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1. Introduction

The purpose of adoption is entirely different today than when this legal institution appeared in Roman law. The term itself can be traced back not only to the fact that we accept someone into our family, but also carried the function of making him an heir[1], and it was primarily the latter that caused this legal institution to develop over the course of thousands of years, i.e. the adopter wanted to ensure to find an heir to his wealth during his lifetime. The suppression of the 1848-49 War of Independence and the subsequent Austrian rule resulted in many changes in the domestic legal system. The laws enacted in this era included the Austrian Civil Code (ACC), which entered into force in our country in 1853. This was necessary due to the lack of modern rules.

Despite the Provisional Judicial Rules of 1861, which restored traditional Hungarian private law, its rules regarding the adoption remained in force until the Act 20 of 1877.[2] In addition to all of this, it is also worth mentioning the Act L of 1879, which regulated the issue of international adoption, as well as the Private law Bill of 1928, which was ultimately not accepted by the Parliament, but it provisions was

[1] JOBBÁGYI, Gábor: *Személyi és Családi Jog [Personal and Family Law]*. Budapest, 2009, Szent István Társulat, p. 11.

[2] VÉKÁS, Lajos: Az osztrák Polgári Törvénykönyv hatása a magánjog fejlődésére [The impact of the Austrian Civil Code on the development of private law]. In: RÁCZ, Lajos (ed.): *A német-osztrák jogterület klasszikus magánjogi kodifikációi, Tanulmányok az OPTK és a BGB évfordulói alkalmából [Classical private law codifications of the German-Austrian legal area, Studies on the occasion of the anniversaries of the ABGB and the BGB]*. Budapest, 2011, pp. 22–28.; RÉKASINÉ ADAMKÓ, Adrienn: Aki megment egy életet: az örökbefogadás az osztrák és a magyar magánjog rendszerében a polgári korszakban [Who saves a life: adoption in the Austrian and Hungarian private law systems in the modern era]. *A Márkus Dezső Összehasonlító Jogtörténeti Kutatócsoport Folyóirata [Journal of the Márkus Dezső Comparative Legal History Research Group],* No. 1, 2018, p. 99.

incorporated into domestic legal practice. In the following, I would like to present the impact of these laws on the regulation of adoption and the related judicial decisions.

2. Implementation of the Austrian Civil Code in Hungary

With the establishment of neo-absolutism, the Austrian empire enacted the Austrian Civil Code in 1853 in the territories of the Holy Crown, which, due to its modern rules, was an important step forward in legal disputes related to adoption. This is also reflected in the fact that, despite the Provisional Judicial Rules of 1861 – which restored a large part of traditional Hungarian private law – the rules on adoption remained in force until the end of Act 20 of 1877 on the settlement of guardianship and guardianship cases.[3]

The ACC contained three conditions for adoptive parents. First of all, it stated that, on the one hand, *"those who have not solemnly accepted celibacy, if they do not have legitimate children of their own, may adopt children; the adopting person is called the adoptive father or mother, and the adopted person is called the adopted child"*[4], and on the other hand, it stipulated that the adopter must be at least 50 years old, and there should be at least an 18-year age difference[5] between the child and the parent.

The act also allowed the adoption of minors and adult children. The difference was only in whose consent was required for the adoption. The adoption of a minor was possible "*only with the consent of the legal father or, in his absence, only with the consent of the mother, guardian [and the court]"*[6]. In the case of an adult child, if the legal father was still alive, his consent was also required.[7] If the consent was refused without sufficient reason, a complaint could be lodged with the court. However, if the consent

[3] VÉKÁS, *op. cit.*, pp. 22–28.; RÉKASINÉ ADAMKÓ, *op. cit.*, p. 99.
[4] Civil Code of Austria § 179.
[5] *Ibid.,* § 180.
[6] *Ibid.,* § 181.
[7] *Ibid.*

was given, it had to be reported to the government office for confirmation and to the competent court for registration.[8]

Regarding the legal effects of adoption, the law provided about naming and noble titles, and about family relationships. Regarding the former, it stated the following: *"adoption has an essential legal consequence: that the adopted person takes the name of the adoptive father or the family name of the adoptive mother; but at the same time he keeps his former family name and the family nobility that belongs to him. If their adoptive parents want their own nobility and crest to transfer to the adopted child, they must ask for the prince's permission"*[9]. In terms of family relations, the adopted child had the same legal status as the adoptive parents' own children. However, *"the relationship between the adoptive parent and the adopted child has no influence on the other members of the adoptive parent's family"*. however, as a counterbalance to this, the adopted child did not lose his own family rights.[10]

The parties could contractually deviate from the *"rights between adoptive parents and adopted child"*, as long as the essential legal consequences of the adoption were not affected and the rights of others were not "abbreviated" thereby.[11] The act also provided for the possibility of terminating the adoption, keeping in mind the interests of the minor child. During this, the relationship could only be terminated with the consent of the minor's representatives and the court. After that, the minor was once again under the control of his legal father.[12]

It was also possible for someone to adopt a child just for "care". The rules of adoption did not apply to this case, anyone could do this. However, if the parties wanted to enter into a contract and they wanted to impose restrictions or "special obligations" on the "foster child", it was necessary to confirm the contract by the court. Since anyone could freely decide to take the child in for "care", the "foster" could not

[8] *Ibid.*
[9] *Ibid.,* § 182.
[10] *Ibid.,* § 183.
[11] *Ibid.,* § 184.
[12] *Ibid.,* § 185.

claim the costs incurred.[13] Progress can be seen in this regulation of adoption by prioritizing the interests of the child. However, the real change will only be observed at the end of the civil age.

3. The Act 20 of 1877 and its relevant provisions regarding adoption

One of the important sources of Hungarian legal history is the Tripartitum of István Werbőczy, which already contained provisions regarding adoption. It was possible to adopt both minors and adults, but at that time inheritance was still among the primary goals of this legal institution. In addition, adoption as children and brothers was also known in Hungarian law, the latter of which was only possible among nobles. Of course, there could be other goals behind the adoption, such as obtaining citizenship or taking over the family name and noble title, but in Hungarian feudal law, the main emphasis was always on "inheritance".[14]

The primary nature of adoption[15] was somewhat changed by Act 20 of 1877 on the settlement of guardianship, when it was stipulated that paternal authority is also transferred to the adoptive father, if no contrary agreement was reached.[16] However, it is also important to note that the legislation related to adoption still regulated this issue around this time incompletely. According to the law, it was still possible to adopt adults. There were two forms of adoption of minors depending on the transfer of paternal power: *adoptio plena*, if it was transferred and *adoptio minus plena*, if the father's power was not transferred.[17]

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[13] *Ibid.,* § 186.

[14] KATONÁNÉ PEHR, Erika: Örökbefogadás [Adoption]. In: JAKAB, András – FEKETE, Balázs (eds.): *Internetes Jogtudományi Enciklopédia [Internet Encyclopedia of Law],* 2018, p. 4., https://ijoten.hu/szocikk/orokbefogadas [Access on April 11, 2022]; BEKE-MARTOS, Judit: Az örökbefogadás jogtörténeti megközelítésben [Adoption in a legal historical approach]. *Családi Jog [Family Law],* No. 4, 2009, pp. 18–23.

[15] KATONÁNÉ PEHR, *op. cit.*, p. 4.

[16] Act 20 of 1877, § 15.

[17] KATONÁNÉ PEHR, *op. cit.*, p. 4.

Since the so-called guardianship act covered adoption in only a few sections, I would like to present the relevant provisions based on a description of a situation[18] for easier understanding. According to the case, A.'s husband and wife were legally separated. The parties actually separated during the divorce proceedings, and the woman gave birth to her son 3 months after the divorce. A. did not recognize the child as his son and stated that he started the divorce (marriage dissolution) because of his wife's "pregnant state". To avoid the legal presumption and the scandal, he recognized the child as "born from a legitimate bed", but he never took care of him. After the divorce, the woman married B. and the question of who should raise the child arose during the guardianship hearing. A. did not even want to know about the son's upbringing and the exercise of paternal authority, so he agreed to appoint B. as the child's guardian. In the meantime, the mother died, and B. wanted to adopt his ward, the then 11-year-old boy, as he was childless and wanted to appoint him as the heir to his huge fortune. However, A. was also childless and wealthy and stated that he would consent to the adoption only if the appointed guardian and the adopter waived the right of inheritance after him on behalf of the minor child. The question that arose during the facts was that whether the adoption could take place despite the opposition of the father, and whether the minor could take the name of the adopter? According to the judge's reasoning, the answer to both questions was yes. Since the (alleged) father did not want to learn about the upbringing of his minor son, and agreed to appoint B. as guardian, as a result of these facts he lost the Act 20 of 1877 20. § a) of the law contained his right and the exercise of his duty, according to which *"the father exercising paternal authority is obliged to seek the approval of the guardianship authority in the following cases, if his own minor child is adopted by someone else"*. The fact that B.'s appointment as guardian took place before the entry into force of the cited law does not change the circumstances of the case either, because the guardianship measure that deprived him of the exercise of paternal authority is based on his own

[18] See: Nyilt kérdések [Open questions]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 21, 1883, p. 168.; SIMON, Endre: Felelet az örökbefogadásra vonatkozó nyílt kérdésre [Answer to the open question about adoption]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 26, 1883, p. 208.

will and therefore, it has become "legal". Based on the facts, A. can be considered legally deprived of the exercise of paternal authority in the Act 20 of 1877 according to Article 22, which says *"paternal authority can also be terminated if the father completely neglects the care and education of his child (...)"*. As a result, the guardian will already be obliged to seek the approval of the guardianship authority in the case of the adoption of the minor[19], that is, the competent guardianship authority would have acted legally even if it had omitted to hear A., because he no longer had the right or obligation to do so. Since in this case B. is also the child's guardian and adopter in one person, the appointment of a temporary guardian acting in the interests of the minor is absolutely necessary, which was done. If the guardianship authority finds B.'s adoption offer beneficial to the interests of the minor, in this case, A.'s objection must be ignored, due to the above, and in accordance with Article 276 of the Act of 1877, because the cited provision states that *"the guardianship authority can generally ignore the statements and comments of the parents (...) only if they cannot be considered beneficial for the interests of minors for good reasons"*. In this case, the latter provision is also correct. The minor thus acquires a "hopeful right" to B.'s property through adoption, and even if this property is transferred immediately, his status as a descendant in the direction of A. will not change in that case either, i.e. his right to inherit will still be preserved. If the guardianship authority were to accept the conditions imposed by A., it would also exceed its authority, as this would affect an issue to be decided by the court. The other question, which related to the inclusion of B.'s family name, is also no obstacle, as long as this is included in the adoption contract and the approval of the guardianship authority also covers this. According to the judge's argument, there is no law or legal practice in the event that the inheritance of a minor in father A's property would be endangered as a result of the name change. Summing up the facts, the minor's right to inherit from his legal father is not jeopardized or lost as a result of the adoption or the adoption of the adopter's family name. It can

[19] Act 20 of 1877, § 113. 3. point

therefore be seen from the regulation that, during adoption, inheritance aspects will continue to take precedence over the establishment of kinship relationships.

4. The relationship between adoption and citizenship

Although the Act 50 of 1879 on the acquisition and loss of Hungarian citizenship does not go into detail about the effect of adoption on citizenship, I consider it important to mention its provisions, which set out some benefits in the case of the naturalization of a foreign adult. This was based on the fact that according to Article 8, in the case of foreign adoptees, it was possible to waive proof that *"they have lived in the country without interruption for five years"*[20], "*have enough assets or a source of income from which, compared to the circumstances of their place of residence, he can support himself and can support his family"*[21] and *"has been entered in the register of taxpayers for five years"*[22], if the adopting Hungarian citizen met the above-mentioned property and tax conditions. If the naturalized man has acquired Hungarian citizenship, it *"extends to his wife and minor children under the father's authority"*[23].

Of course, as stated in the law, the application of this benefit is only one possibility, that is, it does not follow that if these conditions are not met, Hungarian citizenship could be granted to the adopted person. In fact, the Minister of the Interior, the Croatian-Slavonic-Dalmatian Ban and the national authority in the border region decided on the subject of naturalization applications[24], that is, whether they release or require the fulfilment of the conditions.[25] When entering a contract of adoption, foreign law had to be taken into account, and the Hungarian Royal Ministry of Justice did not

[20] Act 50 of 1879, § 8. 3. point
[21] *Ibid.,* § 8. 5. point
[22] *Ibid.,* § 8. 6. point
[23] *Ibid.,* § 7.
[24] *Ibid.,* §§ 10-11.
[25] VIRÁGH, Gyula: Külföldiekből magyarrá lett egyének házasságbontó perei Magyarországon [Divorce lawsuits in Hungary by individuals who have become Hungarians from foreigners]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 14, 1915, p. 176.

approve a contract that did not comply with the domestic law of the Hungarian or foreign individual.[26]

5. Regulation of adoption in the light of the bill of the 1928 Hungarian Private Law Code

On March 1st, 1928, the Minister of Justice Pál Pesthy submitted the bill on the Hungarian Private Law Code (HPLC) to the House of Representatives. He emphasized that the proposal should be discussed as soon as possible. The provisions of bill summarized the regulations that had been in place for a longer time and covered the procedure related to adoption in more detail, which had one of the most important effects among family law institutions.[27] Because of the war, many families were torn apart or were unable to provide for their children also urged the final regulation of adoption as soon as possible.[28]

The Hungarian civil code was not enacted in 1928. However, well-known representatives of private jurisprudence have summarized the provisions of private law in their scientific works based partly on written law and partly based on judicial practice. Notable among them is the university professor and lawyer Artúr Meszlény, who in 1931 supplemented the work named Hungarian Private Law of his former professor, Dezső Márkus, based on bill of 1928. He added provisions of written and customary law, as well as the Curiae decisions, to the corresponding sections of the bill. This was also necessary because private law codification was unsuccessful in our country, although indirectly, this method facilitated the adoption and application of the

[26] *Ibid.*

[27] GÁL, Dezső – NYÁRÁDI, László: *Az örökbefogadás, különös tekintettel a gyakorlati eljárásra [Adoption, especially with regard to the practical procedure].* Budapest, 1941, p. 3.; BAGI, István: Az örökbefogadás és az öröklési jog kapcsolata a magyar polgári jogfejlődésben Werbőczytől a XX. század végéig [The relationship between adoption and the right of inheritance in the development of Hungarian civil law from Werbőczy until the end of 20th century]. In: *(L)ex Cathedra et praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából [(L)ex Cathedra et praxis. Festive volume on the occasion of Tamás Lábady's 70th birthday],* Budapest, 2014, Pázmány Press, p. 27.

[28] GÁL-NYÁRÁDI, *op. cit.*, p. 101.

"uncodified code" into legal life.[29] In the following, I would like to present the regulation of this bill and its practical appearance in more detail.

5.1. The conditions of adoption on the adopter's and adoptee's side

The Bill of 1928 laid out three important conditions that had to be fulfilled in order for someone to be an adoptive parent, i.e. to "adopt as a child": they must be of legal age, have no offspring and be at least sixteen years apart in age between themselves and the adopted person.[30] According to Article 175, the offspring was to be understood as a descending relative, and according to Article 16, an adult was to be understood as a person who had reached the age of twenty-four. The bill refers to "adoption as a child" - not the adoption of a child - that is, it enabled the adoption of not only minor children, but also adults. According to the bill, *"if the adopter has an adopted child, this does not prevent him from adopting another child."*[31] However, in a case deserving of special consideration, the Minister of Justice *"can confirm the contract even if the adopter has offspring by blood, or if the requisite age difference is missing, but the adopted is at least twelve years younger than the adopter"*.[32] However, it is important to emphasize that HPLC's provisions were not always put into practice, as it remained only a draft law throughout, even though it served as a guideline in many cases. Thus, for example, the current legal regulations did not require the adopter to be childless, and he was also entitled to adopt someone else's child even if he had his own legitimate child.[33]

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[29] RÉKASINÉ ADAMKÓ, Adrienn: *Az örökbefogadás a modern magyar családjogban 1861-től napjainkig (PhD-értekezés) [Adoption in modern Hungarian family law from 1861 to the present day (PhD thesis)]*. Pécs, 2021, p. 55.; RÉKASINÉ ADAMKÓ, 2018, *op. cit.*, p. 105.

[30] Private law Bill of 1928, § 207.

[31] *Ibid.*

[32] *Ibid.*

[33] MESZLÉNY, Artúr (ed.): *Magyar magánjog. Törvények, rendeletek, szokásjog, joggyakorlat, magánjogi törvénykönyv szövegével és rendszerében. II. kötet. Jogforrások, személyi és családi jog [Hungarian private law. With the text and system of laws, decrees, customary law, jurisprudence, private law code. II. volume. Legal sources, personal and family law]*. Budapest, 1928, Grill Károly Könyvkiadóvállalata, p. 444.; 20307/1886. I . M. sz.

5.2. Legal effects of adoption

Two important provisions are worth highlighting from HPLC, which were also found in numerous judicial rulings. According to Article 215, *"with adoption, the adopted person becomes the legal child of the adopter"*, and Article 217 stated that *"with adoption, the adopter does not acquire inheritance rights after the adopted person"*. Both provisions are important primarily because of their relevance to inheritance law, as the adopted party had the right of inheritance after the adoptive parents, but this was not possible in the reverse case. If in the adoption contract, the parties still stipulated a right of inheritance in favour of the adopter, this provision was deemed invalid.[34] A child adopted "by observing the legal formalities" had equal rights with the direct heirs of the adoptive parents in the division of the estate.[35] The adopted child was also entitled to challenge the gift that violated his duty part, and of course, this was only possible if the contested gift was established after the date of adoption.[36]

The other important legal effect of adoption is related to the name change, according to which the adopter and, in the case of a joint adoption, the husband could transfer his own family name to the adopted child. The parties could also agree that the family name should be used by the adopted person in connection with his own family name or by omitting it.[37] It is clear from the provisions of HPLC that this was not obligatory, however, in practice, the family name of the adopted person was often changed.[38]

5.3. Dissolution of Adoption

If the interests of the parties so desired, the adoption could be terminated by contract. In this case, the termination agreement also required the confirmation of the Minister

[34] 590. IM. 1890.; MESZLÉNY, *op. cit.*, p. 457.
[35] Lfi. 2065/1889. sz.; MESZLÉNY, *op. cit.*, p. 457.
[36] C. 4082/910. sz.; MESZLÉNY, *op. cit.*, p. 457.
[37] Private law Bill of 1928, § 216.
[38] RÉKASINÉ ADAMKÓ, 2021, *op. cit.,* p. 64.

of Justice. The adopter had to conclude this contract with the adoptee, and if the adoption affected the children of the adoptee, their consent was also required. If the adopter died, the adoption could still be terminated. At that time, the adopter had to conclude the contract with his children. In the case of adoption as a joint child, termination of the contract was only possible with the consent of both spouses while the spouses were alive.[39]

If there was no consensus between the adopter and the adopted regarding the dissolution, i.e. one party backed out, while the other insisted on the contract, then the Minister of Justice refused to confirm and warned the parties via the Orphan's Court to "take the dispute to the normal course of the law". And if the validity of the contract was declared during the judicial process, in this case, the documents had to be submitted again with the confirmation of the government authority.[40]

Either party could initiate judicial termination of the adoption contract, if one of them *"committed an act that could cause the parent to disown the child or the child to disown the parent, or if the adoptee or the adopter deliberately violated the duties associated with the adoption in such a serious way that because of this, maintaining the adoption became unbearable for the other party"*.[41] However, the case[42] where the adopted adult girl left and got married in another village without the consent of the adoptive parents cannot be considered as such a reason.[43]

After the termination of the adoption, the adopted person and his or her children, who were affected by the termination, could no longer bear the family name of the adopter.[44]

[39] Private law Bill of 1928, § 223.
[40] 36946/920. I. M. sz.; MESZLÉNY, *op. cit.*, p. 465.
[41] Private law Bill of 1928, § 224.
[42] P. I. 5875/1903., MD. IV. 51.
[43] MESZLÉNY, *op. cit.*, p. 465.
[44] Private law Bill of 1928, § 226.

6. Summary

The primary inheritance purpose of adoption - i.e. naming an heir - did not change much after 1848, however, due to regulations and established practices, adoptees could increasingly find themselves in a more advantageous situation. The application of the Austrian law represented a step forward compared to the previous regulation, but the subsequent guardianship law also failed to fully regulate this issue. In my opinion, the real progress in this age will be brought by a private law bill that is also incorporated into judicial practice.