Kíra VARGA: The Introduction of Civil Marriage with Act 31 of 1894, with special reference to the impediments to marriage

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1. Introduction

The institution of marriage has long been present in people's lives. Today, marriage is regulated by the Civil Code. It provides that a marriage is contracted when a man and a woman, present together, declare in person before a registrar that they are getting married.[1] It is understood that legally no ecclesiastical confirmation is required for the marriage to be valid. This was not always the case, however, since before the advent of civil marriage, the Church had full regulatory power in this area.

2. Marriage law before the Austrian-Hungarian Compromise of 1867

2.1. The beginnings

In the early days of the Hungarian nation, there was a complete community of women among the members of the tribes. This meant that all the men belonging to the tribe had access to all the women belonging to the tribe from adolescence. Consequently, men became indifferent towards women belonging to their tribe and therefore lusting after strangers. This led to the custom of abduction, which developed because the custom of the time was that a foreign woman could only be taken from her tribe by force. As the custom of abducting women developed, so did the idea of private property, since the man who took a foreign woman was as much his own as the prey he had taken, and the woman he had taken at the risk of his life was not to be given to those who had not helped him to take her. It was the development of this custom that

[1] Act V of 2013 on the Civil Code, 4:5.§

undoubtedly led to the abolition of the female community, and in it, we can trace the origin of the institution of marriage, its first system.[2]

In time, this violent method of acquisition was superseded by the need for cohesion between the tribes and replaced by the abduction of women for marriage. This involved the man buying the woman from the holder of the patrilineal power. This was the beginning of the Christian marriage (matrimonial).

2.2 Christian marriage

From the time of the monastic period until the Reformation, Roman Catholicism was the dominant religion in all European states. When St. Stephen introduced Christianity in Hungary, religion greatly influenced the creation and development of the Hungarian state. The Hungarians were not closed off from Western civilization, the main feature of which was the rule of the Church. Throughout Western Europe, the legal order was based on ecclesiastical law, which derived its authority from the divine will. It was natural that in Hungary, too, ecclesiastical law should become state law and, with the adoption of Christianity, a living law. As a result, the institution of marriage, the most intimate union of man and woman based on the divine ordinance, was also regulated by the Church.[3]

Later, however, the Reformation shook the long-established Roman Catholic Church. The newly emerging Protestant tendencies attracted people in droves and the Catholic religion, which had once dominated the whole of Europe, declined. In Hungary, in 1523, the Diet of Buda declared Lutherans heretics and punished them with death and confiscation of their property. Then, the Diet of Cracow in 1525 takes an

[2] ROSZNER, Ervin: *Régi magyar házassági jog [Old Hungarian Marriage Law].* Budapest, 1887, Franklin Társulat, pp. 2–3.
[3] TÓTH, Gáspár: *A magyar házassági jog rendszeres kézikönyve [Systematic Handbook of Hungarian Matrimonial Law]*. Budapest, 1896, Eggenberger, p. 1.

even more severe measure and gives freedom to burn Lutherans, both clerical and secular.[4]

The restoration of order in the church was expected from the universal synod. The then reigning Pope, Paul III, opened the synod on 1 November 1542, but it was immediately dissolved and did not resume until two years later. The synod lasted for 18 years, with some interruptions and others, but it did not live up to expectations. The Catholic Church distanced itself from the newly-formed denominations and refused to grant any favors. The Synod tightened up the existing rules on marriage: if marriage was contracted without any ecclesiastical procedure, it would be considered invalid. It also confirmed the indissolubility of marriage and established a procedure for marriage, the so-called form Tridentine. It reaffirmed the doctrine that marriage is established by the mutual consent of the two parties, and made it obligatory to proclaim the prospective marriage three times before the marriage was solemnized, and anyone who had any knowledge of an obstacle or prohibition between the spouses had to report it.[5]

After Mohács, the situation of Royal Hungary and Transylvania should be mentioned separately. In the territory of Royal Hungary, the organization and canon law of the Catholic Church remained unchanged. In addition, new religious congregations appeared one after the other, but their legislation was delayed. Later, the synods of Zsolna in 1610 and of Szepesváralja in 1614, the Evangelicals and the Reformed in 1626, and the synod of Komjáti, outlined their ecclesiastical organization and the establishment of canonical law. Protestant marriage matters were left under the jurisdiction of the Catholic cathedrals and were governed by this law. A change was brought about by Joseph II's patents, in which he declared that marriage was a civil contract that needed to be regulated by the state. For example, the delegates the

[4] RÁCZ, Lajos: A polgári házasság intézményének megvalósulása Magyarországon [The Implementation of the Institution of Civil Marriage in Hungary]. *Jogtörténeti Értekezések [Papers on Legal History]* Vol. 4., 1972, p. 7.

[5] *Ibid.*, pp. 8–9.

adjudication of matrimonial matters to the state courts. The state law and jurisdiction he introduced did not prove to be long-lived, as, after his death, Leo II suspended his measures. In the Diet of 1790-92, he restored sectarian rights. In the articles of a law passed, the Protestants were recognized as having jurisdiction over their ecclesiastical sees. Mixed marriages were governed by Catholic canon law. Although there was a view at the time that it was important to maintain a uniform state marriage law, this could not be enforced in the absence of support.[6]

In Transylvania, the renewal of the faith took place with less discord. The Diets of Torda in 1557 and 1558, and of Sighisoara in 1564, had declared the free exercise of religion. A change was brought about by the patents of Joseph II, which also came into force there, and was then revoked and the original situation restored.

In 1848, after the declaration of the Union between Hungary and Transylvania, Act 20 of 1848 declared equality between the denominations. After the suppression of the War of Independence, the Habsburg neo-absolutism introduced the Austrian Civil Code in Hungary. In Hungary, it excluded Roman Catholic, united Greek, and non-united Greek worshippers from its scope, and in Transylvania, it also reserved the Protestant churches. Article 43 of 1868, on the reunification of Transylvania with Hungary, emphasizes that the laws which applied to the religious denominations legally established in Transylvania and Partium remained in force.[7]

3. The creation of Act 31 of 1894 on Marriage Law

3.1. Background to the submission of the bill

Immediately after the Reconciliation, the reform of marriage law was discussed in Parliament. The views in the House of Representatives and the House of Lords were that there were two options for reform: a) each denomination should be given

[6] *Ibid.*, pp. 11–15.
[7] *Ibid.*, pp. 19–20.

jurisdiction over its church, b) or abolish all ecclesiastical jurisdiction and allow the state courts to rule on matrimonial matters.

The Parliamentary Committee on Legal Affairs recommended the latter, as the introduction of the former would be "*an unjustifiable step backward in our times*". The central committee of the House of Representatives, however, said that while it was justified to raise the issue, it would be inappropriate to do so immediately. Instead, the government should be instructed to bring forward a bill on the issue of ecclesiastical courts as soon as possible. The Parliament finally adopted this position.

Pending a final resolution of the issue, two important laws were passed. The first was Act 48 of 1868. This provided for mixed marriages to be subject to double jurisdiction and for each party to be bound by the judgment of its competent court. The other important law was Article 53 of 1868, which was later regarded as the basis of the Protestant Equality Act. This stated that the proclamation of the clergyman of one of the parties was sufficient for mixed marriages to be contracted and that children born of mixed marriages followed the religion of the parents according to their sex.[8]

On 25 February 1873, Daniel Irányi submitted a draft resolution, which was unanimously adopted two days later. The proposal essentially reiterated the resolution of the 1868 Diet, which had called for the government to submit a proposal on the free exercise of religion and the equality of denominations as soon as possible. In 1880, Irányi also made a motion to the House of Representatives to instruct the Minister of Justice by resolution to submit the indicated proposal. This was adopted by the House of Representatives. On 22 March 1881, the Minister of Justice, Tivadar Pauler, submitted a bill entitled 'Civil Marriage between Christians and Israelites and outside the country. The House of Representatives did not like the proposal and expected many more changes. However, governments were characterized by their vigilance over the

[8] *Ibid.*, p. 22.

institutions inherited from the feudal era in a capitalizing Hungary, which still had many feudal features.[9]

3.2. Discussion of the bill

After he was appointed Prime Minister, Sándor Wekerle announced church policy reforms, including a program of compulsory civil marriage, to overcome the baptismal controversy. Preparatory work on marriage law, initiated by the Ministry of Justice in 1890, was still explicitly based on the maintenance of sectarian marriage rights. However, when the government saw that there was no other way out of the situation, it amended its original draft with the help of Béni Grosschmid, Lajos Králik, and László Sipőcz, and the final version of the bill now provides for compulsory civil marriage. In August 1893 the proposal was finalized and submitted to Franz Joseph, who gave his approval for the proposal to be discussed in Parliament.[10]

In the Chamber of Deputies, the discussion of the proposal was delayed until April 1894, and a vote was held on 12 April, with 271 deputies voting in favour and 106 against, so that it was adopted as the basis for detailed discussion, and on 17 April the final stage of the proposal was adopted and only the House of Lords was left to discuss it.[11]

The Estates-General was the most conservative grouping in Hungary at the time. The general discussion of the bill began on 7 May. The vote was 118 in favour and 139 against, so the bill failed in the House of Lords for the time being. This failure led to a government crisis, with Wekerle resigning on behalf of his government. Franz Joseph then came to Hungary to resolve the situation and entrusted the Croatian ban Kiaroslav Khuen-Héderváry with the formation of the government, but the governing party refused to back Wekerle and was forced to give Wekerle the job again. On 12 June, his

[9] *Ibid.*, pp. 24–26.
[10] GROSSCHMID, Béni: *Házassági jog I. [Marriage Law I.]*. Budapest, 1908, Politzer, pp. 310–312.
[11] *Ibid.*, p. 60.

new government had already made its debut at the General Council. At the meeting on 21 June, the proposal was finally adopted, but one amendment was made during the detailed negotiations: the law left the religious obligations on marriage untouched. The amendment was agreed upon by the House of Representatives and ratification took place on 9 December 1894.[12]

4. Act 31 of 1894 on Marriage Law

The Marriage Act made a radical break with the previous denominational legal systems, regulating marriage entirely from a civil law perspective. It is important to note that the legislation does not confer any special legal effect on the engagement, but only provides for a right of compensation against the party who wrongfully withdraws, up to the amount of the costs incurred.

From then on, a valid marriage could only be contracted before a civil official. Such an official was, for example, the registrar, the chief magistrate, the mayor of a town with a regular council, or the first clerk of the legislature.

Under the article of the law, marriages that had been fundamentally broken could be dissolved, but only on the grounds for dissolution provided for by law and only by a court judgment. The different grounds for dissolution were always based on the fault of one of the parties and distinguished between two types of grounds for dissolution: conditional and unconditional. In the case of one of the unconditional grounds for dissolution, the judge is always obliged to order the dissolution of the marriage. An example of such an unconditional ground for annulment was:

1. adultery, fornication, a double marriage
2. desertion (only if there is a good reason for it)
3. serious abuse
4. criminal conviction

[12] *Ibid.*, pp. 66–69.

If one of the conditional grounds for dissolution applies, the judge may dissolve the marriage after examining the life circumstances of the spouses and after finding that the marriage bond is not durable. Such conditional grounds for dissolution include:

1. if one of the spouses is in serious breach of his or her marital obligations
2. if he/she has led an immoral life
3. if he or she persuades or tries to persuade a child of the family to commit a crime or lead an immoral life
4. if one of the parties is sentenced to imprisonment for a term of fewer than 5 years after the marriage.

One of the most important innovations of the article was the permission to divorce. However, the generalization of the institution of separation was important. Separation from bed and board provided for the separation of Catholic believers without a final divorce and without compromising Catholic beliefs.[13]

5. Impediments to marriage under the Act on Marriage

Marriage impediments were dealt with separately in the Act, after the provisions on betrothal. This provision was based on the first draft of the German Imperial Code.[14] In the introductory explanatory memorandum to the government bill, it was stated that, in laying down the impediments to marriage, the bill sought to reconcile the requirements of individual liberty with the essence and moral purity of marriage and its solidity as an institution on which the state was founded. The enforcement of the principle of individual liberty leads to the fullest possible recognition of the capacity to marry, whereas the essence of marriage, its moral character, and important state interests require its restriction. Striking the right balance between these two opposing aspects is the main task of good law. These considerations have necessitated the

[13] *Ibid.*, pp. 77–81.
[14] GROSSCHMID, Béni: *Házassági jog II. [Marriage Law II.].* Budapest, 1909, Politzer, p. 50.

removal of those impediments to marriage in existing law which were based solely on the credo of individual religious denominations. These included, for example, spiritual kinship, based on baptism and confirmation. In addition, it was necessary to modify several marriage impediments and create entirely new ones. The proposal distinguished between two types of marriage impediments: diriment and prohibitive. Diriment impediments are based on facts that are contrary to the very essence or moral nature of marriage. Such an impediment not only precludes the marriage from taking place but also makes its existence impermissible. Prohibitive impediments are set up to protect certain interests which are important in making the marriage impermissible. The difference between the two types of impediments is also apparent from the wording of the paragraphs. The proposal makes a distinction between diriment impediments by using the term 'shall not' and prohibitive impediments by using the word 'forbidden'. The majority of the prohibitive and prohibitive impediments were those which could not be dispensed with because they were incompatible with the nature and morality of marriage. The proposal conferred the right of exemption on the King in the case of impediments of greater moral importance and on the Minister of Justice in the case of impediments of lesser importance.[15]

Marriage could not be contracted in cases of incapacity: this included persons under 12 years of age, the mentally ill or deprived of the use of their reason, persons under guardianship for reasons of insanity, deaf-mutes unable to understand signs or whose minority had been extended for this reason. Women were generally not allowed to marry before the age of 16, men not before the age of 18, although the Minister of Justice could grant an exemption. However, the consent of the parents, legal guardian, or guardianship authority was required for the marriage of minors. A special rule applied to persons under guardianship proceedings on the grounds of incapacity, who were not allowed to marry-until the end of the proceedings.[16] Marriage required the mutual consent of the parties, which, by its very nature, could only be based on the

[15] GROSSCHMID, *op. cit*., pp. 64–67.
[16] RÁCZ, *op. cit.*, p. 78.

self-determination of the couple. In cases in which self-determination is precluded by lack of capacity to consent, marriage cannot take place. This is the reason why persons who are incapacitated, as persons whose will and expression of will are not valid, cannot marry.[17]

The law also made provision for impediments arising from lack of free consent, such as coercion, but here only the fear of serious threats can be taken into account. The Curia clarified this in a decision. Several witnesses questioned during the trial testified that the plaintiff's mother had stated that the plaintiff had to get married or she would disown him. Another witness testified that the parents had said before that the plaintiff did not want to marry, but that they had already promised their daughter to the defendant and encouraged her to marry, and that her father had said that if she did not do so, there would be no more room on his land. The Curia held, however, that these statements by the parents, given the applicant's circumstances and the fact that the applicant was 22 years old at the time of the marriage and therefore of age to exercise her will, could not be regarded as a threat of such a magnitude that the fear which they created would have placed the applicant in a situation of duress.[18]

Such impediments included mistakes and misrepresenting the other spouse's essential personal qualities. The latter gave rise to a right of action. The practice also included the bar of misrepresentation, i.e. the impossibility of divorce. This impediment gave rise to the following case: the plaintiff based her action on the fact that her husband, the defendant, with whom she had married on 4 January 1893, was incapable of performing the conjugal obligations at the time of the marriage; that after almost four years of cohabitation she had not divorced him. She did not know of her husband's sexual impotence at the time of the marriage and could not have inferred it from the circumstances, and she is seeking annulment of the marriage based on Article 54(c) of

[17] MÁRKUS, Dezső: *A házassági jog és az anyakönyvi törvény kézikönyve [Handbook of Marriage Law and Civil Registration Law]*. Budapest, 1895, Grill Károly Cs. és Kir. Kiadó, p. 8.
[18] MÁRKUS, Dezső: *Felsőbíróságaink elvi határozatai [Decisions in Principle of our High Courts]*. Budapest, 1900, Grill Károly Cs. és Kir. Kiadó, p. 102.

Act 31 of 1894. The medical examiner's examination confirmed that the marriage had not been dissolved and found that the defendant was impotent. The plaintiff claimed that until she returned to her parents and they informed her of the illness, she was unaware of it. However, the Curia held that a marriage may be attacked for fault under section 54(c) of Act 31 of 1894 if one of the spouses was permanently unable to perform the marriage debt at the time of the marriage and the other spouse did not know this nor could have inferred it from the circumstances. For this reason, the marriage is to be contested under § 57(c) within one year from the date on which the spouse became aware of the error. Considering that the parties to the action, according to the enclosed certificate of marriage, were married on 4 January 1893 and, according to the plaintiff's admission, separated in October 1896 and thus lived together for almost four years, the plaintiff's claim that the defendant only became aware of his infertility in October 1896 cannot be taken into account. In these circumstances, given that the plaintiff did not bring the action until 13 February 1897, the marital bond between the parties could not be declared invalid.[19] In addition, the impediments arising from the relationship of kinship were also important:

- consanguinity, which prevented marriage between blood relatives in the direct line, between a brother and his brother's blood descendant, and between cousins. According to judicial practice, the last impediment exists only between first cousins.[20]
- civil affinity, or adoption, which was a prohibition rule that applied only to the duration of the adoption.

The guardianship relationship was also a marriage impediment, with marriage between the guardian and his descendant and the ward being prohibited during the

[19] MÁRKUS, 1900, *op. cit.*, p. 104.
[20] MÁRKUS, Dezső: *Magyar magánjog mai érvényében. Törvények, rendeletek, szokásjog, joggyakorlat. I. kötet [Hungarian Private Law in its current version. Laws, decrees, customary law, jurisprudence. I.]*. Budapest, 1906, Grill Károly, p. 123.

guardianship. A valid marital relationship also existed as an impediment until the previous marriage was dissolved or annulled.

Two offenses were listed as impediments: adultery and adultery. The marital impediment was the clerical order and monastic vows. The waiting period remained a prohibition against marriage. It was forbidden for a woman to marry before 10 months had elapsed, in the event of the termination or dissolution of her previous marriage. Any widow wishing to marry within the waiting period was obliged to wait until the waiting period had expired, regardless of her age.

6. Conclusion

Civil marriage has come a long way. For many years, the Church had so dominated people's lives that it became difficult to break away from it. In Article 31 of the Marriage Act of 1894, it is still evident that, although the rules of the Church's marriage were broken, it was not possible to break away from them completely. Such an influence can be seen, for example, in the institutionalization of separation from bed and table, where the rules were adapted to the Catholic faith. The law was a major step forward in codifying a legal system that was largely customary law. As Károly Szladits put it in 1940: "*The whole of our private law today is still a customary law, interspersed with very few laws. Family law is the part of our family law which can be said to be the most codified.*"[21]

[21] RÁCZ, *op. cit.*, p. 83.