FROM MARITAL PROPERTY LAW TO FAMILY PROPERTY LAW – THEORETICAL AND PRACTICAL ASPECTS OF PROPERTY LAW REGULATIONS PROTECTING FAMILIES

Tímea BARZÓ[1]

ABSTRACT

Although the legislator prefers the institution of marriage and accepts it as a form of family relationship, the system of family relationships has altered as a result of social changes, which can also be seen in the legal regulation. Therefore, the framework of previous thinking, which is almost exclusively based on matrimonial property rights, has been modified by the social and economic changes and the consequent constant change in regulation and attitudes. As a result, not only matrimonial property regimes but also the legal relationship between persons living in a registered partnership or de facto partnership, and their relationship with third parties are covered by matrimonial property law as well. Consequently, it is necessary to apply a new comprehensive terminology to these property relations, which is family property law.

However, it can also be stated that during the development of the family property regulation, the legislator sought to incorporate guarantees into the system during the analysis of the diversity of family relationships, which prevented the endangerment of family existence, the vulnerability of the weaker partner or the rights of minors belonging to the family. However, most of the protecting provisions in the family property law apply to persons living in a marriage (registered partnership), the property relations of de facto partners are less regulated, and they contain only partially, or under certain circumstances family protection standards, legal consequences, and safeguards. The reason of this is that the legislature protects and favours marriage in principle over the other two legally regulated forms of partnership, by which it encourages young people and couples to marriage which requires mutual responsibility, solidarity, and commitment.

KEYWORDS

marital property law
family property law
marital community of property
the legal property regime of de facto cohabitants
legally recognised partnership
contractual freedom

1 | Professor, Department of Civil Law, Faculty of Law, University of Miskolc, Hungary; Department of Civil Law, Faculty of Public Governance and International Studies, University of Public Service in Budapest, Hungary; civba@uni-miskolc.hu, ORCID: 0000–0001-9725–8494

https://doi.org/10.55073/2021.1.23-39

1. From marital property law to family property law

In the traditional Hungarian legal literature on civil law, we cannot find any writings on marital property law since the viewpoints of contemporary legal scholars were determined by the Tripartitum for a long time. Consequently, the term 'marital property law' was not used at all, and property law issues relating to the wife were classified into the frame of women's special rights. In addition, there was a significant overlap in the content of the law of succession and the rules on widows regarding women's special rights.[2] Among the special rights for women, they discussed the rights that protected the property and livelihood of women who remain unmarried or single after their marriage has ended, such as the girl's quarter (*de quartalitio seu quarta puellari*), the rights of unmarried women (*de Jure capillari*),[3] the rights of widows (*de Jure viduali*), the *dos scripta vel contractualis,*[4] the *de contradote*, the conjugal life of women and noble women (*de coaquitione conjugali*), and dowry and bride-price (*de allatura et parapherno*).

Nevertheless, in the works of Hungarian private law scholars published in the 1880s and 90s, the legal aspects of women's special rights and property benefits for widows were included in the family law section of personal law; these scholars did not distinguish between the law of matrimonial obligations and the law of matrimonial property.[5] These property provisions typically affected women's unequal property rights and aimed to compensate for it; therefore, they had a family protection objective only in an indirect way.

According to Károly Szladits, the main subjects of private law—even in 1941—were family law and property law.[6] The reason for this viewpoint is that family law was divided into three parts at that time: matrimonial law, kinship law, and guardianship law.[7] In 1940, Antal Almási wrote in Volume II of Hungarian Private Law, edited by Szladits, that the conclusion of marriage did not significantly change the property status of the spouse. With certain exceptions, spouses remained independent property subjects, and the partial merger or subsequent joint acquisition of matrimonial property after marriage was not common.

The legal effects of marriage in terms of property law were mainly in the form of some lasting obligations based on law: a) the maintenance obligation of spouses, particularly of the husband towards his wife, their minor children, and a minor child brought into the marriage by the wife and adopted by the husband; b) the husband's obligation to cover all the costs and expenses of the family household; c) the obligation in certain social classes for spouses to give half of the property that was acquired during the marriage at the time of dissolution of the marriage; and d) the husband's obligation to pay his wife legal wages at the time of dissolution of the marriage for not having breached his marital obligations (typically loyalty) during the marriage.[8] At the turn of the 19th and 20th centuries, most Hungarian women did not have any qualifications, so they were not engaged in any

2 | Herger, 2017, p. 166.
3 | The rights of unmarried women (ius capillare) cover the rights of a daughter orphaned by the death of her father to receive the benefits due to her rank (i.e., housing and maintenance) and to be married off from her father's estate. In Katalin, no date.
4 | Szladits, 1940, pp. 269–270.
5 | Herger, 2017, pp. 166–167.
6 | Szladits, 1941, p. 21 and 23.
7 | Szladits, 1940, p. 5.
8 | Szladits, 1940, pp. 269–270.

gainful employment. Therefore, the wife was treated on a par with minor children, who had to be cared for by the husband. In this respect, maintenance was an important family protection measure at that time.[9]

In summary, it can be stated that property rules in family law were typically linked to marriage. However, these property law provisions were part of family law (matrimonial law), which belonged to the law of persons, so they were not separated as matrimonial property law provisions, despite the fact that the contemporary legal literature dealt with the property obligations arising from marriage, matrimonial property contracts, and dower under the heading 'the property effects of marriage'.

Act IV of 1952 on Marriage, Family, and Guardianship (hereinafter referred to as the Family Act) was a milestone in the history of family law, which typically focused on personal relationships (such as marriage and parent-child relationships) but also regulated property relations between family members, including spouses.[10] However, family law property relations have almost exclusively appeared in the areas of community property, division of community property, maintenance, settlement of dwelling, and contracts between spouses and third parties, and, from 1986, in the area of *matrimonial property law*.[11]

In contrast to the Family Act, *Act IV of 1959 on the Civil Code* (hereinafter referred to as the 1959 Civil Code) primarily regulated property relations between parties in economic life, while personal relations played only a secondary role. Nevertheless, over the past 50 years, family relationships and the property situation of family members have become much more vibrant and complex. However, Hungarian family law considers the institution of marriage as the basic unit of family, and societal changes have made it necessary to provide legal protection for other forms of social cohabitation as well. In recent decades, we have been faced with the social fact that the marriage-based family model on which the family law system is built is being increasingly preferred. The growth of cohabitation is a social trend, and Hungarian legislation could not ignore it.

For the first time, a concrete legal regulation concerning cohabitants was set out in *Act IV of 1977,* which inserted the concept of a cohabitant into the Part of Companies (Section 578. §) of the 1959 Civil Code According to the definition set by the Act, cohabitants refer to *a woman and man living together without marriage, in a common household, in an emotional and economic community.* After a Constitutional Court Decision,[12] Act *XLII of 1996* set out a new definition of cohabitant, which was inserted in the 'Closing provisions' of the 1959 Civil Code:[13] 'unless the Act otherwise stipulates, cohabitants are two persons, regardless of their sex, living together without marriage, in a common household, in an emotional and economic community'.[14] The 1959 Civil Code also provided for de

9 | Herger, 2017, p. 175.
10 | Weiss, 2000, pp. 4–5.
11 | Matrimonial property law, in a narrow sense, means the set of laws governing the external legal relations between spouses and between spouses and third parties, both during the marriage and in the event of dissolution of the marriage. The broader interpretation includes claims relating to the community of property of the spouse, its division, the use of the dwelling, and the enforcement of spousal maintenance. See Csűri, 2002, p.158.
12 | Decision 14/1995. (III.13.) of the Constitutional Court
13 | The definition was changed by the 1996 and 2009 amendments to the Civil Code, and it was transferred to the 'Interpretation provisions' of the Civil Code. The first amendment recognised the cohabitation of same-sex partners, on the grounds of the decision of the Constitutional Court. See Kőrös, 2013, p. 6.
14 | Kuti, 2016, pp. 7–8.

facto property relations between partners, recognising *property acquired by cohabitants in proportion to their contribution* as joint property.[15] Judicial practice has been consistent in the matter, with the presumption of joint acquisition applied to the growth in assets during the life of the partnership.[16]However, equal acquisition by life partners was not a presumption, but only a supplementary rule, which could be applied if it was not possible to establish a realistic acquisition ratio, even after evidence.[17]

The proportion of out-of-wedlock births in Hungary increased in the decade after the turn of the millennium and reached a record high of 47.8% in 2015. This can be traced back to the strong growth of extramarital partnerships and the increase in the number of people who had children out of them. Between 2001 and 2016, the number of people who chose to live in cohabitation more than doubled.[18]This tendency led to an increase in the number of disputes in which the *traditional* rules on matrimonial property and other family protection could not be applied automatically. Consequently, mothers, and less often fathers, were left alone and *unprotected* with their children after the end of a de facto partnership. There was also an increasing need to settle any property liability arising from contracts and transactions concluded by partners with third parties.

In our country, the adoption of the still effective *Act XXIX of 2009* on registered partnerships (Bét.) led to an almost complete elimination of gender discrimination regarding the optional forms of partnership. A registered partnership can be concluded between *two persons of the same sex* who have reached the age of 18 years. Such individuals may enter a registered partnership before the registrar if they mutually state their intention to do so.[19] Registered partners are entitled to all the rights and obligations that the Civil Code of 2013 attributes to marriage in the area of personal and property rights and obligations (according to the Family Law Book, they are loyalty, mutual cooperation and support, maintenance, mutual property acquisition, and right to dwelling, and according to the Succession Law Book, the same status as the spouse in intestate succession).[20] Accordingly, the Civil Code is a background for the law of registered partnerships.[21]

The still effective *Act V of 2013 on the Civil Code* (hereinafter referred to as CC) regulates family members' relationships in a separate unit, in Book Four, whose editorial solution acknowledged family law as an integral part of civil law.[22] However, it is significant that in line with the provisions of the Fundamental Law,[23] the Family Law Book *recognises only*

15 | Szeibert, 2012, pp. 173–189.
16 | BH1996, p. 258; BH2007, p. 122. See in detail: Hegedűs, 2008, pp. 11–19.
17 | Nyírőné, 2016, p. 38.
18 | According to the legal literature, most cohabitants consider their relationship a 'probationary marriage'. See in detail: Spéder, 2004, pp.137–151; Bukodi, 2002, pp. 227–251.
19 | Bét. art. 1. (1)
20 | Bét. art. 3 (1)
21 | Kőrös, 2013, p. 7.
22 | Kriston, 2020, p. 77.
23 | The Fourth amendment of the Fundamental Law supplemented Article L, showing that *the basis of family relationship is marriage and parent-child relationship.* The aim of the Fourth amendment of the Fundamental Law was to strengthen the protection of the family as a fundamental institution of society at the level of the Constitution, in line with historical tradition. The Constitution committed itself to protecting the institution of marriage, which also closed the debate on the recognition of same-sex marriage at the constitutional level. Schanda, 2012, pp. 84–85. The Fourth Amendment of the Fundamental Law also raised to a constitutional level the rules in which the family relationship is based on marriage and the parent-child relationship. With this viewpoint, the Fundamental Law does not recognise *the so-called de facto partnership as a family, even if it results*

marriage as the basis of the family among the forms of couple relationships. The concept of *registered partnership* has been completely removed from the Civil Code, which is intended to regulate private law relationships in a uniform way, to the extent that the law does not mention the registered partner either in the definition of 'relative'[24] or among the obstacles for marriage. It can be found only among the circumstances that exclude the existence of a de facto partnership if one of the partners has a registered partnership with another person.[25] The Civil Code still defines a de facto civil partnership as a contractual relationship in the Obligation Law Book as follows:

> *De facto partnership* refers to a partnership where two people live together outside of wedlock in an emotional and financial community in the same household (cohabitation), provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, that they are not related in direct line, and that they are not siblings.[26]

It is not a requirement for partners to be of different sexes, so a *de facto partnership can be established between same-sex partners* as well.

De facto partnerships will result in family law effects only if the partnership has existed for at least one year, and the partners have a common child from their relationship.[27] However, the recent precedent-setting decision of the Curia recognised that even a de facto cohabitation relationship where only long-term cohabitation takes place, but no common minor child is born, is still a family relationship.[28] This decision is a good illustration of the fact that despite the separation of rules, case law seeks to address this partnership form in a uniform way in the future and clearly recognises its family law nature.

Decision No. 43/2012 (XII. 20.) of the Constitutional Court stated that if the legislature intended to highlight and set one form of cohabitation as a model, it is obliged to guarantee the same level of protection for other forms as recognised by law, because of its obligation to protect the institution.[29] So, family in the *sociological sense* shall also be protected, not just family based on marriage. This is also linked to a cornerstone principle of family law, which focuses on the protection of families alongside the protection of marriage. This

in the birth of a child. In such cases, the parents are considered the family of the common child, but the family relationship is not established between the parties. This approach is also reflected in the regulation of the de facto partnership in the Obligation Law Book of the Civil Code. Unfortunately, this 'marriage-centred' approach discriminates indirectly against children depending on whether they are born out of marriage, an occasional relationship, or a de facto partnership.

24 | CC. art. 8:1. point 1.2.

25 | CC. art. 6:514. (1)

26 | CC. art. 6:514.

27 | In the legal literature, family law issues of de facto cohabitation seem divisive. Kriston, 2016, pp.226–239; Kriston, 2018, 401–406; Kriston, 2019, pp.101–109.

28 | BH2021, p. 11.

29 | It did not follow from Article L of the Fundamental Law that cohabitants who take care of and raise each other's children, but do not or cannot have a common child because of other circumstances (being elderly or infertile), persons caring for their siblings, grandparents raising their grandchildren, and other relations based on lasting emotional and economic communities would not be subject to the same objective obligation of the state to protect the institution, no matter what the legislature may call them. Decision 43/2012. (XII. 20.) of the Constitutional Court. The changing concept of the family and the related case law of the European Court of Human Rights are discussed in detail in the following paper: Bánki, 2015, pp. 367–372.

may also be the reason why the Family Law Book protects family law relationships in a broader sense and does not limit them to the legal relationships of married couples.

The regulation on the protection of the family, in principle, indicates that family law rules primarily *protect the family as a community* (the relationships between individual family members). This applies both to *family relationships established by law* (e.g., marriage, adoption, filiation, adoption, guardianship) and to *other forms of coexistence* regulated by law, in accordance with the case law of the European Court of Human Rights. So, for example:

- In the case of a step-parent, a step-child, a foster parent, and a foster child, the Family Law Book regulates mutual maintenance rights and obligations.[30]
- The law also grants the right to contact for the former step-parent, foster parent, guardian, or person whose paternity presumption was challenged by a court, provided that the child had been brought up in the household of the given person for a longer period of time.[31]
- A person who has a real family relationship with the child (e.g., a step-parent) may participate in the care and upbringing of the child with the consent of the parent who has parental responsibility.[32]

The hierarchy in the legal recognition and protection of partnerships—marriage, registered partnership, and de facto partnership in that order—is also reflected in the *family protection rules governing the property relations* of the persons in these partnerships.

2. Family protection provisions in property relations of persons in different relationships

2.1. Family protection rules of the statutory property regimes

2.1.1. Marital community of property as the legal property law regime

The *marital community of property* is the legal regime governing matrimonial property in Hungary, but the law differentiates between property used in the daily life of spouses and the entrepreneurial assets used by them for their occupation and participation in business. It lays down rules concerning their use, management, and right of disposal, as well as the division of the joint property of spouses. The Civil Code stipulates special rules for entrepreneurial assets. There are special provisions that govern a *spouse's common house as the family's home*.

Spouses are entitled to settle their property relations primarily by way of a matrimonial property contract with content in line with their own intentions.[33] If the spouses do not conclude a matrimonial property contract, the *matrimonial community of property is the legal property system*. The rules of the matrimonial property regime cover property that is not governed by the spouses' matrimonial property contract. The family property

30 | CC. art. 4:198. – 4:200.
31 | CC. art. 4:179 (3)
32 | CC. art. 4:154. Hegedűs, 2014, p. 28.
33 | CC. art. 4:63.

function of the marital community of property can be found in the fact that all of the property, property values, rights, claims, and debts that the spouses acquire together or separately during the existence of marital cohabitation and which are not the personal property of either of them[34] shall be encumbered indivisibly from the date of acquisition or claim; they have an undivided and equal right and interest from the date of the acquisition or the creation of the claim, unless a contract stipulates otherwise.[35] This provision goes a long way to protect a wife who, for example, may be out of work for a long period and unable to take up gainful employment because of childbirths. Similarly, it protects the property interests of the spouse who takes on a greater burden in raising children, running the household, and carrying out family tasks since the other spouse is more of a property earner in terms of income and acquisitions from their work or business. Unfortunately, there is a darker side of this rule: the spouse shall be regarded as a joint owner not only of the assets but its passive elements as well. As a general rule, it means that the spouse who was not a party to the transaction must also be liable for the obligations assumed by the other spouse. This may lead to a situation in which one spouse, through risky transactions, or because of an addiction (e.g., gambling addiction, excessive alcohol consumption), may exhaust the community property and often the potential inheritance of the children during the existence of the community of property. However, the Family Law Book allows courts to terminate the community of property between spouses at the request of either spouse, in such a way that the existence of a life partnership between the spouses subsists. This shall, in particular, include whether the *spouse accumulated debts* that jeopardise their share of the community property and if an enforcement procedure is opened against the other spouse engaged in private entrepreneurial activities, or an *enforcement procedure or liquidation proceeding* is opened against the sole proprietorship, cooperative society, or business association, which jeopardises the other spouse's share.[36] These exceptional rules provide an escape way for spouses who do not want to divorce from their spouse for personal reasons, but, at the same time, do not also want to use their share of assets or income to cover the debts of the other spouse.

Thus, the property of the spouses can be divided into three separate sets of assets (sub-properties) from the moment of acquisition: the sub-properties of either of the spouses and the community of property. Thus, in addition to the community of property, the property of the spouses existing at the beginning of cohabitation and acquired during the period of cohabitation from specific legal grounds (e.g., gifts, inheritance) or from specific sources retains separate status. For example, property inherited by a spouse, typically from his or her ancestors, or received as a gift from close relatives, retains its separate property status for family protection reasons.[37]

The aim of the unification of family property can be ascertained in the property law rule, which states that assets that are a part of separate property of either spouse, which replace any furnishing and household item normally used in everyday life during matrimonial relationship, shall become community property after five years of marriage.[38]

34 | CC. art. 4:37. (4)
35 | However, in contrast to the presumption of equal acquisition, it is of course possible to prove that a separate investment or expenditure results in a different proportion of acquisition.
36 | CC. art. 4:54. (1) points a)-b)
37 | CC. art. 4:38. (1) point b)
38 | CC. art. 4:38. (3)

The priority of marital life community as a value that should be protected is ensured by judicial practice as well. According to courts, if one of the spouses living in marital life with community property establishes cohabitation with another person in another city at the same time, the proof of the marital life and community property excludes the *establishment of the existence of cohabitation from the viewpoint of law.*[39] However, the Curia also stated that the mere existence of a marriage of one of the parties will not exclude the existence of a cohabitation relationship. Therefore, it should be emphasised that it is not the mere existence of a marriage or registered partnership, but the existence of *marital life community or registered partnership* that precludes the establishment and maintenance of a de facto partnership .[40]

The spouses are entitled to jointly manage the assets of community property. *Common burden sharing* is emphasised by the rule, which stipulates that either of the spouses may request the other spouse's consent to take measures deemed necessary for the protection and maintenance of assets that are a part of community property.[41]

The costs of maintenance and administration of the assets of community property, *the costs of maintaining the common household,* and *the expenses of supporting and raising the common child* of the spouses shall primarily be covered from the community property. If the community property is insufficient to cover these costs, they shall be covered from the spouses' separate property as appropriate. If only one of the spouses has any separate property, the funds required to cover such outstanding expenses shall be made available by that spouse.[42]

The rule which stipulates that any contract for pecuniary interest concluded by a spouse during the community of property shall be presumed, with some exceptions, to have been concluded with the other spouse's consent if the contracting third party was aware or should have been aware that the other spouse had not given his/her prior consent for the contract shall be applied only between spouses. The exceptions include a transaction involving a jointly-owned dwelling, or the marital home, and the contribution of joint property to a business. In these cases, the consent of the other spouse cannot be presumed. This restriction was justified on the one hand for *the protection of the family home* and, on the other hand, for the prevention of the concealment of matrimonial property by making it available to a business entity, particularly a company. If the community property becomes part of the assets of a company or an enterprise as a result of a unilateral decision of one of the spouses, it can be managed or removed from the company or enterprise only in accordance with the basis of the law applicable to the given company or enterprise within the framework of the exercise of membership rights in which the non-member spouse has no say. In judicial practice, we can find cases where one spouse has deprived the other spouse of their claim to community property by making a major asset that is part of community property (for example, the common dwelling itself) available to a business as a non-monetary contribution. These rules have been established to prevent such cases.[43]

Regarding property relations of registered partners, Section 3(1) of Bét. II states as a *general rule* that *the rules on marriage shall be applied mutatis mutandis to the registered*

39 | BH2004, p. 504.
40 | EBH2018. M.8. and Csűri, 2016, p. 29.
41 | CC. art. 4:42. (2)
42 | CC. art. 4:44. (1)-(2)
43 | Kőrös, 2005, p. 9.

partnership, with the exceptions governed by law. These exceptions do not affect the property relations of registered partners, only the rules on binding and personal rights: for example, they cannot jointly adopt a child, and the notary can terminate the relationship in certain cases. Consequently, the registered partnership property regime, which is identical to the spousal property regime described in the previous point, and the connected family protection rules shall be applied to registered partners as well.[44] So, from the viewpoint of property law, there is no difference between the two relationship forms.

2.1.2. The legal property regime of de facto cohabitants

As mentioned above, the property law regulations of de facto partners, similar to the concept of cohabitation, are defined in the Obligation Law Book of the Civil Code. Cohabitants are allowed to settle property issues primarily within the framework of a *cohabitation property contract*. Otherwise, *they are subject to the statutory property law provisions*. The Civil Code of 2013 placed the legal property system of cohabitants on new grounds. Accordingly, cohabitants are *considered independent in their property acquisitions* during their relationship, but after the termination of the relationship, either party *can demand a share in the growth in assets*.

Assets constituting the separate property of a given partner shall not be considered a part of the growth in assets. In the course of the division of the growth in assets, the governing principle is the parties' *assistance in the acquisition of property*, so partners are entitled to a share in the jointly-acquired property primarily *in nature and in proportion to their contribution*.[45] Determining the proportion of participation is left to the courts to handle, which can create serious difficulties around proof in practice. According to equity and the need to protect the weaker party, the extent of their involvement in the *household and child-rearing tasks and in the other partner's enterprise* shall be construed as their contribution towards acquisition. If the ratio of contribution cannot be determined, *it shall be considered equal*, unless this would constitute an inequitable financial loss for either partner. The legal property system between cohabitants can be considered specific; however, it *bears many similarities with the property acquisition regime* that can be concluded between spouses by contract.[46] According to an important rule, in the case of complete separation of property during cohabitation, cohabitants use and manage their property independently, so they have full autonomy over it and therefore are also independently liable for the obligations they have assumed. However, a situation may arise where the irresponsible, debt-generating transactions of one of the parties will result in no growth in the assets (jointly-acquired property), i.e., at the termination of the partnership, nothing can be claimed by the other party.

This could lead to an unfair situation where the prudent and careful party would be obliged to give a certain proportion of the growth in assets to the less prudent partner. Therefore, the CC makes it possible, in exceptional cases, to claim the determination of a given party's share of the jointly-acquired property during the existence of the life community, if one party concluded such a contract without the knowledge of the other party, which accumulated a debt that exceeded the claimant's share of the assets.[47] If the other party refuses to cooperate in establishing the value of jointly-acquired property

44 | Kőrös, 2013, p. 7.
45 | CC. art. 6:516. (1)-(4).
46 | CC. art. 6:516. (4); CC. art. 4:71. (1).
47 | Bata, 2017, p. 24.

and providing adequate safeguards despite having been asked to do so, or prevents such efforts, the party may bring action in court.[48]

It seems clear that in the marital community of property, the proportion of the community property acquired by each spouse, or the contribution to running the household and raising the children, is completely irrelevant; the result is undivided community property. On the contrary, in the case of de facto partners, although the *involvement in household and child-rearing tasks and in the other partner's business* is considered to be a contribution to the acquisition of property, the proportion of this contribution is determined by the court on the basis of the evidence, which will certainly fall short of the value calculated under the rules of community of property. There have been several studies on the difficulties in establishing the contribution to the acquisition rate.[49]

2.2. Family protection rules in contractual relationships of persons in a legally recognised partnership

Based on the principle of voluntary and free choice of a couple, the Family Law Book emphasises that spouses, registered partners, and de facto partners (hereinafter referred to as parties) shall settle their property relations by way of a *matrimonial, registered partnership, or de facto partnership property contract* with content in line with their own intentions.[50] In these contracts, parties can identify the *property law regime* that would govern their property relations instead of the statutory property system, from the date stipulated in the contract, during their life community.

The CC regulates *optional property systems* in addition to the legal property regime, and the rules of optional systems can be found within the framework of the rules regarding property law contracts. As an optional property regime, the law contains provisions on *the acquisition of community property based on the principle of added value* (called the property acquisition regime) and on the *separation of property*. The regulations, which aim to protect one spouse or partner from the indebtedness or abusive exercise of rights by the other spouse or partner, are incorporated into the statutory and optional property regime as well. Regarding the content, amendment, and termination of the contract, the rules of the matrimonial property contract can be applied mutatis mutandis to the property contract of de facto partners.[51] However, agreements are also often *concluded to divide the common property of spouses or registered partners or to liquidate the property of de facto partners*.[52]

2.2.1. Family protection limits of contractual freedom

The parties *are free to decide* whether they should settle their property relations for the duration of their cohabitation by a property contract, rather than through the provisions of the Family Code. They are also free to decide whether they should settle the division of the community property or growth in assets by contract after the end of their cohabitation or start a dispute before the court.

The *freedom to choose a partner* can only be applied to the free choice of the partner, since the subjective limit is strict in the contractual settlement of the parties' property

48 | CC. art. 4:70. (1)-(3).
49 | Nyírőné, 2016, pp. 38–43; Nyírőné, 2017, pp. 44–49.
50 | CC. art. 4:63; 6:515.
51 | Kriston, 2014, pp. 35–40.
52 | CC. art. 4:57. (1)-(2).

relations: property law contracts can only be concluded by the parties intending to form a partnership or by persons who are already in the given partnership (spouses, registered partners, de facto partners).The partners can also be the persons who dissolve the relationship in the division of community property or growth in assets. The parties are also free to determine the *content of their contracts*.

The freedom of the parties to determine the content of the contract is primarily guaranteed by the law, since most of the contract law rules are dispositive. The contracting parties can derogate from contractual rules by common consent, unless the law stipulates otherwise. Cogent rules are the limits of contractual freedom; therefore, they are exceptional in contract law. Cogent rules are required if the *interests of third parties or the protection of the moral values of society*, other than the contracting parties, require intervention in the autonomy of the contracting parties by means of a binding rule.[53] Accordingly, with regard to the contractual relations of spouses, the following interests are protected by provisions restricting the parties' freedom to formulate the content of the contract:

- protection of the fundamental interest of the family
- prohibition of property deprivation of the other spouse
- protection of one of the spouses' creditor, and
- exclusion of the limited responsibility of the spouse on the grounds of Art. 4:49 (2) of the CC[54]

We will only deal with those restrictions from the abovementioned list that are designed to protect the fundamental interests of the family, including the rules on the prohibition of spousal abuse.

As mentioned previously, the parties are free to decide in the contract whether to deviate from the rules of the statutory property regime for the duration of their cohabitation and live under full separation of property in the future. Family protection interests can be found in the cogent provision of the law, which stipulates that the *costs of maintaining the common household and the expenses of supporting and raising the common child* should primarily be covered from the community property, even if the spouses live in full separation. *Any contractual clause is null and void* if it exempts either spouse from all or most of these costs and expenses.[55] Work done in the household and efforts to raise a child shall be construed as a contribution to costs.[56] Since de facto partners are entitled to conclude a contract that contains any provision relating to property rights, which could apply to married couples under contract, or in accordance with the CC, the abovementioned restrictions shall be applied in contractual relationship of de facto partners as well.[57]

With regard to the contractual relations of the parties, it is very difficult to determine the extent of the contractual freedom and private autonomy of the spouses, and, thereby,

53 | Vékás, 2016, pp. 44–45.
54 | So, the spouses cannot exclude the liability of a spouse who is not a party to a community of property transaction.
55 | This provision is fully in line with the Principles of the European Committee on Family Law, in particular the principle on property relations between spouses, which requires each spouse to contribute to the family household needs according to his/her ability. This contribution includes running the household, meeting the personal needs of the other spouse, and raising, educating, and caring for children. See Boele-Woelki, 2014, p. 7; Kopasz, 2018, pp. 26–27; Szeibert, 2016, p.8.
56 | CC. art. 4:73. (2).
57 | CC. art. 6:515. (2).

the socially reprehensible threshold that negates the property interests of one (former) spouse and almost exclusively prioritises the property rights of the other spouse without any reasonable justification.

For such contracts, the legal provisions in the Civil Code on the invalidity of contracts can help in assessing the issue.[58] The property matters not covered by the Family Law Book, which include, for example, the invalidity of a contract, shall be governed by the obligation law rules of the Civil Code, but the court is entitled to derogate from those provisions on the basis of equity with regard to the specific and particular circumstances of family law relationships.

a) Gross disparity in value: The adjudication of this issue is very difficult because consideration or proportionality is not a requirement either in the contract between the parties relating to property law or in the contract for the division of community property or the division of the growth in assets.[59] Therefore, a claim based on gross disparity in value is not meaningful in these contracts.[60] The court shall examine the circumstances of the conclusion of the contract, the whole content of the contract, and the background of the case. Spouses may be guided not only by property considerations, but also by other *personal considerations*, which may influence their contractual intention to a greater extent than strict proportionality.[61]

b) Immoral contracts:[62] *Good morals* are a legal category and concern the general moral judgement of society. Thus, the question of whether a contract is contrary to *good morals* depends not on the harm to the contracting party's interests, but on *whether the transaction itself is socially reprehensible*. Therefore, a property law contract will not be considered unfair by public opinion at the time of its conclusion. A contract can be regarded as null and void if it is manifestly in contradiction to *good morals*. It also follows that both parties must be aware with due diligence that the content of the *contract serves a prohibited purpose* and its unethicality is obvious to them, but the good or bad faith of the parties is irrelevant. It should also be emphasised that the immorality of a contract can only be determined in the light of the *situation at the time of the conclusion of the contract;* subsequent changes may result in a situation that is unfair or even inconsistent with society's value judgements, but the assessment is not relevant from the viewpoint of whether the contract is immoral.[63]Judicial practice is unanimous on this issue:

> *[I]t is not contrary to the general moral perception of the society* if one party gives the other party a free pecuniary advantage at the expense of its own property, and nor is it if one of the spouses transfers his/her separate property or a part of it to the community property or to the spouse's separate property.[64]

58 | Barzó, 2010, pp. 24–26.
59 | The contractual relations between spouses *are not subject to the presumption of the retroactivity of contracts*, and the burden of proof on retroactivity is on the spouse who invokes it. BDT 2012. 2633.
60 | CC. art. 6:98.
61 | The fact that the plaintiff knew the value of the property and did not ask for any compensation and even initiated the contract showed the intention to give it for free. The intention to give the property free of charge excludes the application of a gross disparity in value. BH 2000. 539.
62 | CC. art. 6:96.
63 | BDT 2010. 2269. I.
64 | BH 1999. 409., BH 2000. 539.

Thus, if one party gives a free benefit, i.e., a gift, to the other party, or transfers his/her joint property to the spouse's separate property, it is not contrary to the general social view.[65] Consequently, a matrimonial property contract is not contrary to morality if it defines joint and separate property differently from the law. It follows from the nature of the marital property contract that the determination of the scope of community or separate property in a different way from the provisions of the law does not provide a basis for nullity on the grounds of an infringement of morality.[66]

A matrimonial property contract that *gives almost all of the separate property of one spouse and all of the community property to the other spouse without any real compensation* is contrary to morality and therefore null and void.[67] In another case, the Supreme Court also considered the clauses of a contract as contrary to morality, as the parties had transferred the assets, which were acquired until the conclusion of the contract, *exclusively to the husband's separate property*. The purpose of these provisions was to deprive the wife of her share of community property.[68]

The Curia ruled as *contrary to morality and therefore null and void* (partial invalidity) a clause in a matrimonial property contract, which excluded the community of property between the spouses retroactively to the establishment of the community of life 17 years earlier, and not just for the future; in this context, all the joint-owned real estate assets and business shares were stipulated as the separate property of one of the parties only. This provision *seriously infringed the interests of family protection* in that until the contract was concluded the spouses managed the property jointly and, according to their agreement, the children were being raised by the disadvantaged party.[69]

Thus, it can be stated that in contractual relationships, courts confirm that neither party is led by the intention to completely disregard the other party, especially if the implementation of the agreement negatively affects the future of joint minor children.

3. Summary

In summary, it can be said that even though marriage is the preferred form of family relationship, the legislature clearly and in detail regulates the property relations of both registered partners and de facto partners over time. As a result of social changes, the system of family relationships has also changed, which is evident in the legal framework as well. Consequently, previous viewpoints, which were almost exclusively centred on matrimonial property law, have been disrupted by social and economic changes and the constant changes in regulation and attitudes that have accompanied them.

65 | BH 2000. 539.
66 | BH 2011. 337. I.
67 | BH 1999. 409.
68 | The Supreme Court stressed that in 'the examination of certain points of a contract from the point of view of its immorality, it is not possible to disregard the parties' personal circumstances and their intention to conclude the contract, even if the legal assessment of the contract is governed by the provisions of Hungarian law. In this context, in a specific case, it was significant that the parties were citizens of Sweden-Iran and Iran, both from a state whose tradition and legal system was fundamentally different from the Hungarian, and which did not even recognise the presumption of the community of property regime'. Pfv.II.21.240/2007/4.
69 | BH 2015. 254.

This tendency led to a state of affairs where not only matrimonial property issues belong to the area of property law, but also the legal relationships between people and their children in a de facto partnership or a registered partnership, that is, the family in the sociological sense, as well as their property relationships with third parties. This makes it necessary to apply a new summary terminology to these property relationships, namely the family property law.

Edit Kriston deals with this issue in detail in her works. According to her viewpoint, family property law is the totality of laws that regulate the property relations between persons living in a legally regulated relationship and who are classified as relatives under the Civil Code, as well as between them and third parties, for the period determined by the provisions of the specific legislation, unless otherwise provided by the parties. It also includes property law relationships between persons in a family relationship who are not classified as relatives (e.g., guardian-ward). The definition is based on the legal literature-based definitions of matrimonial property law, but it is suitable for all property relationships between family members governed by the Civil Code. However, according to Kriston, the concept of family property law can be narrowed and divided into entities. As is clear from the abovementioned definition, there is a separate section for property relations between persons living in a relationship and other legal entities classified as relatives under the Civil Code (e.g., parents, grandparents).

Accordingly, family property law, in a narrow sense, is the totality of laws that regulate property relations between persons living in a legally regulated relationship as well as those between them and third parties for the period of life community and after the termination of marriage, registered partnership, or de facto partnership, unless otherwise provided by the parties.[70] However, the broader interpretation includes claims relating to the community of property of a spouse or registered partner, the property of de facto partners, the division of property, the use of a common dwelling by a spouse, registered partner or de facto partner, and the enforcement of maintenance by a spouse, registered partner, or de facto partner.[71] It also covers agreements between parents concerning the maintenance of a common minor child, its replacement by more valuable property, and property law provisions as well. An analysis and detailed presentation of these legal instruments from the perspective of family protection have not been included in this study due to scope limitations.

It can also be stated that during the establishment of family property law regulation, the legislature sought to incorporate guarantee rules into the system in order to prevent the endangerment of the family's existence, the vulnerable situation of the weaker party in a relationship, or the infringement of the rights of minors.

However, most of the provisions on family protection in the family property law shall be applied to married couples or registered partners, while regulation of property relations of de facto partners are less stringent and contain only partial rules, consequences, and safeguards for family protection, or can be applied only if certain conditions are met. The reason for this is that the legislature protects and prefers marriage over the other two legally regulated relationship forms, thus encouraging young people and couples to marry in the spirit of mutual responsibility, solidarity, and commitment.

70 | Kriston, 2020, pp. 138–139.
71 | Csűri, 2002, p. 158.

Bibliography

Bánki, E. R. (2015) 'Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében' in *Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére*. Budapest-Győr: Eötvös József Könyv- és Lapkiadó BT.

Barzó, T. (2010) 'A házassági vagyonjogi szerződés múltja, jelene és jövője' in Somfai, B. (ed.) *Studia Iuridica Auctoritate Universitatis Pécs Publicata 148. Ünnepi tanulmánykötet Filó Erika kandidátus egyetemi docens 70.* Pécs: születésnapjára.

Bata, D. (2017) 'Az alternatív vagyonjogi rendszerek megjelenése az új Ptk.-ban', *Családi Jog*, 2017/3, p. 24.

Boele-Woelki, K. (2014) 'General Rights and Duties in the CEFL Principles on Property Relations between Spouses' in Boele-Woelki, K., Dethloff, N., Gephart, W. (eds) *Family Law and Culture in Europe*. Cambridge-Antwerp-Portland: Intersentis.

Bukodi, E. (2002) 'Házasság vagy élettársi kapcsolat: ki mikor mit (nem) választ', *Statisztikai Szemle*, 2002/3, pp. 227–251.

Csűri, E. (2002) 'A házassági vagyonjog' in Sári, P. V. M. (ed.) *A Családjogi törvény magyarázata*. Budapest: KJK-Kerszöv.

Csűri, E. (2016) 'Házassági vagyonjog az új PTK-ban. Kiegészítő kötet' in *Negyedik Könyv: Családjog Második rész VI. Cím (4:34.§ – 4.85.§) Házassági vagyonjog*. Budapest: Opten Informatikai Kft.

Hegedűs, A. (2008) 'Az élettársi kapcsolat vagyonjogi vonatkozásai', *Családi Jog*, 6(1), pp. 11–19.

Hegedűs, A. (2014) *Polgári jog Családjog*. Szeged: R.I.M.Á.K Bt.

Herger, C. (2017) *A modern magyar házassági vagyonjog kialakulása és rendszere a német jogfejlődés tükrében*. Passau: Schenk Verlag.

Katalin, K. I. (no date) 'Női különjogok a középkori öröklési jog területén', Available at: https://www.uni-miskolc.hu/~wwwdeak/Collegium%20Doctorum%20Publikaciok/Koncz%20Ibolya%20Katalin.pdf (Accessed: 22 September 2021).

Kopasz, P. (2018) 'Házassági vagyonjogi rendszereket érintő szabályozás Magyarországon az Európai Családjogi Bizottság elvei fényében', *Családi Jog*, 2018/1, pp. 26–27.

Kőrös, A. (2005) '"Fontolva haladás" – az új Ptk. Családjogi Könyve 3. Rész: A házastársi vagyonközösség', *Családi Jog*, 2005/4, p. 9.

Kőrös, A. (2013) 'Az új Ptk. Családjogi Könyve – a 2013. évi V. törvény és a Szakértői Javaslat összevetése. First part: Alapelvek, Házasság, Élettársi kapcsolat', *Családi Jog*, 2013/3, p. 6.

Kriston, E. (2014) 'Az élettársi kapcsolatok szabályozása az új Ptk. Tükrében', *Advocat (Miskolc) XVII:(1-2)*, pp. 35–40.

Kriston, E. (2016) 'Az élettársak megítélése az alkotmányjog és a polgári jog szempontjából', *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica, Tomus XXXIV*, pp. 226–239.

Kriston, E. (2018) 'A család fogalma a társadalmi innováció sűrűjében, különös tekintettel a jogi és szociológiai megközelítésre', *Publicationes Universitatis Miskolciensis Sectio Iuridica et Politica, Tomus XXXVI/2*, pp. 401–406.

Kriston, E. (2019) 'Relationship Form in Contemporary Hungary – in the Light of the European Trends' in Králíčková, Z., Kornel, M., Valdhans, J. (eds.) *Days of Law 2018. Part one – Marriage for all? Acta Universitatis Brunensis Iuridica edition Scientia*. Brno: Masaryk University Press.

Kriston, E. (2020a) 'A "családi vagyonjog" és ami mögötte van – a párkapcsolatban élők közötti vagyoni viszonyok a magyar Ptk.-ban' in *Modern researches: progress of the legislation of Ukraine and experience of the European Union. – Part 1*. Riga: Izdevniecība "Baltija Publishing".

Kriston, E. (2020b) 'A családi vagyonjog szerződéses viszonyainak rendszere és jellemzői a Ptk.-ban, különös tekintettel a párkapcsolatban élők jogi szabályozására' in Erika, R. (ed.) *Studia Iurisprudentiae Doctorandorum Miskolciensium – Miskolci Doktoranduszok Jogtudományi Tanulmányai*, 2020/1, pp. 138–139.

Kuti, S. (2016) 'Párkapcsolati formák Magyarországon. Élettársak a közjegyző előtt – "születéstől a halálig"', *Közjegyzők Közlönye*, 2016/1, pp. 7–8.

Nyírőné, K. I. (2016a) 'A szerzésben való közreműködés arányának megállapítása az élettársi közös vagyon megosztása során – jogeset elemzés a Fővárosi Ítélőtábla gyakorlata alapján I. rész', *Család Jog,* 2016/4, p. 38.

Nyírőné, K. I. (2016b) 'A szerzésben való közreműködés arányának megállapítása az élettársi közös vagyon megosztása során – jogeset elemzés a Fővárosi Ítélőtábla gyakorlata alapján I. rész', *Család Jog*, 2016/4, pp. 38–43.

Nyírőné, K. I. (2017) 'A szerzésben való közreműködés arányának megállapítása az élettársi közös vagyon megosztása során – jogeset elemzés a Fővárosi Ítélőtábla gyakorlata alapján II. Rész', *Családi Jog*, 2017/1, pp. 44–49.

Schanda, B. (2012) 'A jog lehetőségei a család védelmére', *Iustum Aequum Salutare*, 2012/2, pp. 84–85.

Spéder, Z. (2004) 'Gyermekvállalás és a párkapcsolatuk alakulása' in Tamás, K., György, T. I., György, V. (eds.) *Társadalmi riport 2004*. Budapest: TÁRKI.

Szeibert, O. (2012) 'Élettársi vagyonjog: az ítélkezési gyakorlat állása 2012-ben. Újabb ítéletek és kérdések' in Szeibert, O. (ed.) *Család, gyermek, vagyon. A joggyakorlat kihívásai. Családjogi tanulmánykötet*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft.

Szeibert, O. (2016) 'A házassági vagyonjogi rendszerek közötti eltérések áthidalhatósága, különös tekintettel a házastársi vagyonközösségre és a közszerzeményi rendszerre', *Családi Jog*, 2016/1, p. 8.

Szladits, K. (ed.) (1940) *Magyar Magánjog, Második kötet: Családi jog*. Budapest: Grill Károly Könyvkiadóvállalata.

Szladits, K. (ed.) (1941) *Magyar Magánjog, Első kötet: Általános rész, Személyek*. Budapest: Grill Károly Könyvkiadóvállalata.

Vékás, L. (2016) *Szerződési Jog. Általános rész*. Budapest: ELTE Jogi Kari Tankönyvek. ELTE Eötvös Kiadó Eötvös Lóránd Tudományegyetem.

Weiss, E. (2000) 'Az új Polgári Törvénykönyv és a családjogi viszonyok szabályozása', *Polgári Jogi Kodifikáció*, 2000/2, pp. 4–5.