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Self-determination and Protection of the Family – Two Aspects to be Reconciled in the Conception of a New Hungarian Family Law Book*

The profound economic and social changes which have taken place in Hungary since the collapse of communism in 1990, have brought such changes in the area of civil relations that their legal coherence requires the framing of a new Civil Code. The concept of the new Civil Code was prepared on the basis of a Government Resolution in 1998, titled Conception of the New Civil Code. The Conception would like to integrate the broadest possible range of private law regulations stipulated in specific laws, among others, the regulations of family law. Thus the substance of family law will be incorporated in the Civil Code as a separate Book of the Code.

Brief History of Hungarian Family Law

The comprehensive codification of Hungarian family law was accomplished for the first time in 1952 by the Family Law Act. Despite the date of its passing — this was the worst Stalinist period - the Act was a respectable piece of legislation. It must be stressed that the principle of equal rights for husband and wife in both marriage and family life in general, as well as the requirement to protect the interests of the child, were identified as fundamental principles of the Act. What is more, even the terms like "child born out of wedlock" and "fatherhood outside of marriage" were no longer included: the Act gave the same rights to such children as children born within marriage, in terms of both family law and inheritance law. (These regulations date back to 1946.)

Changes in family relations call for the updating of family law on a more or less constant basis. This task has been addressed partly by legislation and, on many issues, partly by judicial prac-

* In structure the Hungarian Code is inspired by the Dutch Civil Code in that the Hungarian Code will be broken into five Books, Family Law, the subject of my presentation, being one of them.

tice, which may often be regarded as the forerunner of legislation. Hungarian courts have adopted general rules of law that have been codified through legislative enactment. These codifications have been instituted by amendments of the Family Law Act. Since 1974 the state has provided financial assistance in cases where child support was temporarily in arrears. The autonomy of spouses was strengthened by a 1986 amendment which made it possible for the spouses to enter into contract in property issues, deviating from the statutory matrimonial property system. In 1995, the concept of joint parental custody of children was introduced for those parents who were living separately. Furthermore, in 1997, the Hungarian Parliament passed the Child Protection Act, placing administrative tasks in connection with the protection of imperilled children on new grounds.

Hungarian family law has also been influenced by the incorporation of international family law norms: e. g. in 1986 Hungary adopted the Child Abduction Treaty, and in 1991, Hungary ratified the UN Convention on the Rights of the Child. The most significant rule incorporated into Hungarian family law was the "best interests of the child" standard, which is an indispensable requirement in the course of the court proceedings and decisions concerning the child.

The Requirement of the Harmony of Family and Individual Interests

Integration of the body of family law into the Civil Code would certainly raise more questions than would be raised by adjusting the amended Family Law Act to today's circumstances. One of the most important questions is the requirement of the harmony of family and individual interests. The increasing autonomy of the members of the family must not violate the interests of the family as a unit. Self-determination and protection of the family are the two aspects on which the Conception of the new Family Law Book has been built. The Conception intends to ensure the harmony of these main principles especially in the field of the law concerning the rights of the child and in the inner relations of the spouses too. But how can the law intervene in family relations on behalf of the child or one of the spouses?

Different legal systems have different approaches to defining the extent and depth to which the regulation of family relations should be a legal function, beyond which such relations should be regarded as the "internal affair" of families and in respect to which legal intervention is likely to prove unnecessary. Similarly, different national legislations have a different view of the extent to which they want to exercise state powers and authority to resolve conflicts within legally regulated family relations. In many countries, the legal trend seems to be in the direction of restricting state intervention as much as possible, or while retaining the possibility of state intervention, give preference to alternative instruments, particularly mediation and alternative arbitration.

The Principles of the New Family Law Book

The peculiarities of the social relations regulated by family law necessitate that certain fundamental principles, characteristic of family relations but typically differing from civil law, should be formulated in the preamble to the Book on Family Law.

1. Among the principles in the preamble to the Family Law Act, it is justified to preserve the principle of protection of marriage and family, the principle of equal rights for parties both in marriage and parent-child relations, as well as the principle of the protection of children and the priority of their interests.
2. The harmony of social and individual interests prescribed for the application of law will be replaced by the requirement of harmonizing family and individual interests.
3. The ban on discrimination in relation to family law before the European Court of Human Rights — although not in Hungarian cases — has emerged particularly regarding the equal rights of children born out of wedlock. I should mention that this discrimination — at least at the legislative level — had already been abolished in Hungary in 1946 prior to the adoption of the Family Law Act.
4. Nevertheless, it is desirable to promulgate in the sphere of family law rules, certain principles of the Convention of the Rights of the Child, such as the principle that a child should, to the extent possible, be brought up in his/her natural family.

As mentioned one of the main principles is the requirement of harmony between family and individual interests. How does the Conception of our new Family Law Book intend to ensure this harmony? Where are the limits to self-determination — on behalf of the protection of the family, the protection of the "weaker party" - according to the opinion of Hungarian family law makers? I'd like to investigate this question in the main fields of family law: divorce, alimony, matrimonial property and parental custody.

Divorce

A significant majority of legal systems today already profess the principle of the breakdown of the marriage instead of the principle of fault in marriage dissolution cases. Moreover, it has become quite widespread in legal systems that they recognize divorce by mutual consent (joint agreement) as an independent option of dissolution, but with the condition that the spouses must agree also on the collateral issues or at least the majority of them, and most legal systems also stipulate separation for a defined period of time.

The rules of the Hungarian divorce law in essence follow the international tendencies: they accept the principle of the breakdown of the marriage and do not list any itemised causes for the dissolution. They identify under separate rules the dissolution on the basis of common agreement by the parties if it extends to an agreement on the main collateral issues (the placement and the support of the child, and the use of the family home). Generally speaking, they do not require any lengthy separate domicile

or just any separation for the dissolution of the marriage and fault may be meaningful in some collateral issues but may not be important unconditionally.

However, the Conception considers that the facts and rules of dissolution on the basis of agreement versus not on that basis should be more distinctly separated than it is stated in the current law. In the case of mutual consent, the court cannot investigate whether or not the marriage is in fact irretrievably broken down if the parties alleged the breakdown.

In many countries the reconciliation of the parties or the more civilized settlement of collateral issues of the dissolution proceedings is helped by a so-called mediation procedure independent of the court proceedings. Mediation is already well known in many areas of Hungarian law as a procedure that replaces court proceedings and the parliament passed a law on the conditions of this kind of activity in general in early 2003. It could play a role in divorce law if taken not as something replacing the court proceedings but as an institution assisting the court, particularly in settling collateral issues in divorce suits. An obligation to use the mediation procedure in the cases concerning the life of the child (the placement of the child, and the regulation of contact between the child and the parent living apart) perhaps would mean a step forward to the civilized separation of the parties, too.

Alimony

The importance of alimony in Hungarian circumstances is much smaller than in many other countries, but some changes in social and economic relations will most certainly lead to changes in this regard, giving it greater significance.

The Family Law Act stipulates maintenance obligation or entitlement based on law, making no mention of the possibility that the parties may arrange maintenance by spouse also by contract. In that process — which is the more frequent case in Hungarian practice — one of the parties may undertake a maintenance obligation even when no legal preconditions require it. Allow me to mention that there are two comparative legal researches in Hungary surveying the European legal systems investigate whether certain legal systems allow that one of the parties to waive his/her maintenance claims by contract. It can be questionable whether the law should stipulate the possibility of agreement on maintenance by the spouses, but it still must be said that alimony — if so required — is a collateral issue in a dissolution process under mutual consent that requires the agreement of both parties.

The general legal preconditions of maintenance by a spouse on the basis of law, namely, on the side of the beneficiary, do not require any amendment. The preconditions are that the beneficiary must be in financial need for reasons beyond that person's control, and not be a person who is ineligible for maintenance. On the side of the obligor the precondition is the capacity to provide for himself and support others who have to be supported by him.

However, it should be taken into consideration that no maintenance would be due to a spouse, even if the legal preconditions exist in the case of a marriage or common law cohabitation — particularly when there are no children — that was of short duration, say, less than a year.

Matrimonial Property

In the course of the past ten years, significant changes occurred in property relations, their importance, the magnitude of private property, and the direct or indirect participation of private individuals in economic life. However, the property-law provisions of the Family Law Act of 1952 came into being when the rapid demise of private property was the government's goal and hence they were regulated insufficiently. Legal practice soon showed that the matrimonial property law provisions, written in only five articles, were not satisfactory even in a world where private property played an ever decreasing role in economic life. First, court practice tried to fill the gaps, and later on, the legal principles developed in court practice received regulation in law, in the articles of 1974 and 1986 amending the Family Law Act. However, in 1986 there were new developments in economic relations, and the law acknowledged the possibility of entering into property contracts that had been abolished in 1952. Thus partners getting married and spouses acquired the right to determine a matrimonial property system different from the statutory community property regime. The contract was valid only if a notary or a lawyer had certified it. Still, the provisions of community property contracts were regulated too briefly and not even unambiguously. For this reason, the rules of the contract need to be worked out in more detail than in the current regulation. (The current law contains only one sentence about the substance of the contract, saying that "the spouses may decide, deviating from the provisions of this Act, which property should be joint or separate properties.")

Basically, a matrimonial property contract can have two types of content. One is to stipulate another community property-law system differing from the legislative community property-law system. The other is the acceptance of the legislative community property regime, deviating from the general rules included in the law on some issues (e. g., the objects of common or separate property, management of common property in case of business-property, the rules of handling the property or disposal over common property). Deviation in part-issues, naturally, may also occur in the area of the optional property-law system. Of course, no law can regulate in advance the possible and full content of such a contract, but it is undeniable that a regulation broader than the current one would be necessary, e. g., the provisions of optional matrimonial property-law systems need to be worked out.

What are the limits to self-determination of the parties in connection with the possible content of the contract? I am convinced that contractual liberty, on the one hand, may only go to the limit that it may not infringe upon basic family-protection interests. For example, it may not allow any avoidance of the costs of the common

lifestyle, any non-participation in the children's financial care or any unilateral disposal over the rights of spouses to live in a dwelling they occupy, and, on the other hand, the contract may not aim at any encroachment upon creditor's rights, if there are any. Moreover, the ban on infringement upon "sound morals" must be established in family law, which serves as a general rule in the Hungarian Law of Contracts, too.

The Conception of the new Code holds that a matrimonial property agreement should contain a provision also in the case of death, and to this extent the spouses may have a joint will. However, such joint will provisions in the contract should lose their legal force when the spouses have, or one of them has a child subsequently, following the agreement.

The currently valid family law provisions determine separately the issues of settlement of dwelling use by the spouses in case the settlement is based upon an agreement between them. Couples planning marriage, and spouses, can conclude a contract for the future disposal of the joint dwelling in the event of divorce. Regarding the substance of these contracts, the currently valid provisions need to be amended in certain respects.

At present a judge is entitled to deviate from the way of settlement of the use of the dwelling as written in the contract, in the interest of assuring the right to use of the dwelling for the minor child, even according to the currently valid provisions. This requirement ought not to be lifted in the future, but it would be necessary to prescribe the obligation on the part of the legal expert to inform the parties regarding this fact.

It would be necessary to recognise by law that the spouses should be entitled to enter into a contract settling the use of the dwelling by the spouses not only in the case of dissolution of the marriage but also in the case of termination of their cohabitation.

The principle of "protection of the family home" needs to establish special provisions for the disposal over the common dwelling without respect to the fact that it is common or separate property.

Cohabitation without marriage

One of the more controversial issues in the course of the discussion of the Book of Family Law planned by the Conception was the expansion of any rights that must be provided to unmarried cohabitants (so-called common law couples). Many felt that any strengthening of such rights would lead to a further weakening of the institution of marriage and family.

West-European legal systems during the last two decades almost without exception moved forward from the earlier standpoint of "neutrality" which treated the common-law couples as being "outside of the law", to a positive regulation that, generally speaking, provides a certain degree of social security, and in private law, entitlements

to maintenance and the use of dwellings and property. Obviously, in this development the massive growth of cohabitation without marriage played a role. In Hungarian law, a number of legal provisions which invest common-law couples with rights similar to those of married couples is also growing (such as pension for the widow, or the widower, and preferential rates in acquisition of dwellings).

The current Civil Code of the Hungarian Republic regulates the property law aspects of common-law relationships in the Law of Covenants. By now, this solution no longer satisfies the characteristics of such relationships. The common-law relationship calls first of all for regulation by the criteria of family law. This is why the Conception takes the position that private law provisions of a common-law relationship should be regulated in the new Civil Code not in the sphere of the Law of Covenant or Things but rather in the Book of Family Law. The current provisions — limited exclusively to joint acquisition of property — should be extended in case of a lengthy common-law relationship to include rights of maintenance and use of common dwellings. The Conception does not suggest the introduction of a registered partnership, neither for partners of the same gender nor for couples of different gender. The above mentioned expansion of the rights of unmarried cohabitants should include them without calling for registration. Naturally, a possibility would be open for the cohabitants to regulate their relationship in advance and in any way differing from the law. The cohabitees could not be excluded even from the possibility of making in a public document any statement recognizing each other as common-law couples or of asking the notary to give them a “certificate” about this relationship.

Parental custody

In the regulation of parent-child relationship, the Conception intends to consistently enforce the family law requirements formulated in the United Nations Convention on the Rights of the Child. The Conception intends to expand the rights of the offspring vis-Ð-vis the parents, and in the same way to protect the child’s contact with the parent living apart. With regard to the European Convention on Human Rights, the Concept wishes to restrict the sphere of legislative or official intervention related to the exercise of parental rights.

The possibility of exercising the rights and duties towards the children on the part of the parent living separately after the divorce or after the termination of cohabitation, requires on the part of both parents certain fair cooperation. Joint parental custody represents such a higher degree of cooperation for which no compulsion is required, and this can only be assured when parents are ready and willing to exercise this cooperation in the interest of the child. With reference to the requirement of parental cooperation in order that this right might be exercised, joint custody may be adjudicated only upon parental consensus.

The institution of joint parental custody was introduced following foreign examples and by observing the principles and rules of the Convention on the Rights of the Child by provisions of the Amendment of the Family Law Act in 1995. The provisions that

assure this issue in divorce proceedings or the child's placement take appropriately into consideration the interest of the child and the willingness of the parents to cooperate.

In contrast with the provisions in certain European legal systems, joint parental custody after the divorce or termination of cohabitation is rather an exceptional solution today in Hungary. The law ought to express resolutely that decisions in favor of joint parental custody may not mean any "divided placement" of the children between the two parents, for example, changing every week, fortnight, or month.

As mentioned, joint custody needs a higher degree of cooperation, and it could work only on the basis of the parents' agreement. A lower degree of cooperation, particularly the assurance of contact between the child and the parent living apart, is, however, not a question of undertaking, but a legal duty. Even broader cooperation is prescribed by the provisions of the Family Act, which assure a right for parents living separately to decide together the important issues concerning the life of the child and which are listed in the Act in an itemised way. (These important issues are deciding the child's name, residence and schooling).

Conclusions

Assigning the limits to self-determination in the field of family law is not an easy task. The prescriptions of the law and the actions of courts and other authorities are considered by some family members as a matter of the state poking its nose into their private affairs. But the state must not abandon cardinal principles such as the protection of the child and protection of the weaker party in general.

The Conception of the new Family Law Book regards the preservation of well-balanced family life as one of the most important human values which recognises the freedom and autonomy of the parties in making decisions on questions concerning their persons, but stresses that they have to make their decisions always with regard to the interests of the family.

However, it has to be acknowledged that ensuring the harmony of self-determination and protection of the family may not be only a legal issue: it is influenced by the moral standards of society and by public opinion.

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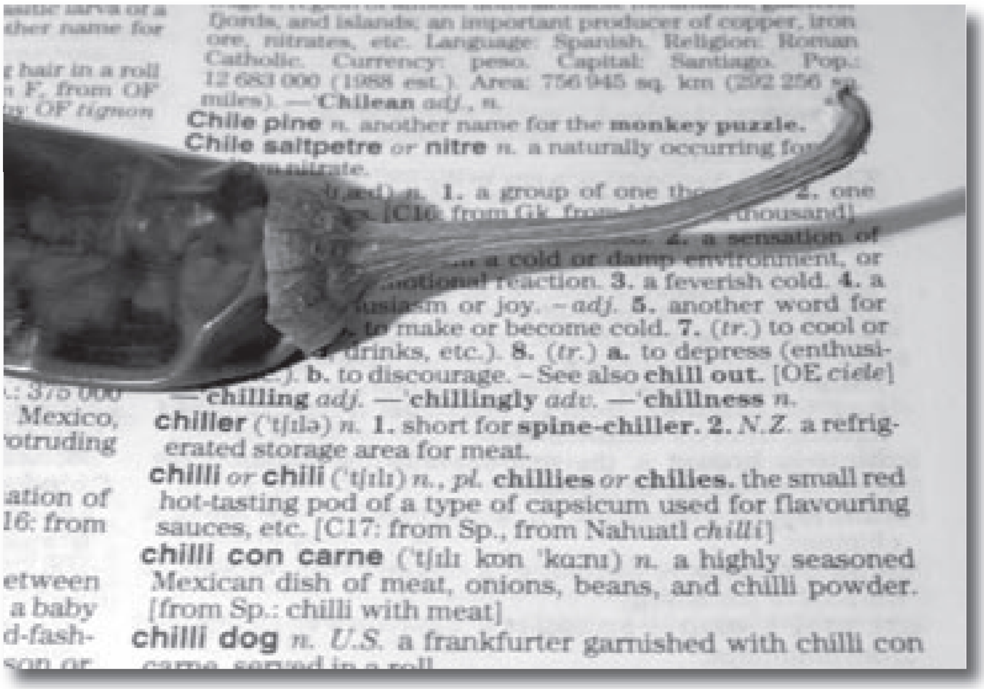
ore, nitrates, etc. Language: Spanish. Religion: Roman
Catholic. Currency: peso. Capital: Santiago. Pop.:
12 683 000 (1988 est.). Area: 756 945 sq. km (292 256 sq.
miles). —'Chilean adj., n.
Chile pine n. another name for the monkey puzzle.
b. to discourage. – See also chill out. [OE ciele]
— chilling adj. —'chillingly adv. —'chillness n.
chiller ('tʃɪlə) n. 1. short for spine-chiller. 2. N.Z. a refrig-
erated storage area for meat.
chilli or chili ('tʃɪlɪ) n., pl. chillies or chilies. the small red
hot-tasting pod of a type of capsicum used for flavouring
sauces, etc. [C17: from Sp., from Nahuatl chilli]
chilli con carne ('tʃɪlɪ kɒn 'kɑːnɪ) n. a highly seasoned
Mexican dish of meat, onions, beans, and chilli powder.
[from Sp.: chilli with meat]
chilli dog n. U.S. a frankfurter garnished with chilli con