratory act.)

The identical legal character of marriage and registered partnership led the Constitutional Court to the conclusion that the registered partnership is a 'quasi-marriage'. Because there would be an institution in the legal order which seemed to be a special non-marital partnership but would provide the same consequences as marriage, it was deemed to be unconstitutional. Besides, it was definitively stated that both legal certainty and the principle of constitutional protection of marriage would be undermined if institutions could function side by side with the same character but with a different title.

It has to be mentioned that the exact title of the institution is *registered cohabitation*. We called it *registered partnership* as it corresponded in terms of its content to the institution of registered partnership as this terminology is used in the European legal orders. Nevertheless, the Act used the phrase *registered cohabitation* according to the literal translation. (*Registered partnership* would be *bejegyzett partnerkapcsolat* or *bejegyzett társkapcsolat* in Hungarian, but the Act called the institution *bejegyzett élettársi kapcsolat,* which is literally translated as *registered cohabitation*.)

(iv) Act No XXIX 2009 on Registered Partnership and the Modification of Legal Rules in Connection with Registered Partnership and the Facilitation of the Proof of Cohabitation

In February 2009 a Bill based on the annulled and revised Act was submitted by the Government to Parliament. It was debated really quickly and on 20

April the Act was approved. Just at the time of finalising this chapter, on 8 May the Act was signed by the President of the Hungarian Republic, and it has been promulgated in the Official Gazette.

In spite of the fact that this Act has not entered into force yet, the most important regulations are worth mentioning. This Act has a double aim, and is intended to introduce two new measures, namely the registered partnership for same-sex partners and the facilitation of the proof of cohabitation. Concerning the registered partnership (registered cohabitation by literal translation) this instrument restricts it only to same-sex partners. These new regulations and their structure are the same as the rules and structure of the annulled Act. The new Act deals with the establishment of the registered partnership, its legal consequences and its termination.

According to its legal regime the main rule is that the consequences of registered partnership are identical to those of marriage. However, there are exceptions. The registered partners cannot choose a common surname, and neither of them can bear the partner's surname. Joint adoption is prohibited and the partners cannot participate in the process of artificial insemination. In keeping with these limitations, no paternal presumption is established by the registered partnership. Lastly, this part of the Act contains the regulations of several Acts which are to be altered. These are the Family Act, the Civil Code and the Act on Maintaining the Register, among others.

The other aim of the Act is to facilitate the proof of cohabitation which can be established both between different-sex and same-sex partners. As the institution of cohabitation in Hungary follows the factual model, there is no registration system for cohabitation regulated in the Civil Code. If the existence and the duration of cohabitation are in dispute, it is the court's task to decide whether or not the relationship in question had been cohabitation or not. The idea of providing cohabitants with the opportunity of getting their partnership registered had already emerged in the course of the recodification of the Civil Code. The proposal of the new Family Law Book issued in 2005 was intended to give them an opportunity to register their cohabitation although its existence would not have depended on the registration, but it would have made the proving of cohabitation easier. So, even according to this proposal, cohabitation would have preserved its factual character. However, this proposal was one stage in the course of the codification process and the idea was abandoned later on.

This Act regenerated the idea of a registration system which is not obligatory for the establishment of the relationship but makes it easier to prove. The Act would amend the Act on Notarial Non-Litigious Proceedings (Act No XLV 2008) concerning the tasks regarding the maintenance and management of the Registration of Cohabitants' Statements. Cohabitants could declare their statement, according to which they live in cohabitation as regulated in the Civil Code, before the notary. There are detailed regulations for the register and its management.

II COHABITATION – THE APPROACH OF CIVIL LAW AND FAMILY LAW

There are several rules in Hungarian law which give cohabitants almost equal status as married partners. This happens primarily in the field of social law and in both civil and criminal procedural law. While cohabitants are not treated as strangers when they ask for certain social benefits, they are almost strangers from the viewpoint of the civil law. Family law does not contain any rule concerning cohabitants as this relationship is not a familial one.

Concerning the personal consequences of cohabitation it is important to mention that they cannot bear a common surname and cannot bear each other's name. This approach is in keeping with the Hungarian legal conception, according to which the married partners' common name is inherently connected to marriage.

They cannot adopt a child jointly and no statutory parental presumption is connected to the fact of living together as cohabitants. In the case of a common child the unmarried partner has to make a voluntary recognition of paternity which is regulated in the Family Act. However, if the child–parent relationship is legally established, the unmarried parents have the same rights and obligations as married parents.

Although the Civil Code does not oblige the cohabitants, in contrast with spouses, to maintain each other in the course of the community of life and to be at one with each other, they are expected to do so both in society and by the courts. So the maintenance and taking care of each other are essential and intrinsic elements of cohabitation according to actual judicial practice. This approach is based upon the accepted opinion of society.

This solidarity contains both financial and personal elements and tasks. Nevertheless, the problems mostly arise when the partnership terminates and cohabitants cannot claim for maintenance, they do not have any right to use the common dwelling and the surviving cohabitant is not the statutory heir.

III FINANCIAL CONSEQUENCES OF COHABITATION ACCORDING TO THE CIVIL CODE NOW IN FORCE AND TO JUDICIAL PRACTICE[2]

(a) The property consequences

Some property consequences of cohabitation are contained in the Civil Code.

---

[2] On the legal status of cohabitants and the judicial practice in detail in English, see Orsolya Szeibert-Erdős 'Unmarried Partnerships in Hungary', in Katharina Boele-Woelki (ed), *Common Core and Better Law in European Family Law* (Intersentia, 2005), pp 313–330.

(i) The property regime of cohabitants

The statutory matrimonial property regime is the 'community of property' one, according to the Family Act. When codifying the property consequences of cohabitants the legal aim was to sharply distinguish between the financial rules of cohabitants and spouses to preserve and maintain the primacy of marriage. Unmarried partners acquire common property in proportion to the contribution they have made in acquiring such property according to the first sentence of § 685/A of the Civil Code. The main difference between the two property regimes, is that while the extent of the contribution is not relevant in the case of marriage, this is relevant when cohabitants' common property is divided. At the same time, this approach is very beneficial to cohabitants, especially if we compare it to other European regimes.

There are two points which make it clear that the property regime for Hungarian cohabitants places them in a relatively strong position. One is that common property comes into being upon the acquisition of the assets and not upon the termination of the community of life as happens in the community of accrued gains regime. Another point is in connection with the approach of what 'contribution' means. When establishing the community of property regime for spouses in 1952, the legislator took the position that this regime better provides for the equal rights of the spouses and emphatically takes into consideration the fact that one spouse's activity in managing the household and caring for children is equivalent to the other spouse's gainful employment. The same is true of cohabitants. When codifying the property consequences of unmarried partners, the legislator intended to maintain the equality of cohabitants. As a consequence, the Civil Code (third sentence of § 685/A) provides that any work done in the household is considered to be a contribution in acquiring this property. This phrase means that work of a woman who plays a really traditional role is evaluated in the property consequences.

According to a rule in the Civil Code (second sentence of § 685/A) if the proportion of contribution cannot be calculated, the property is considered to have been equally acquired. According to actual judicial practice this presumption can be taken into account only when there is really no evidence of the extent of contribution. At this point the community of property regime of spouses and the special community of property regime of cohabitants are very close to each other. It needs to be mentioned that the property regime of cohabitants does not have a special name and there are standpoints in the legal literature that refuse to use the name of 'community of property', as the difference and not the similarity is to be emphasised.

(ii) The meaning of common property

As the regulation of the cohabitants' property regime is laconic, the judicial practice has always had an enormous role in developing the methods to apply. The terminology of a marriage's financial consequences can be applied to the

relationship between cohabitants but cautiously. In the case of spouses it is unambiguous that there are three categories of assets in the community of property regime: the common property and the separate property of each spouse. According to the default regime the dominant role is played by the common property of spouses, as the assets acquired during the matrimonial community of life belong to the common property, except for the assets belonging to the separate property which are listed in the Family Act.

The property regime concerning cohabitants differs from the matrimonial property regime as the Civil Code does not use either the terminology of separate assets, or of common assets.

In legal disputes, when the court has to judge it, the question whether this or that asset belongs to the separate property or the common property often arises. At this point the judicial practice diverges. In some cases almost the same attitude is used as in matrimonial cases, but there are judgments showing another approach. In the first-mentioned case the presumption of common property exists, just in matrimonial cases, and either cohabitant can prove that the assets are his or her separate assets. According to the other approach there is no presumption of common property, so the assets can belong to the common property if it was the cohabitants' intention expressed by an explicit or at least an implicit consent. This concept causes severe problems of proof.

(b) The definition of cohabitants

Cohabitation, as was mentioned, means two people actually living together in Hungary. As an informal partnership, even whether there existed cohabitation or not is sometimes a question before the court. The Civil Code (§ 578/G(1)) gives a definition according to which 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. This definition has great importance. I should mention that this list is not the only thing that influences the courts. There are other elements to be investigated and taken into account in practice: the common child, the stability of the partnership, the intention of the parties to live together, the appearance of belonging together to third persons.

If there is a dispute between the cohabitants concerning the financial consequences of the partnership's termination and even the existence of the partnership, each element of the definition is to be proved. The exact interpretation of these conceptual elements has been more or less crystallised in legal practice. Nevertheless there are some tendencies towards change even nowadays. Although there are legally interesting points concerning every element, the existence of an economic community has continuously increased in importance and it has become a decisive issue. The interpretation of the phrase 'economic community' has become more and more strict during the last 10 years. The method of managing the assets is not a determinative factor, as it

can differ according to the particular circumstances. However, economic community requires the cohabitants' close co-operation in financial issues, common investments, their intention to raise their living standards and to govern their common life financially. The existence of these factors is scrutinised very critically, so sometimes economic co-operation of a greater extent is required from cohabitants than from spouses.

IV FINANCIAL CONSEQUENCES OF COHABITATION ACCORDING TO THE BILL ON THE NEW CIVIL CODE

One of the most debated fields of family law during the recodification of the Civil Code and the Family Law Book was the regulation of cohabitation. The issues where and how this institution should be regulated were really meaningful. The reform of the whole civil law has been motivated by the great changes in private law resulting from the social and economic developments over the last few decades, but at the same time a fear could have been felt whether the decision to give new and wider rights to cohabitants was the right one. The Bill balances two opposite views carefully: the regulation of cohabitants should be contained in the Family Law Book and their legal position would be strengthened with new rights and obligations, but, at the same time, their legal position would be weaker than that of the spouses, so that the difference is underlined.

The definition of cohabitation is maintained. As there is no registration, judicial practice concerning the interpretation of this definition does not lose its importance, even if the 2009 Act introducing the regulation of the Register of Cohabitants' Statements enters into force, as use of the Register will not be obligatory.

The regulations governing financial consequences would be much more detailed than today. A new default property regime would be provided which takes into account the distance between marriage and cohabitation but makes efforts to protect the weaker party. There are some issues which are not regulated now but the Bill intends to govern: maintenance, use of the common dwelling and inheritance.

(a) Property regime

The Bill deviates from the special property regime of unmarried partners which is in force now. It proposes a special variation of community of accrued gains regime. The common property would come into existence only when terminating the partnership and the cohabitants' share would not be equal, as the share would be determined by the cohabitant's contribution which he or she made in acquiring the property. The equality of cohabitants is strengthened theoretically by determining that the work done in the household, the caretaking of children and also the work done in the other partner's business

are contributions. The Bill stresses the possibility for cohabitants to enter into a property agreement. Cohabitants can agree on their property relations now as well, but it is far from common.

(b) Maintenance and use of the common dwelling

According to the Bill the former cohabitant could claim for maintenance from the former partner after the termination of the unmarried partnership. The requirements are proposed to be almost the same as for spouses but the mere existence of the cohabitation would not be enough. There are some extra conditions, either a long-lasting unmarried partnership which means at least 10 years, or a common child and at least a one-year-long partnership. Nevertheless, in line with the classic principle of family law, the equity can be applied for in the case of shorter partnerships.

Another issue that is very significant in Hungary is the use of the common home. The Bill would strengthen the cohabitants' position primarily in the interest of the common child but also making efforts to protect the weaker party. Some extra conditions are the same as in the case of maintenance: a long-lasting partnership or a partnership of minimum duration where there is a common child.

(c) Inheritance

Concerning the law of succession, the Bill does not list the survivor cohabitant as a statutory heir, but he or she would get the right of lifelong use of the home and furnishings which were used together during the community of life. The aim of this rule is that the survivor partner should remain in his or her usual and customary circumstances. An extra condition is the duration of the partnership, namely 10 years.

V CONCLUSION

There are two kinds of partnerships open to different-sex partners: marriage and cohabitation. Although cohabitation provides much weaker personal and financial consequences than marriage, the position of a cohabitant if the existence and duration of cohabitation is not disputed is relatively strong, at least stronger than in several European legal orders.

Act No XXIX 2009 was promulgated in May 2009. The regulations entered into force a month later. The regulations regarding the introduction of registered partnership will enter into force on the first day of the second month counting from its promulgation. However, the rules regarding the registration of cohabitants' statements will enter into force only on the first day of the eighth month counting from its promulgation as the establishment of the registration system needs time.

If it happens, same-sex partners will be able to live in the framework of a registered partnership (registered cohabitation) which would offer the same property consequences as marriage. Although the Constitutional Court declared it unconstitutional to let different-sex partners live in a marriage-like registered partnership, the possibility of registration seems to be meaningful from the viewpoint of financial consequences.

The position of cohabitants will be strengthened by the approval of the Bill on the new Civil Code but it is waiting for the vote in Parliament.