

HUNGARIAN LAW AND PRACTICE OF CIVIL PARTNERSHIPS WITH SPECIAL REGARD TO SAME-SEX COUPLES

DAS UNGARISCHE RECHT UND PRAXIS VON LEBENSPARTNERSCHAFTEN MIT BESONDERER RÜCKSICHT AUF GLEICHGESCHLECHTLICHE PAARE

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Abstract: Cohabitation is a factual question in Hungarian law (living in a financial and emotional community in a common household), it does not constitute civil status, and is extended to same-sex couples, too. The default property regime is “participation of acquisitions.” While the constitutional notion of marriage in Hungary covers the conjugal union of a man and a woman, registered partnership (reserved for same-sex couples) has existed since 2009, the latter constitutes a civil status and has the same legal effects as marriage except the presumption of paternity, the possibility of joint adoption and of taking part in artificial human reproduction, and the right to use each other’s name or a joint family name. The default property regime is “community of property”.

Keywords: cohabitation, same-sex couples, registered partnership, Hungary, civil code.

Abstrakt: Lebensgemeinschaft ist eine faktische Frage im Ungarischen Recht (man lebt in einer wirtschaftlichen und emotionalen Gemeinschaft im gemeinsamen Haushalt zusammen), sie schafft keinen Personenstand/Zivilstand und ist auch für gleichgeschlechtliche Paare zugänglich. Der gesetzliche Güterstand ist die Zugewinnngemeinschaft. Während der verfassungsrechtliche Begriff der Ehe in Ungarn auf die eheliche Lebensgemeinschaft von Mann und Frau beschränkt ist, existiert seit 2009 die eingetragene Lebenspartnerschaft, welche für gleichgeschlechtliche Paare vorbehalten ist. Dieser schafft zivilrechtlichen Status (Personenstand) und hat dieselben Rechtsfolgen wie eine Eheschließung, ausgenommen die Vermutung der Vaterschaft, das Recht auf die gemeinsame Adoption eines Kindes oder auf die gemeinsame Unterziehung einer künstlichen Befruchtung, sowie das Recht, den Namen des/der anderen Partner(s) oder einen gemeinsamen Familiennamen anzunehmen. Der gesetzliche Güterstand ist die Ehegütergemeinschaft.

Stichwörter: Lebenspartnerschaft, gleichgeschlechtliche Paare, eingetragene Lebenspartnerschaft, Ungarn, Bürgerliches Gesetzbuch

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I. The Aim of this Study and Some Instructions for the Benefit of the Reader¹

1. This article presents next the various registers with relevance to the civil status in Hungary (II), then it describes and analyses the civil union, i.e. “simple” cohabitation in Hungarian law (focusing on the notion and legal sources, the rights and duties of the cohabitants and the termination of cohabitation –III). Subsequently, registered partnership – reserved for and accessible to same-sex couples only– is elaborated on (IV) including the most important elements like the notion, establishment, rights and duties of the registered partners and the termination (or dissolution) of registered partnership. This is followed by an analysis of the invalidity of the subsequent (heterosexual) marriage due to an existing registered partnership (V). Then the recognition of foreign registered partnerships (and the refusal of the recognition of foreign same-sex marriages) in Hungary are highlighted (VI). Finally, a short summary closes the analysis (VII).

2. In my analysis, I will refer to the most relevant legal sources as follows:

- Act No. V/2013 on the Civil Code (hereinafter referred to as the Civil Code of Hungary or Civil Code or hCC); it is noteworthy that the new Hungarian Civil Code –which replaced the former one, i.e. Act. No. IV/1959 –was adopted in 2013 and entered into force on 15th March 2014;
- Act No. XXIX/2009 on Registered Partnership and Related Legislation and on the Amendments of Other Statutes to Facilitate the Proof of Cohabitation (hereinafter referred to as the Registered Partnership Act or RPA);
- Act No. XLV/2008 on Non-litigious Notarial Procedures (hereinafter referred to as the Notarial Procedures Act or NPA);
- Act No. I/2010 on Registry Procedures (hereinafter referred to as the Register Act or RA), which is supplemented with the Decree No. 32/2014 (V.19) of the Minister of Justice and Administration (hereinafter referred to as the Register Decree or RD);
- Act No. CLIV/1997 on Healthcare (hereinafter referred to as the Healthcare Act or HA).
- Act No. CLXXV/2013 on the Register of Persons under Guardianship and of Anticipatory Declarations (hereinafter referred to as Guardianship Register Act or GRA);

¹ In 2016 the Swiss Institute for Comparative Law conducted a study on civil partnerships with special regard to same-sex couples. This study was published on 13th March 2017. The author provided a short report on Hungarian law and practice therein in German language. An English up-to-date and more detailed analysis is provided in this paper. Credit goes to my former student Dr. Beáta Judit Sándor, lawyer and project manager (working for “Háttér” – Background – Support Society for LGBT People) for answering my questions on the everyday practice of legal issues of same-sex couples in Hungary.

- Law Decree No. 13/1979 on International Private Law (hereinafter referred to as PiL Decree or PiLD), which is going to be replaced by the new law as of 1st January 2018: Act No. XXVIII/2017 on International Private Law (hereinafter referred to as PiL Act or PiLA).

3. Two annexes follow this paper:

- *Annex No. 1*: Chart on Similarities and Differences among Marriage, Registered Partnership and “Simple” Cohabitation (aka Civil Partnership)
- *Annex No. 2*: Translation of Act. No. XXIX/2009 on Registered Partnership and Related Legislation and on the Amendments of Other Statutes to Facilitate the Proof of Cohabitation

4. In my analysis I could rely on the “National Report: Hungary” of Informal Relationships written by Prof. Dr. Orsolya Szeibert in February, 2015,² which can be accessed on the website of the Commission on European Family Law.³

5. If not indicated otherwise, literary translations of statutes in this paper are those prepared by *Wolters Kluwer Jogtár Online* (an online database service provided by the Wolters Kluwer Kft., 1117-Budapest, Prielle Kornélia u. 21-35.).

II. Registers with Relevance to the Civil Status in Hungary

6. The registry of civil status in Hungary is called “anyakönyv”, i.e., register or registry (cf. subchapter 1.).

7. There are also further registers, which have also some significance in connection with family law or personal status. These additional registers will be indicated separately (cf. subchapter 2.).

1. Registry of Civil Status (Anyakönyv) and its Role Related to Marriage and Registered Partnership

A) Legal sources

8. The Registry and the registration procedure in Hungary are governed by Act. No. I/2010 on Registry Procedures (hereinafter referred to as the Register Act or RA), which is supplemented with De-

² Cf. <http://ceffonline.net/wp-content/uploads/Hungary-IR.pdf>, see also the concrete indications in the footnotes, hereinafter referred to as the SZEIBERT REPORT 2015, last download 12th June 2017.

³ See also the academic publications on cohabitation and registered partnership in Hungarian law available in English written by the same leading author, Professor *Orsolya Szeibert* PhD (Eötvös Loránd University Budapest): O. SZEIBERT (The respective parts on Hungary in), K. BOELE-WOELKI – C. MOL – E. VAN GELDER (eds.), *European Family Law in Action*, Volume V: Informal Relationships, Cambridge, Intersentia, 2015. (European Family Law Series; 38.), O. SZEIBERT “Partnerships in Hungary in the Light of the New Legal Developments: Status or Contract?”, B. ATKIN (ed.), *The International Survey of Family Law 2012 Edition* (Published on behalf of the International Society of Family Law), Bristol, Jordan Publishing Ltd., 2012. pp. 115-122, O. SZEIBERT “How Cohabitants and Registered Partners Can or Cannot be a Child's Legal Parents in Hungary with a Special View to the ‘Pater Est’ Principle for Cohabitants”, B. ATKIN (ed.), *The International Survey of Family Law 2011 Edition* (Published on behalf of the International Society of Family Law), Bristol, Jordan Publishing Ltd., 2011. pp. 211-220, O. SZEIBERT “Family Solidarity in Partnerships: Maintenance of Former Spouses, Registered Partners and Cohabitants in Hungary according to the Effective Rules and in the new Civil Code”, B. ATKIN (ed.), *The International Survey of Family Law, 2010 Edition*: Published on behalf of the International Society of Family Law, Bristol, Jordan Publishing Ltd., 2010. pp. 179-187, O. SZEIBERT “Cohabitation, Registered Partnership and their Financial Consequences in Hungary”, B. ATKIN (ed.), *The International Survey of Family Law, 2009 Edition*: Published on behalf of the International Society of Family Law, Bristol, Jordan Publishing Ltd., 2009. pp. 203-213, O. SZEIBERT “Same-sex partners in Hungary. Cohabitation and registered partnership”, K. BOELE-WOELKI (ed.), *Debates in Family Law around the Globe at the Dawn of the 21st Century*, Antwerp, Intersentia, 2009. pp. 305-318, O. SZEIBERT “Same-sex partners in Hungary. Cohabitation and registered partnership.” *Utrecht Law Review* 4:(2), pp. 212-221. (2008), O. SZEIBERT “Unmarried partnership in Hungary – Today and de lege ferenda.” *Annales Universitatis Scientiarum Budapestiensis Rolando Eötvös Nominatae - Sectio Iuridica XLVII*: pp. 315-339. (2006), O. SZEIBERT “Unmarried Partnerships in Hungary”, K. BOELE-WOELKI (ed.), *Common Core and Better Law in European Family Law*, Antwerp, Intersentia, 2005. pp. 313-333.

cree No. 32/2014 (V.19) of the Minister of Justice and Administration (hereinafter referred to as the Register Decree or RD). These rules entered into force on 1st July, 2014. Additionally Government Decree No. 415/2016 (XII. 14.) on the Designation of Registry Authorities and on the Qualifications Necessary to Keep the Registry has to be highlighted as one regulating among others, the powers and competences of authorities related to the registry.

B) Content of the register

9. The register keeps records on personal identification data, civil status and other pieces of information provided by law in connection with the so-called “registry events”, i.e., births, marriage, registered partnership (cf. chapter IV. of this paper) and death, including changes thereof like the termination (dissolution) of marriage and registered partnership. Besides, name change procedures (changing of birth and marriage names) must be recorded in the Registry, too.⁴ Among other data, the civil status of a person is duly recorded in the Registry (unmarried, married, registered partner, widowed, widowed registered partner, divorced, divorced registered partner).⁵

10. In relation both to marriage and registered partnership, the following pieces of information are recorded in the Registry:

- Venue and date of the wedding or the establishment of registered partnership;
- Personal identification data of the spouses/registered partners (and the changes thereof);
- Name of the registrar;
- Name of the witnesses and the interpreter (if there was an interpreter);
- Starting date of the (valid) marriage/registered partnership;
- Termination, dissolution or annulment of the marriage/registered partnership; and either spouse’s/registered partner’s acquiring or loss of Hungarian citizenship afterwards.⁶

11. If a record is based on the judgment, order or decree of a court or administrative authority, the issuing court or administrative authority, the number of the judgment, order or decree and the date of the judgment’s, order’s or decree’s being rendered final must be recorded additionally in the Registry, too.⁷

C) Authenticity

12. In the absence of proof to the contrary, the Registry certifies authentically the entries and records registered therein, including their changes. In other words: the Registry contains authentic records until the contrary is proven.⁸

D) Electronic registry system

13. Since the Register Act’s entering into force on 1st July, 2014, the Registry is kept electronically. The system itself is called “Elektronikus Anyakönyvi Nyilvántartás Informatikai Rendszer” (Electronic Registry System) and is abbreviated as “EAK”. Hence there is a huge amount of data, the Registry is being switched from the paper-based form to the electronic system stepwise and gradually.⁹ Consequently, from the 1st July, 2014 on:

⁴ Cf. S. 1 Para 1 and 3 as well as S. 69/A-69/I Register Act. Besides, the so-called “Paternity Statements’ Register” is attached to the Registry, cf. S. 69 Para 2 lit. b) and S. 70 Register Act.

⁵ S. 69/B Para 1 lit. bj) Register Act.

⁶ S. 69/D Para 1 lit. a)-d), f)-i); S. 69/E Para 1 lit. a)-h); as far as marriage is concerned, the spouses’ choice on the surname of their future children must be indicated too, cf. S. 69/D Para 1 lit. e) Register Act.

⁷ S. 69/H Register Act.

⁸ S. 1 Para 2 Register Act.

⁹ For the details cf. S. 55-58 of the Register Decree.

- All new entries must be recorded only and exclusively into the Electronic Registry System;¹⁰ and
- All new entries trigger a chain of electronic registrations related to the persons affected by the new entry, depending on the type of event, which is being registered first after the 1st July, 2014.¹¹ If a birth is recorded, the registrar in charge notifies (via the electronic system) those registrars who were and are competent to record the parents' marriage and birth. These latter registrars then record the births and marriage of the parents electronically, too, within 120 days. If a marriage or registered partnership is registered, the registrar notifies the registrars in charge for recording the spouses' or partners' births in the same way. The same applies to the registration of death: the registrar notifies the other registrar in charge for the birth registration of the deceased directly, if the deceased was neither married nor registered partnered; or the notification goes to that particular registrar who is in charge of the registration of marriage or registered partnership if the deceased was married or registered partnered, and as soon as the marriage or registered partnership has been recorded electronically, this 2nd registrar notifies the 3rd one competent to register the birth of the deceased.

E) Authorities keeping the register

14. The Registry is kept and administered by the following public authorities:

- The Registry is generally kept by the *registrars* (“anyakönyvvezető”), i.e., public officials with special qualification who are employed by the municipalities. They have personal and secured access to the electronic registry system “EAK”.¹²
- The *Budapest Capital Government Office* is in charge of recording those “registry events” that occurred abroad.¹³

15. If a man and a woman have the intention to marry, they can apply at any registrar's office at their choice and convenience for the marriage and registration procedure.¹⁴ If two persons of the same sex wish to establish a registered partnership, they have to apply at one of the registrar's offices

- either in one of the districts (“kerület”) of Budapest (the capital), or
- in a city with county rights (“megyei jogú város” – the bigger cities in Hungary have the same rights and the same position under public law as counties), or
- at least at the seat of the district (“járás” – an administrative unit below county level; it is the same word in English but in fact different from the districts of Budapest, the capital).¹⁵

2. Additional Registers with Family Law and/or Civil Status relevance

16. Besides the Registry, which authentically certifies the civil status, there are three more registers that have relevance in connection with cohabitation.

A) The “Register of Cohabitants' Statements”

17. The “*Register of Cohabitants' Statements*” is kept by the “*Hungarian Chamber of Civil Law Notaries*”. The aim of this opt-in and declaratory register is to facilitate the proof of “simple” co-

¹⁰ S. 57 Para 1 of the Register Act.

¹¹ S. 57/A-58/A Register Act.

¹² S. 4 Para 1 lit. c) Register Act.

¹³ S. 2 Para 1 lit. a) Government Decree No. 415/2016 (XII.14.) on the Designation of Registry Authorities and on the Qualifications Necessary to Keep the Registry.

¹⁴ S. 17 Para 1 Register Act.

¹⁵ S. 31 Para 1 Register Act.

habitation through the entry's establishing a *rebuttable presumption* on the fact of cohabitation.¹⁶ (E.g., this register does not have anything in common with the “registered partnership” of same-sex couples!)

B) The “National Register of Property Agreements of Cohabitants”

18. The “*National Register of Property Agreements of Cohabitants*” (just as like that of spouses) is kept by the Hungarian Chamber of Civil Law Notaries, too. Property agreements between cohabitants are valid and effective towards third parties only if the agreement is recorded in this register, or if the partners are able to prove that the third party was aware, or should have been aware that such agreement existed.¹⁷

C) The “Register of Persons under Guardianship and of Anticipatory Declarations”

19. Finally, there is another register that can have significance if it is related to marriage or registered partnership. If the legal capacity of a person has been fully limited by (final and binding) court judgment (and therefore he or she has been placed under guardianship), he or she cannot marry or enter into a registered partnership.¹⁸ The so-called “*Register of Persons under Guardianship and of Anticipatory Declarations*” certifies the fact of being placed under guardianship.

- This register is kept (electronically) by the “*National Office for the Judiciary*”,¹⁹ which is the central administrative body of the courts.²⁰
- The “Register of Persons under Guardianship and of Anticipatory Declarations” certifies authentically all personal data and guardianship information recorded therein.²¹
- If someone is placed under guardianship due to fully limited legal capacity by a final and binding judgment, it is the trial court's task to make the appropriate entry into the register.²²
- The registrars have direct access to this register, too, in order to inspect whether those who applied for marriage or registered partnership have legal capacity.²³
- Anybody can file a request for information recorded in the register if the requester either proves his or her legitimate interest on acquiring information through substantiating the transaction or other right that justifies his or her request or indicates a special rule, which entitles him to obtain information.²⁴

III. Civil Union Recognised by Hungarian Law

20. There are two different types of civil union in the Hungarian law. The first one is the (simple) *cohabitation* or as it is called in the English translation of the Hungarian Civil Code: “*civil partnership*”.

¹⁶ For the details see subchapter III.2.B. below.

¹⁷ For the details see subchapter III.3. below.

¹⁸ S. 4:10 Para 1 hCC.

¹⁹ S. 18 Para 1 Guardianship Register Act.

²⁰ The National Office for the Judiciary (NOFJ) is not a court itself. The president of the NOFJ is in charge of all central administrative matters of the courts. According to Article 25 Para 5 of the Basic Law (i.e., the Hungarian Constitution): “The President of the Országos Bírósági Hivatal (National Office for the Judiciary) shall manage the central administrative affairs of the courts. The Országos Bírói Tanács (National Committee of Justices) shall oversee the central administration of courts. The Országos Bírói Tanács and other bodies of judicial self-government shall participate in the administration of the courts.” Para 6 adds: “The President of the Országos Bírósági Hivatal shall be elected by Parliament from among the judges for a period of nine years on a recommendation by the President of the Republic. The President of the Országos Bírósági Hivatal shall be elected by a two-thirds majority of votes of Members of Parliament. The President of the Kúria shall have a seat in the Országos Bírói Tanács, and other members shall be elected by the judges as specified in an implementing act.”

²¹ Cf. S. 3 Para 3 Guardianship Register Act.

²² S. 4 Guardianship Register Act.

²³ S. 6 Para 2 lit. h) Guardianship Register Act.

²⁴ S. 7 Guardianship Register Act.

The cohabitation or civil partnership is available to both different-sex and same-sex couples. The Hungarian law follows the factual model in this field, i.e., the cohabitation comes into being upon the realisation of the conceptual elements described in the Civil Code without any formalities or registration.²⁵

21. The other type of civil union is *registered partnership*, which is reserved for and available to same-sex couples only and grants same-sex couples almost all the rights and obligations that married couples have. As I will indicate, registered partnership is established if two persons of the same sex declare before the registrar personally that they wish to establish a registered partnership with one another. I will provide you with information on this kind of civil union (reserved for same-sex couples) below in chapter IV.

22. The former civil code of 1959 originally did not contain any provisions on civil partnership, though the number of couples living in (simple) cohabitation increased after World War II. Act No. IV/1977 –which reformed the civil code profoundly and in many aspects– was the first to introduce codified rules on patrimonial relationship between cohabitants. The new rule back then was placed into Title III (contract law special part) Chapter XLVI (company or partnership constituted under civil law), which shows that civil union was perceived as a kind of contractual relationship and not as a family relationship. According to S. 578 Para 1 of the (former) civil code (as entered into force on 1st March 1978):

“Domestic partners –i.e. a man and a woman living together outside of wedlock in an emotional and financial community in the same household– shall acquire joint title to property in proportion to their contribution for acquisition while cohabiting. If the ratio of contribution cannot be determined, it shall be considered equal. Work done in the household shall be construed as contributing to acquisition.”

23. Later S. 578 Para 1 was relocated as S. 578/G Para 1, however the content remained the same until 19th June 1996. In its decision No. 14/1995 (III.13.) the Constitutional Court of Hungary declared the rule that contained the notion of “domestic partners” unconstitutional and repealed it, because the notion was restricted to couples of different sexes. Though marriage was and is protected through and by the constitution, thus marriage and family are constitutional values, this does not exclude that the state can protect other forms of communities of life different from marriage. The long lasting community of life of two persons can represent a value which deserves acknowledgement by the law –with special regard to human dignity as a fundamental right– irrespective of the sex of the persons living together. The different handling of same-sex couples (from the point of view of civil partnership) may equal to discrimination unless it is justified by those peculiarities that can be attributed by their nature to different-sex couples only. As a result, the notion of “domestic partners” was relocated into the new S. 685/A as follows:

“Domestic partners are –unless any legislation provides for otherwise– two persons living together outside of wedlock in an emotional and financial community in the same household (cohabitation)”

24. The (quite short) provisions on “civil partnership” were amended only one more time, namely in 2009, when the Registered Partnership Act entered into force. The crucial point and the aim of the legislator were to clarify the relationship between the “simple” partnership (provided for in the civil code) and the “registered partnership” (provided for in a separate act), i.e. to differentiate between the two accordingly. The last wording of the relevant rules in the (former) civil code was as follows (in force from 1st July 2009, until 14th March 2014 when the former civil code was replaced by the new one):

S. 578/G Para (1): *“Domestic partners shall acquire joint title to property in proportion to their contribution for acquisition while cohabiting. If the ratio of contribution cannot be determined, it shall be considered equal. Work done in the household shall be construed as contributing to acquisition.”*

S. 685/A: *“Domestic partners shall be construed as two persons living together outside of wedlock or registered partnership in an emotional and financial community in the same household (cohabitation),*

²⁵ Cf. SZEIBERT REPORT 2015, p. 5.

provided that neither of them is engaged in wedlock or partnership with another, registered or otherwise, and that they do not stand in any relationship to one another, including brother and sister (whether by whole or half blood)."

25. Now I will give you a brief summary on the general *cohabitation* or *civil partnership* here. In order to facilitate the differentiation between the two types, I will consequently use the term *cohabitation*, despite the fact that the English version of the (new) Civil Code contains the other term (*civil partnership*).

1. Legal Sources of (General or Simple) *Cohabitation aka Civil Partnership* – Available to both Same-sex and Different-sex Couples – in the (new) Civil Code

26. Cohabitation is regulated in two different books of the (new) Civil Code.

27. In the *third part of book 4 (Family Law)* the “*Family Law Consequences*” of cohabitation are regulated, which covers

- the *maintenance* (alimony) obligations of the cohabitants after the termination of the cohabitation in title VII (S. 4:86-4:91, entitlement for maintenance, undeserving or unworthiness, agreement to provide lump-sum maintenance, etc.) on the one hand;
- and the right of tenancy, i.e., the rules on judicial arrangement of the *use of common dwelling* after the termination of the cohabitation in title VIII (S. 4:92-4:95) on the other hand.

28. In the *third part (Types of Contracts)* of *book 6 (Law of Obligations)* title XXV contains some general rules on cohabitation, which is regarded as a special contract (i.e., contractual relationship) by and between the cohabitants. Besides the establishment and termination of cohabitation (S. 6:514), the partnership contract (i.e., property contract between the cohabitants, cf. S. 6:515), the default property regime (S. 6:516) and finally, the contractual arrangement of the right of tenancy (S. 6:517) are covered here.

29. It needs and deserves explanation why the rules on cohabitation were and are split in the new civil code. Namely, this is not the status as the draft was submitted by the Academic Codification Committee to the Ministry of Justice,²⁶ and not even as the governmental draft bill²⁷ was submitted to Parliament. Since both contained all rules on “civil partnership” together in the 4th book (Family Law) and the “civil partnership” was considered unambiguously as a family (law) relationship.²⁸ The result – as the Civil Code contains now rules on cohabitation at two different places and some rules were taken out of the draft bill – can be traced back to a motion for amendment submitted by the smaller governing party (the Christian Democratic Party), which has finally been approved by the majority of Parliament.²⁹

30. There had been reasons of ideological and political nature in the background. The reading of the draft bill on the new civil code in Parliament was namely running in parallel with a kind of “constitutional bargaining” between the Constitutional Court and the Parliament at that time.

²⁶ Cf. L. VÉKÁS (ed.), *Az új Polgári Törvénykönyv Bizottsági Javaslatát magyarázatokkal (The Draft Civil Code prepared by the Committee with Commentaries)*, Budapest, Complex, 2012, S. 4:86-4:101, pp. 224-230.

²⁷ Cf. Draft Bill (as submitted to Parliament) No. T/7971, S. 4:86-4:101, pp. 140-143, accessible at <http://www.parlament.hu/irom39/07971/07971.pdf>, last downloaded on 16th June, 2017.

²⁸ As the head of the Codification Committee Lajos Vékás stated, private law has to follow the social changes and the change of the common opinion towards civil partnership in particular. 40% of the children in Hungary were born out of wedlock by that time. Many public law legislations already acknowledged civil partners as each other’s family members. Cf. L. VÉKÁS, “Bírálat és jobbító észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt) / (Criticism and Remarks for Improvement on the Draft Bill of the New Civil Code – Before the Final Vote)”. *Magyar jog*, 1/2013, p. 2.

²⁹ Cf. Motion for Amendment No. T/7971/106, accessible at <http://www.parlament.hu/irom39/07971/07971-0106.pdf>, last downloaded on 16th June 2017.

- The parliament had enacted a bill in 2011 on the Protection of Families (Act No. CCXI/2011) that reflected the order of values of the conservative government on family and marriage. According to S. 7 Para 1 of this bill, only marriage (between a man and a woman), lineal relatedness (affinity) and guardianship in a family can be seen as the bases of a family.
- However, the Constitutional Court declared – in its decision No. 43/2012 (XII.20.) – this narrow notion of family as unconstitutional and repealed S. 7 and 8 of the Family Protection Act. The Constitutional Court referred to its earlier decisions and emphasized (again) that the constitutional protection of family applies beyond the families by marriage also to family life in terms of sociology (among other things in order to ensure the equal protection of children born within or out of wedlock). Family and marriage – though mentioned in and protected by the same article of the “Basic Law” (which is the new constitution of the country) – are not linked to each other in a way that only marriage could constitute a family. Nevertheless, S. 7 Para 1 of the Family Protection Act restricted the notion of family to the narrowest possible content. The Constitutional Court highlighted that also other forms of communities of life (different from marriage and lineal relatedness) can deserve acknowledgement and protection by law and state, like, for example, when cohabitants take care and grow up one another’s children; cohabitants (of different sexes) who do not want or cannot have children; persons taking care of their brothers and sisters or of the children of their brothers and sisters; grandparents taking care of their grandchildren; persons taking care of elderly relatives not being in lineal affinity with them, etc. According to the Constitutional Court’s view, these durable emotional and financial communities following common goals, wherein care is mutually provided, were already recognized as “families” by many special legislations, therefore, the application of a much narrower notion (like that of the Family Protection Act) would result in an unconstitutional restriction of the level of protection of emotional and financial communities already present in the legal system. The different notions of family in the Family Protection Act on the one hand and in other special legislations on the other infringed the constitutional requirements of predictability (and rule of law).³⁰
- Since the governing parties had the two-third majority necessary to amend the “Basic Law” (i.e. the constitution), the 4th amendment of the Basic Law was enacted in 2013 and the narrow definition of family was incorporated into the Basic Law itself as its Art. L Para 1 Sentence 2 as follows: “*The basis for family relationship is marriage, as well as the relationship between parent and child.*” Once it became part of the Basic Law (constitution), from that very moment on, the narrow definition of family could not be challenged any more and even less evaluated and declared to be unconstitutional by the Constitutional Court. The narrow notion of family became thus untouchable thereby.

31. As a result, there was no longer any constitutional obstacle that could have restrained the majority of the Parliament to keep only those rules on cohabitation in the 4th (i.e. family law) book of the new civil code, whereby cohabitation had (and has) any family law consequences only if the cohabitants have a common child.³¹ If we try to reconstruct the reasoning behind: since family is based either on marriage or on parent-child relationship, and cohabitants are not married, they qualify as a family i.e. the rules on their relationship fit into the book on family only if they both “create” a parent-child relationship, i.e. they have a common child. (All other rules applicable to cohabitants were placed into book 6 on the law of obligations, after the rules on the various types of contracts.) This is a serious restriction since it was intended in the original draft bill to provide the cohabitants with a claim of maintenance and with the right of use of common dwelling after dissolution even if they did not have a common child but

³⁰ Cf. Paras 34-35, 38, 42-46 of decision No. 43/2012 (XII.20.).

³¹ Actually, the motion for amendment submitted by the Christian Democratic Party had been approved the same day when the decision of the Constitutional Court had been declared, i.e. even much earlier than the Basic Law was finally amended. See in this respect L. VÉKÁS, “Bírálat és jobbító észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt) / (Criticism and Remarks for Improvement on the Draft Bill of the New Civil Code – Before the Final Vote)”. Magyar jog, 1/2013, pp. 2-3.

the cohabitation had existed at least for ten years.³² Consequently (as it is provided for in the new civil code now), cohabitants do not enjoy any protection by law after the dissolution of their partnership (in particular not from the point of view of maintenance and the right of use of the common dwelling) unless they have a common child (for the details see subchapter III.4.B and C). Thus – as Szeibert points out – cohabitation is considered now in the (new) civil code “both as a contract and as a contract with family law consequences.”³³ This has been heavily criticized in the Hungarian legal literature, with special regard to the fact that the weaker partner completely depends on the mercy of the other partner; she or he can remain without any claim of maintenance and/or residence even after the dissolution of a very long lasting cohabitation (without a common child), which is even more unjust if the partner is unemployed, sick and/or of higher age.³⁴ The split regulation involves a couple of other inconsistencies, too. Though some rules on cohabitation can already be found in the 4th book (family law), the notion of (simple) cohabitation is defined only in S. 6:514, i.e. in the 6th book (obligations). There is a split even between interrelated rules on the same subject matter: while the provisions on judicial arrangement of the use of common dwelling after dissolution of the cohabitation are placed in book 4 (family law), the legal framework of contractual arrangement of the right of tenancy can be found in book 6 (obligations) only.³⁵ These all are symptoms of a fundamental contradiction caused by conservative policy considerations.

2. (Simple) Cohabitation

A) Notion, constituting elements and their interpretation in case law

32. The notion of cohabitation can be found in S. 6:514 Para 1 hCC:

“Civil partnership means when two persons are living together outside of wedlock in an emotional and financial community in the same household (hereinafter referred to as „cohabitation”), provided that neither of them is engaged in wedlock or partnership with another person, registered or otherwise, and that they are not related in direct line, and they are not siblings.”

33. The Hungarian law follows the factual approach, which means that the cohabitation does not constitute, i.e., being a cohabitant is not a civil status.³⁶ S 6:524 Para 2 points out that cohabitation

³² Interestingly, another legislation (of public law nature) in force, namely S. 45 Paras 1 and 2 Act No. LXXXI/1997 on Social Security Pension Benefits extends the so-called widow’s pension to domestic partners (i.e. cohabitants or civil partners), provided the domestic partners had been living together for one year continuously and they had a child; or had been living together for ten consecutive years. This law seems to be in line with the original draft of the codification committee and of the Ministry of Justice, but not with the new civil code as enacted finally and entered into force.

³³ SZEIBERT REPORT 2015, p. 9. Similarly L. VÉKÁS, “Bírálat és jobbító észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt) / (Criticism and Remarks for Improvement on the Draft Bill of the New Civil Code – Before the Final Vote)”. Magyar jog, 1/2013, p. 3.

³⁴ O. SZEIBERT, “Élettársak – a villikirály lányai vagy szürkellő fűzfák? A de facto élettársi kapcsolat szabályozásának margójára (Cohabitants - the Elf-king’s Daughters or Grey Ancient Willows? On the Margin of the Rules on de facto Civil Partnership)”, <http://ptk2013.hu/szakkikkek/szeibert-orsolya-elettarsak-a-villikiraly-lanyai-vagy-szurkello-fuzfak/1699>, last download on 16th June 2017. E. KRISTON, “Az élettársi kapcsolatok szabályozása az új Ptk. tükrében (The Regulation of Civil Partnership in the Mirror of the New Civil Code)”. ADVOCAT, 1-2/2014, pp. 37, 39-40. F. FERENCZI, “Az élettársi kapcsolat magyar szabályozása és az Élettársi Nyilatkozatok Nyilvántartása (The Rules on Civil Partnership in Hungary and the Register of Cohabitants’ Statements)”. Debreceni Jogi Műhely, 3-4/2015, Chapter 2 Subchapter 2, accessible here: http://www.debrecenijogimuhely.hu/archivum/3_4_2015/az_elettarsi_kapcsolat_magyar_szabalyozasa_es_az_elettarsi_nyilatkozatok_nyilvantartasa/, last download: 16th June 2017. L. VÉKÁS, “Bírálat és jobbító észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt) / (Criticism and Remarks for Improvement on the Draft Bill of the New Civil Code – Before the Final Vote)”. Magyar jog, 1/2013, p. 2. E. REIDERNE BÁNKI, Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében (The Civil Union in the Mirror of the New Civil Code), in B.-A. KESERŰ – Á. KÓHIDI (eds.), *Tanulmányok a 65 éves Lenkovich Barnabás tiszteletére (Essays in Honor of the 65th birthday of Barnabás Lenkovich)*, Budapest – Győr, Eötvös József Könyvkiadó, 2015, pp. 375, 380.

³⁵ E. REIDERNE BÁNKI, Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében (The Civil Union in the Mirror of the New Civil Code), in B.-A. KESERŰ – Á. KÓHIDI (eds.), *Tanulmányok a 65 éves Lenkovich Barnabás tiszteletére (Essays in Honor of the 65th birthday of Barnabás Lenkovich)*, Budapest – Győr, Eötvös József Könyvkiadó, 2015, p. 375.

³⁶ O. SZEIBERT, in L. VÉKÁS – P. GÁRDOS (eds.), *Kommentár a Polgári Törvénykönyvhöz (Commentary on the Civil Code)*, Budapest, Wolters Kluwer, 2014, p. 2222.

comes into existence upon the realisation of the conditions (conceptual elements) specified in Para 1 of S. 6:514. (Cohabitation does not have to be officially reported or registered anywhere.)

34. The constituting elements are:

- common household,
- emotional fellowship,
- and economic (financial) partnership.

35. The Hungarian courts use a strict interpretation on the realisation of those elements; they focus on external signs like:

- whether the partners' belonging together is also obvious to third parties;
- and/or the partnership has a marriage-like character;
- whether the emotional ties are mutual or not (emotional closeness is seen as one required to be mutual and reciprocal);
- whether the partners cooperate in achieving common aims and they use their income accordingly together,
- whether they maintain a common way of living, etc.³⁷

36. If either party contests the existence and/or the commencement date of the cohabitation, the courts evaluate the constituting elements in their complexity,³⁸ i.e., if one of the elements is temporarily missing or appears in an atypical form, it does not necessarily mean that there was (is) no cohabitation.

- For example, if there is emotional fellowship and a kind of economic community, but one of the parties is hospitalised for a longer time (for example into a rehabilitation centre after a stroke, etc.) and therefore the partners do not live physically together in this period, the court stated nevertheless that the parties were cohabitants.³⁹
- The same stands true if the partners' intention is to enter into a long-term cohabitation, they have a common home and there is definitely a close tie of love and affection between them, but one of them cannot significantly contribute to the incomes of their partnership, because he or she is still a student.⁴⁰

37. Two more important factors are also highlighted in the recent scholarship.

- First, one of the constituting elements, namely economic partnership or community must be reconsidered and/or reinterpreted in the court practice, since in the new civil code the default property regime between cohabitants is not the “community of property” any more as it was in the former civil code, i.e., they acquire property and assets now separately and independently during their cohabitation, a claim for division of the acquired property (accession and gains) emerges only with their separation.⁴¹

³⁷ Cf. SZEIBERT REPORT 2015, pp. 4-5.

³⁸ SZEIBERT REPORT 2015, p. 5.

³⁹ O. SZEIBERT, in L. VÉKÁS – P. GÁRDOS (eds.), *Kommentár a Polgári Törvénykönyvhöz (Commentary on the Civil Code)*, Budapest, Wolters Kluwer, 2014, p. 2220.

⁴⁰ With reference to judgment No. BDT 2008. 1805 A. OSZTOVITS, in A. OSZTOVITS (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja (Large Commentary on the Act No. V/2013 and on the Related Statutes)*, Vol. III, Budapest, Opten, 2014, p. 1327. According to E. REIDERNÉ BÁNKI, Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében (The Civil Union in the Mirror of the New Civil Code), in B.-A. KESERŰ – Á. KÖHIDI (eds.), *Tanulmányok a 65 éves Lenkovich Barnabás tiszteletére (Essays in Honor of the 65th birthday of Barnabás Lenkovich)*, Budapest – Győr, Eötvös József Könyvkiadó, 2015, p. 382, even couples having a lower income and spending this as a whole for the costs of living, i.e. whose goal is “only” to come up for the expenses of life together, shall qualify as cohabitants even if there is no growth in assets at all to share in the end of their relationship as cohabitants.

⁴¹ O. SZEIBERT, in Gy. WELLMANN (ed), *Kötelmi jog, harmadik, negyedik, ötödik és hatodik rész (Law of Obligations, Parts*

- Second, since in the case of the termination of the cohabitation, if the community of life existed for at least one year, and the partners have a common child, the former partner in need can have a claim for alimony (maintenance) against the other partner (cf. subchapter III.4.B. below), the courts cannot conclude that there was no cohabitation at all because the relationship lasted too short (at least not if the relationship lasted at least one year provided that all other prerequisites of cohabitation were met).⁴²

38. Cohabitation can exist also if one of the cohabitants or both of them are married or live in a registered partnership provided that his/her or their “community of life” in the marriage or registered partnership already ceased, which is a question of fact again. In other words: if there is nonetheless a valid marriage or registered partnership but it exists only as a mere and empty legal bond without a true “matrimonial community of life” in fact, then the matrimonial bond (or registered partnership) as such does not exclude the cohabitation’s coming into being.⁴³

B) The possibility of registration of the “simple” cohabitation

39. To make matters more confusing, cohabitation can be registered (there is an opt in model of registration), which shall not be confused and mixed up with the *registered partnership reserved for same-sex couples* (discussed below in chapter IV). In order not to mix them up here, I will use the term “*registered cohabitation*” for the cohabitations that are registered in the so-called “*Register of Cohabitants’ Statements*” which is kept and maintained by the “*Hungarian Chamber of Civil Law Notaries*”. The most important features of this register and of the possibility of registration are the following:⁴⁴

- Making a statement on the existence of cohabitation is *voluntary*.
- The registration does not have a constitutive character but only a *declaratory* one. In other words: it is not the registration that establishes cohabitation but only the realisation of the constituting elements as described above.⁴⁵ The aim is to facilitate the proof of the cohabitation (including the date of establishing cohabitation).
- The registration of cohabitation results in a *rebuttable presumption* on the fact of cohabitation, thus it is possible to rebut the presumption through proving that the cohabitation did not in fact exist or that the community of life began at a later date.⁴⁶

40. If two persons of the same or different sex over 18 years of age and having legal capacity make a joint statement before the notary public that they are living in cohabitation, then the notary public records this common statement in the register.⁴⁷

41. From that registration on, the register certifies the cohabitation up to the date when one of the cohabitants dies, gets married or enters into a registered partnership (which is reserved for same-sex couples) or makes a unilateral statement before the notary public that the registered cohabitation does not exist any longer.⁴⁸

three, four, five and six) – Az új Ptk. Magyarázata VI/VI. (Commentaries on the New Civil Code), 2nd revised edition, Budapest, HVGORAC, 2014, p. 454.

⁴² O. SZEIBERT, in GY. WELLMANN (ed), *Kötelmi jog, harmadik, negyedik, ötödik és hatodik rész (Law of Obligations, Parts three, four, five and six) – Az új Ptk. Magyarázata VI/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, HVGORAC, 2014, p. 455.

⁴³ SZEIBERT REPORT 2015, p. 3-4.

⁴⁴ Cf. S. 36/E-36/G of the Notarial Procedures Act.

⁴⁵ SZEIBERT REPORT 2015, p. 5.

⁴⁶ SZEIBERT REPORT 2015, p. 5.

⁴⁷ Cf. S. 36/E Para 1 lit. a) Notarial Procedures Act.

⁴⁸ Cf. S. 36/E Para 1 lit. b) and Para 2-3, Para 4 lit. d) Notarial Procedures Act.

42. “The register may certify only one cohabitation per person”⁴⁹ since the next cohabitation with another person (new partner) cannot be registered while the earlier cohabitation with the former partner is certified (the easiest way to get the new cohabitation registered and to get rid of the former registration is to make the so-called non-existence statement –meaning that the cohabitation does not exist anymore– which can be declared unilaterally).

3. Rights and Duties of Cohabitants, Property Regime, etc. within (Simple) Cohabitation

43. Simple cohabitation has by far not the same legal consequences as marriage or registered partnership for same-sex couples. However, the content of the legal relationship between cohabitants is not a legal black hole any more. The civil code covers some rights and duties of cohabitants during and after cohabitation. Judicial practice has also contributed significantly to the legal duties of cohabitants towards each other.

44. Not even if the cohabitants are of the different sex does simple cohabitation induce a presumption of paternity (unless the cohabitants take part in a special artificial human reproduction procedure), therefore the father has to make a paternity acknowledgment statement. Cohabitants cannot adopt a child jointly so as they both would become the legal parents of the child.⁵⁰

45. Simple cohabitants are not statutory heirs of each other; they can inherit only by way of last will (testamentary succession) after one another.

46. The civil code introduced a new default property regime for cohabitants, which is similar to the regime of “*participation in acquisitions*” (like the German *Zugewinnngemeinschaft*), which is actually an alternative (opt in) regime for married couples, too (the default property regime for married couples is still the community of property and this applied to cohabitants under the former civil code).

47. As it is described in the Szeibert Report 2015, where the author explains S. 6:516 hCC:⁵¹

- “The cohabitants are the *owners of any acquired property* during their community of life and *joint ownership is not established* by simply being cohabitants.
- In the case of *separation*, both cohabitants may claim from one another the *division of the other’s acquired property*. (Personal and other assets, which belong to the separate property of the spouses in the matrimonial community of property regime, do not belong to acquired property.)
- A cohabitant may claim for his or her participation and *in proportion to the contribution* he or she has made in acquiring such property.
- The work done in the *household, caring for children and working in the business* of the other cohabitant is considered to be a contribution to acquiring that property.
- When this proportion cannot be calculated, the contribution is considered to have been *equal except if this results in an unfair disadvantage* for the other cohabitant.”

48. S. 6:516 Para 4 refers explicitly to the “participation in acquisitions” regime between spouses, which applies *mutatis mutandis* to property relationship between cohabitants.

49. Cohabitants can enter into a *property agreement* and they can arrange their financial relationship thereby in advance.

⁴⁹ Cf. SZEIBERT REPORT 2015, p. 6 and S. 36/E Para 3 Notarial Procedures Act.

⁵⁰ Cf. S. 4:98 hCC: „[Facts establishing paternity] Paternity is established: a) by way of wedlock; b) by way special procedures for the purpose of human reproduction in the case of civil partnerships (hereinafter referred to as „reproduction procedure”); c) by way of acknowledgement of paternity; or d) by way of court decision.” See also O. SZEIBERT, in GY. WELLMANN (ed), *Kötelmi jog, harmadik, negyedik, ötödik és hatodik rész (Law of Obligations, Parts three, four, five and six) – Az új Ptk. Magyarázata VI/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, pp. 456-457.

⁵¹ SZEIBERT REPORT 2015, p. 28.

- They can *opt for any matrimonial property* regime, i.e., they can choose the “community of property”, the “participation of acquisitions” or the “separation of property” system and they are also entitled to deviate from the statutory rules of these regimes.⁵²
- The agreement underlies strict formality requirements: must be executed in a “*public*” (*notarial*) deed or *private document countersigned (attested) by an attorney*.⁵³
- The property agreement between cohabitants is valid and effective in dealing with and *towards third parties* only if the agreement is recorded in the “National Register of Property Agreements of Cohabitants”, or if the partners are able to prove that the third party was aware, or should have been aware that such agreement existed, including its contents. (This register is also kept by the Hungarian Chamber of Civil Law Notaries. The entry of the property agreement establishes a rebuttable presumption on the existence thereof. The agreement itself must be attached to the request for getting it registered. The request has to be filed by both cohabitants together.⁵⁴ Anybody can file a request for information whether someone has such a property agreement, if the requester proves his or her legitimate interest substantiating the transaction, contract to be entered into or other claim or right to the notary’s reasonable satisfaction. Information on the content of the property agreement can be provided only with the prior written consent of either cohabitant.⁵⁵)

50. S. 6:517 hCC covers the partners’ agreement on the use of common dwelling (right of tenancy) after the termination of the cohabitation. The cohabitants can agree upon this either before entering into or under the duration of their cohabitation but also following the termination thereof. S. 6:517 Para 2 refers to the rules on the use of the common home of spouses with regard to the right of tenancy of a child.

51. Besides, the Curia (i.e., the Hungarian Supreme Court) developed a practice whereby cohabitants are expected to support and maintain each other. This duty remained uncodified, the Civil Code does not provide any explicit rule on this.⁵⁶

4. Termination of (Simple) Cohabitation (Dissolution)

A) Termination (dissolution) in general

52. According to S. 6:514 Para 2 hCC, cohabitation terminates if

- the cohabitants marry each other, or
- enter into registered partnership with each other, or
- their community of life ends.

53. This rule reflects again the factual character of cohabitation: no formality is required to terminate cohabitation. If one of the cohabitants disagrees on the existence and/or date of the termination of the cohabitation, the burden of proof lies with him or her. From this point of view “the lack of conceptual elements” (common household, emotional fellowship and economic partnership) is decisive.⁵⁷

54. (Let us not forget the possibility to get the “simple” cohabitation registered in the “*Register of Cohabitants’ Statements*” kept by the Hungarian Chamber of Civil Law Notaries, which is voluntary

⁵² Cf. S. 6:515 Paras 1-2 hCC.

⁵³ S. 6:515 Para 1 hCC.

⁵⁴ S. 36/H Para 4, S. 36/I Paras 1-2 Notarial Procedures Act.

⁵⁵ S. 36/K Paras 3 and 5 Notarial Procedures Act.

⁵⁶ SZEIBERT REPORT 2015, p. 20. See also E. REIDERNÉ BÁNKI, Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében (The Civil Union in the Mirror of the New Civil Code), in B.-A. KESERŰ – Á. KÓHIDI (eds.), *Tanulmányok a 65 éves Lenkovics Barnabás tiszteletére (Essays in Honor of the 65th birthday of Barnabás Lenkovics)*, Budapest – Győr, Eötvös József Könyvkiadó, 2015, p. 374 with reference to the judgment of the Supreme Court published as BH 2005.141, and p. 377, where she pleads for the explicit incorporation of this obligation into the civil code.

⁵⁷ SZEIBERT REPORT 2015, pp. 5-7.

and declaratory only, establishing a rebuttable presumption on the existence of the cohabitation. In this regard, either of the parties can submit a non-existence statement before the notary public, i.e. a statement that the registered cohabitation does not exist any longer.)

55. Although this is not explicitly mentioned in the civil code, cohabitation obviously comes to an end if either of the cohabitants dies.

B) Maintenance after dissolution

56. According to S. 4:86 Para 1, S. 4:87 and S. 4:88 hCC, the former partner *can claim maintenance* from the other partner immediately after the termination of the cohabitation or if the need emerges later on, but not later than within one year following the termination (in the latter case only if there are exceptional circumstances) if

- the claimant lacks the *necessary means to maintain himself/herself* (and he or she is not at fault for not being able to do so, i.e., he or she took all measures that can be reasonably expected according to the common belief in society to ensure his or her living expenses⁵⁸), and
- the *community of life* existed *for at least one year*, and
- they have a *common child*,⁵⁹ and
- the other party *would not seriously jeopardise his or her own maintenance* or the maintenance of *his or her child*, and
- there is *no unworthiness* on the claimant's side.⁶⁰

57. The *unworthiness* of the claimant thus releases the other partner from this statutory obligation. According to S. 4:87 Para 1 hCC, the former cohabitant (claimant) shall be considered unworthy if

- the claimant's gross misconduct (extremely objectionable behaviour) or his or her reprehensible lifestyle contributed primarily to the termination of the cohabitation, or
- his or her behaviour after the termination has seriously infringed the interests of the other party or that of his or her resident relatives.⁶¹ (However, the acts or omissions of the other former partner shall be taken into consideration too).

58. According to S. 4:91 hCC to all the details not regulated in this title the general provisions on maintenance of relatives apply, among other things to the amount of maintenance, means of providing and duration of the obligation, changes of the amount and duration, etc.

- Generally, maintenance is a *periodical payment due in every month in a fixed amount* (i.e., not a percentage of the income), which cannot exceed the half of the income of the debtor. (However, according to S. 4:89 hCC the parties can agree in a notarial deed or private document countersigned by an attorney to replace the periodical payment with a lump sum payment or with providing assets of kind value.)

⁵⁸ O. SZEIBERT, in A. KÖRÖS, *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 169.

⁵⁹ Also if the common child was born before or after the period the partners cohabited, cf. O. SZEIBERT, in A. KÖRÖS, *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 170.

⁶⁰ According to S. 4:89 Para 1 Lit. a) of the draft submitted by the Codification Committee and of the draft bill as submitted to the Parliament the claim would have existed even if there had not been a common child but the community of life had existed for at least ten years. Cf. L. VÉKÁS (ed.), *Az új Polgári Törvénykönyv Bizottsági Javaslatok magyarázatokkal* (The Draft Civil Code prepared by the Committee with Commentaries), Budapest, Complex, 2012, S. 4:89 Para 1, p. 225; and Draft Bill (as submitted to Parliament) No. T/7971, S. 4:89 Para 1, p. 140. This has been taken out during the reading in Parliament.

⁶¹ See also SZEIBERT REPORT 2015, p. 25.

- The obligation to pay maintenance *can be limited to a fixed period* in time or until a certain event occurs or a *condition* is fulfilled.
- The maintenance can be *adjusted* accordingly if the *circumstances change* and this infringes the legitimate interests of either of the parties.⁶²

59. The right to receive maintenance from the former cohabitant *ceases* if

- the claimant gets married, or
- enters into a registered partnership,
- or establishes another (simple) cohabitation with another person.⁶³

C) Right of use of common dwelling after dissolution

60. The civil code contains specific provisions on the judicial arrangement of the use of common dwelling after the termination of cohabitation (it is called in the official English translation of the hCC. as the “right of tenancy”). These provisions follow the model for the use of matrimonial home after the divorce of the spouses.⁶⁴ (As referred to earlier, the cohabitants can agree upon the use of the common dwelling in advance, including the use after the termination of the cohabitation, but such an agreement can be concluded after the termination of the cohabitation, too.)

61. If the cohabitants had a *common legal title* (joint ownership, joint usufruct or if both of them were contracting parties to the tenancy agreement)⁶⁵ to use the dwelling, this is taken into consideration accordingly, just as the *interest of a common child of minor age* (if any) with the right of tenancy for appropriate housing.⁶⁶

62. The general rule on the judicial arrangement of the use of the common dwelling after the termination of the cohabitation – in lack of a common legal title of the use – can be found in S. 4:94 hCC. The court may award the right to the former partner – at his/her request – *to continue using the common home occupied under the exclusive legal title of the other partner* (sic!),

- if their cohabitation *existed for at least one year*, and
- if this is justified in the interest of providing appropriate housing under the right of tenancy *of a minor child born during their relationship* (Para 1),⁶⁷
- unless the claimant has a vacant home elsewhere, or a home that can be made vacant by means of a unilateral statement (Para 6).⁶⁸

63. Regarding the means of use

⁶² See generally the SZEIBERT REPORT 2015, pp. 25-26 with a brief analysis on the relevant articles of the hCC (S. 4:205 Para 6, S. 4:207, S. 4:209 Paras 1-2, S. 4:210. Para 1 hCC).

⁶³ S. 4:91 hCC.

⁶⁴ SZEIBERT REPORT 2015, p. 2.

⁶⁵ O. SZEIBERT, in A. KÖRÖS, *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 174.

⁶⁶ S. 4:93 hCC.

⁶⁷ According to S. 4:100 Para 1 Lit. a) of the draft submitted by the Codification Committee and of the draft bill as submitted to the Parliament, the claim would have existed even if there had not been a common child but the community of life had existed for at least ten years. Cf. L. VÉKÁS (ed.), *Az új Polgári Törvénykönyv Bizottsági Javaslatok Magyarázataival (The Draft Civil Code prepared by the Committee with Commentaries)*, Budapest, Complex, 2012, S. 100 Para 1, pp. 228-229; and Draft Bill (as submitted to Parliament) No. T/7971, S. 4:100 Para 1, p. 142. This has been taken out during the reading in Parliament.

⁶⁸ The civil code does not require the other (vacant) home to be in the same town or village, see in this respect E. REIDERNÉ BÁNKI, *Az élettársi kapcsolat az új Polgári Törvénykönyv tükrében (The Civil Union in the Mirror of the New Civil Code)*, in B.-A. KESERÜ – Á. KÖHIDI (eds.), *Tanulmányok a 65 éves Lenkovich Barnabás tiszteletére (Essays in Honor of the 65th birthday of Barnabás Lenkovich)*, Budapest – Győr, Eötvös József Könyvkiadó, 2015, pp. 379-380.

- the court shall primarily order the *shared use* of the home that is considered suitable; but
- in exceptional and duly justified cases, the court may grant entitlement to a former partner for the *exclusive use* of a home owned exclusively by the other partner (sic!), or in which the other partner has beneficial rights, if that partner has parental authority over at least one of the common minor children with the right of tenancy and the housing for the minor child cannot be provided otherwise (Para 2-3).

64. The court may order the shared use or exclusive right of tenancy also for a *fixed period of time*, or subject to some condition (Para 4). Moreover, either of the parties can claim the *rearrangement* of the use if his/her legitimate interests or those of the common child of minor age are in jeopardy under the current arrangement due to changes in the circumstances (S. 4:95 hCC).

65. It is noteworthy that though there can be a right of use of the common dwelling after the termination of the cohabitation despite the fact that the common home was and is occupied under the exclusive legal title of the other partner; in other words: though the former partner who did and does not have any legal title to use the common dwelling can be entitled to the shared or even to the exclusive use thereof if the above indicated conditions are met, *there is still no right of use in case of the death of either of the cohabitants!* Although there was such a rule proposed in the draft Civil Code prepared by the academic Codification Committee, providing the surviving cohabitant with a lifelong right of use on the common dwelling (with the equipment and furniture, etc.) if the community of life existed for at least ten years and existed also at the partner's death, but this proposal was removed during the discussions of the draft in the Parliament.⁶⁹

IV. Registered Partnership

66. As already stated above, “simple” cohabitation is accessible to both different-sex and same-sex couples. In contrast, the so-called “*registered partnership*”, which is not regulated in the civil code but in a separate statute (Act. No. XXIX/2009 on Registered Partnership and Related Legislation and on the Amendments of Other Statutes to Facilitate the Proof of Cohabitation), is reserved for and accessible to same-sex couples only.

67. Since the “Basic Law” which is the Hungarian Constitution itself, in Article L Para 1 declares that “*Hungary shall protect the institution of marriage, the conjugal union of a man and a woman based on their voluntary and mutual consent*”, marriage cannot be open to same-sex couples, because this would not be in line with the constitution. Therefore the legislator enacted the above-mentioned special statute on registered partnership.⁷⁰

⁶⁹ Cf. L. VÉKÁS (ed.), *Az új Polgári Törvénykönyv Bizottsági Javaslatát magyarázatokkal (The Draft Civil Code prepared by the Committee with Commentaries)*, Budapest, Complex, 2012, S. 7:63 draft hCC, p. 551, pp. 553-554, that yet contained the above described right, and so did the draft bill submitted to Parliament (cf. here S. 7:63 too, p. 357.).

⁷⁰ For the constitutional background see SZEIBERT REPORT 2015, pp. 1, 7-9. Szeibert refers to two decisions of the Constitutional Court that reflect the varied chronicle of the codification. The first one – decision No. 154/2008 (XII.17.) – declared Act No. CLXXXIV/2007 on Registered Partnership unconstitutional and repealed it, but this had nothing to do with same-sex partnerships; on the contrary: the reason was that the legislator extended the possibility of entering into a registered partnership to different-sex couples, and the Constitutional Court was of the view that this policy decision decreased the level of constitutional significance and the protection of marriage through offering different-sex couples another legally protected form of community hardly different from marriage. Regarding same-sex couples, the Court highlighted that it is obviously in line with the constitution to introduce registered partnership to those couples who cannot marry at all (i.e. same-sex couples), thus registered partnership cannot be considered as a “competing model of community” to marriage. Though marriage deserves particular protection by the constitution, but not an exclusive protection. The recognition and accessibility of registered partnership (for same-sex couples) can be traced back to the fundamental right of human dignity, too, and to other fundamental rights derived therefrom, like, for example, the right of self-determination, the free development of one's personality and last but not least the general freedom of action (see in particular chapters 1.4. and 3.2.). Therefore the Parliament enacted the recent law, Act No. XXIX/2009, which reserves the registered partnership only for same-sex couples. But even this latter legislation was con-

68. The legislator – or at least the Codification Committee and the Ministry of Justice – intended first to incorporate the most important rules on registered partnership into the new civil code. S. 4:102-4:103 of the draft bill as submitted to the Parliament involved yet the rules on establishing registered partnerships and on the effects and legal consequences thereof. Moreover, the draft bill on the new civil code referred explicitly to registered partners, too, wherever the legal consequences of marriage and/or the status “married” were mentioned (the details were planned to remain in the separate act on registered partnership).⁷¹ Finally, all rules and provisions on registered partnerships (and registered partners) were removed from the draft bill during the hearing by Parliament as a result of the same motion for amendment submitted by the smaller governing party (the Christian Democratic Party) already referred to above.⁷² Therefore, all rules on registered partnership remained in the (separate) Registered Partnership Act.

69. Before going into details, it must be underlined again that also *simple cohabitation* can be registered but this must not be mixed up and confused with the “*registered partnership*” referred to in this chapter. Let us highlight *three main differences* between the two:

The registration of the simple cohabitation aims only at facilitating the proof of the existence of cohabitation; the register plays only a declaratory role in establishing a rebuttable presumption for the existence (and starting date) of the cohabitation. Whereas in case of “registered partnership,” the personal declaration before the registrar and the recording in the registry is of crucial importance and of constitutive character regarding the registered partnership’s coming into being.

While the “Notarial Register on Cohabitation Statements” is kept by the Hungarian Chamber of Civil Law Notaries, and the statement on cohabitation itself is to be made before a notary public; concerning the “registered partnership”, the civil status is recorded into the Registry (just as in case of marriage) kept by the registrars, i.e., public officials of the municipalities with special qualification.

Whereas the registered partnership comes up to marriage with a few exceptions explicitly mentioned in the Registered Partnership Act; in other words: registered partnership has almost the same legal effects as marriage; this is by far not the case if the parties live together in a “simple” cohabitation.

70. Consequently, a same-sex couple has the free choice either to enter into a simple cohabitation (and to get it registered with a notary public or not) or establish a registered partnership according to the Registered Partnership Act.

1. Notion of Registered Partnership

71. According to S. 1 Para 1 RPA (i.e. Registered Partnership Act):

“Registered partnership is established if two persons of the same sex who have reached the age of eighteen years and are both present in front of the registrar personally declare that they wish to establish

tested in the Constitutional Court; the Court, however, confirmed the law to be in line with the constitution in its decision No. 32/2010 (III.25.). The Constitutional Court repeated the argumentation delivered in the former decision (cf. chapter 4.1.) and stressed that it had not the competence to perform any moral evaluation of homosexuality, since homosexuality is not qualified or evaluated by the constitution, either, therefore, it is a neutral phenomenon from the constitution’s point of view; however, all long-lasting partnerships bring and represent values (cf. chapter 8.2.), which deserve constitutional recognition and protection. It is, thus, constitutional to establish the form of registered partnership for same-sex couples, but also to maintain specific rules that are different from those applicable to marriage, provided this is justified by the nature and differences of the two forms.

⁷¹ Cf. Draft Bill (as submitted to Parliament) No. T/7971, S. 4:102-4:103, pp. 143-144, accessible at <http://www.parlament.hu/irom39/07971/07971.pdf>, last downloaded on 16th June 2017.

⁷² Cf. subchapter III.1. Para 29 above, and see Motion for Amendment No. T/7971/106, accessible at <http://www.parlament.hu/irom39/07971/07971-0106.pdf>, last downloaded on 16th June 2017. The reasoning within the motion for amendment referred to the narrow notion of family (first repealed by the Constitutional Court but incorporated into the Basic Law later on). Registered partnerships do not fit into the (narrow) concept of family, therefore, rules on registered partnership “cannot” be incorporated into the 4th book of the new civil code (family law) or into the civil code in general. Cf. p. 12 of the motion for amendment. See also the disappointment and critical remarks of the head of the Codification Committee, Lajos Vékás: L. VÉKÁS, “Bírálat és jobbitó észrevételek az új Ptk. törvényjavaslatához (a zárószavazás előtt) / (Criticism and Remarks for Improvement on the Draft Bill of the New Civil Code – Before the Final Vote)”. Magyar jog, 1/2013, p. 3.

registered partnership with one another.”

2. Establishing Registered Partnership

72. Accordingly, registered partnership is established if

- two persons of the same sex,
- who have reached the age of eighteen years,
- and are both present in front of the registrar,
- personally,
- in the presence of two witnesses,
- declare that they wish to establish registered partnership with one another (S 1 Para 1 and 4 RPA).

73. Since the preconditions of a valid marriage apply accordingly, additionally

- the partners have to have legal capacity (S. 4:10-4:11 hCC);
- neither of them has an existing marriage or registered partnership (S. 4:13 hCC, it means if one or both of them was married or registered partnered before, they have to file the order of the court or notary public on the dissolution of the former marriage or registered partnership, cf. subchapter V.1. and V.2. below);
- they are neither relatives in direct line; nor siblings; one person is not the biological descendant of his/her sibling who is the other person; and they are not in an adoptive parent – adopted child relationship either (S. 4:12 Para 1 hCC).

74. After the mutual and congruent declarations by the parties, the registrar records the establishment in the Registry. (S. 1 Para 3 RPA). However, it is not the registration that establishes and effectuates the registered partnership, but the mutual and congruent declarations by the parties. Even if the registration has not been performed or the content of the record (entry) is incorrect, this has no effect on (e.g., is without prejudice to) the registered partnership’s (valid) coming into being through the mutual and congruent statements.⁷³

75. S. 1 Para 2 RPA emphasises that “permission to enter into registered partnership shall not be granted for minors”. This is a difference from marriage, because according to S. 4:9 Para 2 hCC, the guardian authority may authorise the marriage of a minor of limited legal capacity over the age of sixteen years. This is not allowed in the case of registered partnership, i.e., both persons must be at least 18 years old.

76. S. 2 RPA provides for some additional rules on entering into a registered partnership with regard to (the steps of) the procedure itself:

“2. § (1) Before entering into registered partnership, future registered partners shall declare in front of the registrar that to the best of their knowledge there is no legal impediment to the registered partnership, and they shall verify that the legal requirements for the establishment of registered partnership are satisfied.

(2) If either of the parties has a life-threatening health condition, the statement of the parties shall suffice to verify all legal requirements for the establishment of registered partnership, and registered partnership may be established immediately upon notification.”

⁷³ O. SZEIBERT, in L. VÉKÁS – P. GÁRDOS (eds.), *Kommentár a Polgári Törvénykönyvhöz (Commentary on the Civil Code)*, Budapest, Wolters Kluwer, 2014, p. 642. G. JOBBÁGYI, in A. OSZTOVITS (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja (Large Commentary on the Act No. V/2013 and on the Related Statutes)*, Vol. II., Budapest, Opten, 2014, p. 23.

3. Rights and Duties of Registered Partners within *Registered Partnership*

77. The most important feature of the Registered Partnership Act (RPA) is that the rules on marriage are declared to be applicable to the registered partnership analogously unless there is an explicit exemption in the RPA itself.

78. This is expressed by S. 3. Para 1 lit. a) and b) RPA as follows:

“3. § (1) Unless this act stipulates otherwise or this act forecloses its application a) all rules that apply to marriage shall apply to registered partnership, b) all rules that apply to spouse or spouses shall apply to registered partner or registered partners,”

79. I do not intend to explain the civil status of spouses and married couples, but I wish to highlight four important points.

- According to S. 4:24 Para 1 hCC “Spouses must be loyal and faithful to each other; they shall cooperate in their common goals and shall *support one another*.” This applies to registered partners accordingly, it means, registered partners do have an obligation to support each other during the partnership, and also after its termination, pursuant to the *maintenance* rules on former spouses (S. 4:29-4:33 hCC).⁷⁴
- The default property regime between spouses is the “*community of property*” (S. 4:34 Para 2 HCC). It means that – unlike (simple) cohabitation – each and every asset acquired either jointly or separately by either registered partner belongs to the community of property of the registered partners, i.e., will be part of their joint ownership, except the assets belonging to the so-called separate property (for example all property acquired before entering into the registered partnership, gifts, inheritance, property of personal use).⁷⁵ As it is described

⁷⁴ 4:29 [Entitlement for maintenance]

(1) Following the termination of matrimonial relationship, either spouse shall be entitled to demand maintenance from his/her spouse, or ex spouse in the case of divorce, if unable to support him/herself for reasons beyond his/her control.

(2) If the spouse or former spouse develops the need for support after a period of five years following the termination of matrimonial relationship, maintenance may be demanded in cases of exceptional circumstances.

(3) If the matrimonial relationship of the spouses lasts for less than one year, and their marriage did not produce a child, the former spouse shall be entitled to maintenance - if in need - for a duration corresponding with the length of their marriage. In cases of exceptional circumstances, the court may order maintenance payments for a longer period of time.

4:30 [Undeserving maintenance]

(1) A spouse or former spouse shall be considered unworthy of maintenance:

a) if the irretrievable breakdown of their marriage is attributable to his/her gross misconduct or reprehensible lifestyle; or
b) if he/she engaged after the termination of matrimonial relationship in any conduct intended to do harm to his/her spouse, former spouse or their any resident family member.

(2) In determining unworthiness, the actions of the spouse or former spouse invoking it shall be taken into consideration.

4:31 [Ability to provide maintenance]

A person shall not be obligated to support his/her spouse if this would seriously jeopardize his/her ability to provide for him/herself or for his/her child.

4:32 [Agreement to provide lump-sum maintenance]

By agreement of the spouses executed in an authentic instrument or in a private document countersigned by an attorney, the spouse subject to maintenance obligation shall meet this obligation by providing assets of kind value or in a lump-sum payment. In that case the spouse to whom maintenance is provided shall not make any maintenance claim in the future, even if otherwise made eligible by this Act.

4:33 [Maintenance of relatives]

The amount of maintenance, the means of providing and the duration such maintenance, including any changes thereof, the enforcement of any maintenance claim retroactively, the cessation of right to maintenance and the termination of maintenance shall be governed by the common provisions on the maintenance of relatives, with the proviso that the right to spousal support shall cease if the entitled party re-marries or enters into a domestic partnership.

⁷⁵ For the exact list cf. S. 4:38 hCC: according to Para 1 „Separate property of a spouse shall include: a) any property acquired before marital community of property; b) any property acquired by gift, bequest, devise, or inheritance, and any received with compensation during marital community of property; c) any right of the spouse as the proprietor of intellectual property, except for the royalties due during community of property; d) any compensation received for personal injury; e) personal

in a guide prepared by the Hungarian LGBT Alliance, “it does not matter who is the formal owner of the house or who appears in the sales contract of the car: the couple holds the property jointly”.⁷⁶ The spouses – and therefore the registered partners, too – are entitled to an undivided and equal share of the marital (joint) property.⁷⁷ Therefore if one of the spouses / registered partners dies, half of the community property shall be automatically given to the surviving spouse / registered partner regardless of inheritance and only the other half is shared among the heirs. This claim has to be made during the probate hearing. If the marriage/ registered partnership is dissolved, the court divides the common property equally between the spouses / registered partners.⁷⁸

- Registered partners can enter into a *property agreement* just like spouses can (S. 4:34 Para 1 hCC, S. 4:63-4:68 hCC, S. 4:74-4:75 hCC), in this regards cf. the chapter on simple cohabitation above, since the rules on property agreements of cohabitants were constructed after the respective rules on such agreements between spouses, including the necessity of registration of the agreement if third party effect is targeted).
- Registered partners *inherit the same way* as surviving spouses do in case of *intestate succession*⁷⁹ and they are entitled to the *compulsory share* (reserved share) as spouses are if testamentary succession applies (i.e. the deceased partner made a last will in favour of someone else).

80. The Registered Partnership Act provides for four exemptions, where registered partners do not enjoy and cannot exercise the same rights as married couples, i.e. spouses.

- According to S. 3 Para 2 RPA, rules on *adoption by spouses* shall not apply to registered partners. This means that registered partners cannot adopt jointly as spouses can and neither of them can adopt the child of his or her registered partner.⁸⁰ Thus the Hungarian law does not allow for both registered partners to become legal parents of a child. As the experience of the Hungarian LGBT Alliance shows, though the possibility of an individual adoption is

effects and articles of personal use of customary value; and f) assets acquired in exchange for the spouse’s separate property and anything of value acquired for such property.” Para 2 adds that „The proceeds on separate property that remain during matrimonial relationship after handling and maintenance charges and other burdens are deducted shall be considered community property.” Finally, Para 3 „converts” some assets from separate property into joint property after 5 years of marriage, e.g. registered partnership as well: „The assets comprising 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.”

⁷⁶ *Registered Partnership, Guide for Gay and Lesbian Couples*; Háttér Support Society for LGBT People / Hungarian LGBT Alliance, 2010, p. 5, available at: <http://www.hatter.hu/kiadvanyaink/registered-partnership-guide>, last visited on 12th June 2017. Hereinafter referred to as LGBT GUIDE.

⁷⁷ Cf. S. 4:37 Para 3 hCC.

⁷⁸ Cf. LGBT GUIDE, p. 5-6.

⁷⁹ 7:58 [Spouse’s share from the estate contemporaneously with a descendant]

(1) The testator’s spouse shall be entitled contemporaneously with the legal heir to:

- a) life estate on the family dwelling used together with the testator, including furnishings and appliances; and
- b) one share of a child from the remainder of the estate.

(2) Life estate may not be limited, and no redemption value may be demanded from the spouse.

(3) Under an allocation agreement, instead of a child share, the spouse may be granted estate for life in respect of the entire estate

7:60 [Spouse’s share from the estate over parent]

(1) If there is no descendant, or if the descendant is excluded from succession, the testator’s spouse shall inherit the family dwelling used together with the testator, including furnishings and appliances.

(2) Half of the estate to which Subsection (1) does not apply shall be inherited by the testator’s spouse, and the other half shall be inherited by the testator’s parents in equal shares. If a parent is debarred from succession, the other parent and the testator’s spouse shall succeed in equal shares.

7:61 [Spouse as the sole heir]

If there is no descendant or parent, or if they are excluded from succession, the surviving spouse shall receive the entire estate.

⁸⁰ O. SZEIBERT, in GY. WELLMANN, *Kötelmi jog, harmadik, negyedik, ötödik és hatodik rész (Law of Obligations, Parts three, four, five and six) – Az új Ptk. Magyarázata VI/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, HVGORAC, 2014, pp. 467-468.

not precluded by law, therefore people living in registered partnerships – as individuals – are not excluded totally from becoming an adoptive parent, but in this case only one (the adopting) partner becomes the legal parent of the child. Besides, preference is given to adoption by a married couple, therefore, it is quite unlikely that an individual living in a registered partnership (or even in a simple cohabitation) will be able to adopt.⁸¹ This can be traced back to the explicit provision in S. 4:120 Para 5 hCC: “Moreover, after the requirements set out in this Act are satisfied, the guardian authority shall authorise the adoption if it is deemed to be in the child’s best interest. In the interest of the minor child, in its adoption decision the guardian authority *shall give preference to adoptive parents living in wedlock.*”

- In the same place it is provided for that rules on *presumption of paternity* shall not apply to registered partners.
- According to S. 3 Para 3 RPA, *rules on spousal names* shall not apply to registered partners. It means that registered partners *cannot take each other’s name* as spouses can.⁸² Additionally “Upon entering into registered partnership a person shall no longer be entitled to bear the name of her former husband with the spousal marker, and this right shall not resume upon the dissolution of her registered partnership. If a registered partner has been using the name of her former husband with a spousal marker until the time of establishing registered partnership, she is not entitled to change her name to any other spousal name, but shall use her birth name.”
- Another significant difference is that the rules on procedures aimed at *human reproduction concerning spouses* shall not apply to registered partners. In other words: lesbian women living in a registered partnership (or even in a simple cohabitation) cannot participate in artificial insemination procedure. This is also confirmed by S. 167 of the Healthcare Act, which states that artificial human reproduction procedures are available only to married couples or different-sex cohabiting couples and infertile single women or single women who are likely to become infertile soon due their age (provided all other conditions indicated in the Healthcare Act are met). As experience shows, some lesbian women are ready not to enter into registered partnership and to deny their existing cohabitation with another woman (e.g., to pretend to be single) in order to be allowed to participate in an artificial insemination, while others take advantage of more permissive regulation abroad. Once again: this (i.e. pretending to be single) is not an option for those who are living in registered partnership since the latter as a legal family (civil) status is recorded in the Registry.⁸³

4. Termination and Dissolution of the *Registered Partnership*

81. Termination and dissolution of registered partnership is regulated in S. 4 Para 1 Registered Partnership Act. According to these rules, registered partnership ceases to exist

- in the event of the death of either of the parties;
- if dissolved by court order;
- if dissolved by public notary.

82. S. 4 Para 2 RPA adds that the rules that apply to the termination of marriages shall apply also to the termination of registered partnerships.

⁸¹ Cf. LBGIT GUIDE, pp. 6-7.

⁸² The Hungarian LBGIT Alliance points out that everybody can change his or her name, since there is a general possibility to change one’s name. Therefore one registered partner can take his/her registered partner’s surname. This results, however, in the change of the birth name while spouses actually keep their birth name when they opt for a marriage-name in the marriage. See LBGIT GUIDE, p. 6. Cf. S. 49-52 Register Act.

⁸³ Cf. LBGIT GUIDE, p. 7.

A) Death of either of the parties

83. The registered partnership ceases to exist if one of the partners dies. According to S. 2:5 Para 1 hCC “a missing person may be legally declared dead by the court upon request five years after the date of his/her disappearance if there has been no information of any kind during this period to indicate that he/she is alive.” And if so: “The court shall declare the time of death upon due consideration of the circumstances. If weighing the circumstances proves to be inconclusive, the date of death shall be the fifteenth day of the month following the month of disappearance.” (S. 2:6 hCC.)

84. As legal presumption of death has the same legal effect as death itself, if one of the registered partners is declared dead, the registered partnership is deemed to be terminated upon the date specified in the court order.

85. Sometimes it happens that the person who has been legally presumed dead is found alive. In this case the court order on the legal presumption of death shall be abolished, and the ensuing legal consequences shall be considered null and void (S. 2:7 Para 4 hCC).

86. This general rule, however, does not apply to the subsequent marriage (or registered partnership), because the special provision of S. 4:20 Para 2 hCC prevails, which makes it clear that the subsequent marriage (or registered partnership, accordingly) remains existent and valid, despite the fact that the former spouse or registered partner was found alive. According to the content of S. 4:20 Para 2 hCC:

- The marriage (the former marriage with the disappeared person is meant, which applies accordingly to the former registered partnership) shall be considered terminated,
- if the other spouse (or the other registered partner) re-married (or entered into another registered partnership) after the declaration of death,
- provided that neither of the parties of the latter (i.e., 2nd) marriage (or registered partnership) had been aware that the death did not occur (i.e., both of them were in good faith).

87. In this case, the former registered partnership is abolished upon the latter marriage or registered partnership, despite the fact that the former registered partner was found alive.

B) Dissolution by public notaries at the joint request of the partners

88. Marriages cannot be *dissolved by public notaries* in Hungary, only registered partnerships can, thus this is a significant difference concerning marriage. According to S. 4 Para 3 RPA, the dissolution of the registered partnership by a public notary is possible only if the parties agree on all aspects of the “divorce”. In this case the registered partnership gets dissolved within the framework of a non-contentious (or non-litigious) civil proceeding. The details can be found in S. 36/A-36/D Notarial Procedures Act. The notary public has to dissolve the registered partnership if

- this is requested jointly by the registered partners (still having legal capacity) based on their mutual agreement reached without undue influence; and
- neither of them has a child in relation to whom both registered partners are jointly obliged to provide maintenance (i.e., they do not raise the child of one of the partners in the common household); and
- they agreed upon the maintenance (alimony) towards each other, on the use of the common home, and also on the division of the common property (excluding the separation of jointly owned immovables); and
- they executed their agreement in the form of a notarial deed or in a private document countersigned (attested) by an attorney (S. 36/A Para 1 Notarial Procedures Act).

89. If the agreement of the parties complies with the law and meets the above-specified requirements, the notary public approves their agreement and dissolves the registered partnership with his order (S. 36/C Para 1 Notarial Procedures Act).

90. The aim of the legislator was to simplify the divorce of registered partners and this is why it is possible to turn to the public notary instead of the court. However, this simplified divorce based on agreement is just an option, the registered partners can initiate a divorce procedure at court even if the conditions of the dissolution by the public notary are met.

C) Dissolution by court

91. In the case of breakdown, the registered partnership can be dissolved through litigation.⁸⁴ For the court proceeding, the same rules apply as to the divorce of a marriage.

92. If the parties request the dissolution together and can agree upon the circumstances specified above (cf. the dissolution by notary public as indicated above, i.e., on maintenance, use of the common home and division of common property excluding the separation of jointly owned immovables), the court approves their agreement and delivers a judgment dissolving the registered partnership (*dissolution based on agreement*).⁸⁵

93. Otherwise, if there is no agreement between the registered partners, the court dissolves the registered partnership at the request of either of the registered partners, in the event of breakdown of the registered partnership due to irreconcilable differences (in other words: the relationship between the partners is irretrievably broken). The registered partnership shall be considered to have broken down if the relationship of the registered partners has been ruined and there is no reasonable expectation of reconciliation in the light of the events that led to destruction of their life as a couple, or based on the length of their separation.⁸⁶ If this is the case, the court decides on all open questions like alimony (maintenance), use of the common dwelling and division of the common property.⁸⁷

V. The Former Registered Partnership as an Impediment to the Subsequent Heterosexual Marriage - Invalidity

1. The Rules

94. In the following part a particular interaction between marriage and registered partnership will be elaborated on. In doing so, first of all S 4:13 Para 1 hCC has to be taken into consideration:

“S. 4:13 [Existing marriage] (1) Marriage shall be declared invalid if one of the parties to the marriage is already married.

95. According to S. 3 Para 1 Registered Partnership Act

“3. § (1) Unless this act stipulates otherwise or this act forecloses its application a) all rules that apply to marriage shall apply to registered partnership, b) all rules that apply to spouse or spouses shall apply to registered partner or registered partners,”

⁸⁴ See also the LBGT GUIDE, p. 12.

⁸⁵ See the general description in the LBGT GUIDE, p. 12, but first and foremost S. 4:21 Paras 2-4 hCC.

⁸⁶ This is exactly the paraphrased text of S 4:21 Para 1 hCC, I replaced “marriage” by “registered partnership”, “spouse” by “registered partner”.

⁸⁷ See also LBGT GUIDE, p. 12.

96. It results from these two norms that a registered partnership constitutes definitely an impediment to a subsequent heterosexual marriage⁸⁸ (but not the simple cohabitation of same-sex couples, not even if registered in the declaratory “Register of Cohabitants’ Statements”!).

2. *Ex officio* Examination of Former Marriage / Registered Partnership Before the Marriage (Registered Partnership) by the Registrar

97. According to the Register Act, the registrar checks and proves *ex officio* whether there are legal impediments to the marriage (registered partnership) and/or whether the legal prerequisites of marriage (registered partnership) have been verified appropriately, both when the couple applies for marriage / registered partnership and also immediately before starting the procedure.⁸⁹ This aims that no such marriages come into existence, which are foredoomed to be invalid.⁹⁰

98. The registrar checks whether either of the parties was already (or is still) married or registered partnered. If this was the case, the *ex officio* inspection is extended whether the former marriage or registered partnership has already been terminated (dissolved). These circumstances can be verified and certified

- by the registrar’s direct access to the “*Register of Personal Data and Addresses of the Citizens*” whereby the registrar can make sure that neither of the parties has been married or registered partnered so far (if this is the case);⁹¹ or
- by the registrar’s direct access to the “Electronic Registry System” whereby the registrar can make sure whether the former spouse / registered partner of either parties has died or their former marriage / registered partnership has already been dissolved (or annulled);⁹² or
- in lack of an electronic entry (to the stepwise introduction of the electronic system see subchapter II.1.D. above), by the registrar’s inspection of original deeds that confirm and certify the death or the dissolution (or annulment) of the former marriage or registered partnership (final divorce or annulment decree of the court; final decree of the public notary on dissolution of the registered partnership based on the agreement of the parties; death certificate; marriage or registered partnership certificate supplemented with a proviso on the death or divorce; court judgment on declaring either of the former parties legally dead, etc.).⁹³

99. On the bases of all these

- If there is a legal impediment, and/or
- the legal prerequisites have not been verified appropriately,

the registrar has to refuse to conduct the proceedings necessary to get married or to establish a registered partnership.⁹⁴

⁸⁸ Scholars of family law come to the same conclusion, cf. Zs. BOROS, in A. KÖRÖS (ed.), *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 57. O. SZEIBERT, in Gy. WELLMANN (ed.), *Kötelmi jog, harmadik, negyedik, ötödik és hatodik rész (Law of Obligations, Parts three, four, five and six) – Az új Ptk. Magyarázata VI/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 467. G. JOBBÁGYI, in A. OSZTOVITS (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja (Large Commentary on the Act No. V/2013 and on the Related Statutes)*, Vol. II., Budapest, Opten, 2014, p. 34. Vice versa: the former (but still existing) marriage is an impediment to the subsequent registered partnership and no one can have two registered partnerships the same time either, see also O. SZEIBERT, in L. VÉKÁS – P. GÁRDOS (eds.), *Kommentár a Polgári Törvénykönyvhöz (Commentary on the Civil Code)*, Budapest, Wolters Kluwer, 2014, p. 651.

⁸⁹ S. 22 and 34 Register Act and S. 16 Para 1 Register Decree.

⁹⁰ G. JOBBÁGYI, in A. OSZTOVITS (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja (Large Commentary on the Act No. V/2013 and on the Related Statutes)*, Vol. II., Budapest, Opten, 2014, pp. 25, 34.

⁹¹ S. 30 Para 1 Register Decree. The above-mentioned “Register of Personal Data and Addresses of the Citizens” is regulated by Act No. LXVI/1992 and kept by the “Central Office for Administrative and Electronic Public Services”, which is part of the central state administration.

⁹² S. 32 Para 2 Register Decree.

⁹³ S. 32 Para 2 lit. a)-e) and Para 3 Register Decree.

⁹⁴ S. 22 Para 2 lit. c)-d), S. 34 Para 2 lit. c)-d) Register Act.

3. Annulment of the Subsequent Marriage by the Court

100. Though it is exceptionally unlikely that the parties succeed to marry, if either of them is still married or registered partner (due to the registrar's ex officio inspection on the impediments and prerequisites, cf. subchapter V.2. above), but even if this happens, the subsequent marriage (or registered partnership) can be declared invalid by the court.⁹⁵

101. It is noteworthy that the judgment of the court on the invalidity has no constitutive effect. The subsequent marriage or registered partnership is invalid due to the still existing former marriage or registered partnership.⁹⁶ The declarative judgment of the court (having retroactive effect) is needed to apply the consequences of invalidity.

102. According to S. 4:14 Para 1-2 hCC:

(1) *A marriage shall be considered annulled upon the act of a court in voiding the marriage in an action brought for such reason (hereinafter referred to as „action for annulment”).*

(2) *The judgment for annulment of the marriage applies to all parties involved.*

103. This special invalidity action (action for annulment) must be brought by someone who is entitled by the hCC to bring such an action. According to S. 4:15 Para 2 hCC, an action for annulment may be brought

- by either of the spouses (registered partners accordingly),
- by the public prosecutor,
- or by any person who has a legal interest in the nullity of the marriage.

104. The prosecutor's entitlement to commence an action can be traced back to public interest if the parties themselves are not interested in contesting their own marriage or registered partnership. Other persons having a legal interest in the nullity of the marriage can be for example the legal heirs of either party who inherit (more) if the marriage of their relative gets annulled. The registrar or the guardianship authority as such does not have a legal interest to contest the marriage, if they realise the cause of invalidity, they have to notify the public prosecutor.⁹⁷

4. Dissolution of Partnership with a View to Entering into Marriage

105. If the person bound to a homosexual union lives in a “simple” cohabitation with another person (of the same sex), this is not an impediment to enter into a heterosexual marriage. Consequently, the question is relevant only if the homosexual union is a registered partnership.

106. In this case the registered partner has the following possibilities:

⁹⁵ Due to the ex officio examination by the registrar before the marriage, annulment actions and procedures are very rare, cf. Zs. BOROS, in A. KÖRÖS (ed.), *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 47.

⁹⁶ Even the marriage voided by the court has some residual legal effects: paternity presumption (S. 4:99 Para 1 hCC); the “spouses” are still entitled to bear their marriage names (S. 4:28 Para 1 hCC); if either of the spouses obtained full age through the marriage, he or she qualifies as major despite the annulment (S. 2:10 Para 2-3 hCC) and if either of them was in good faith, the marital property effects of the marriage cease to exist not retroactively but only ex nunc with respect to him or her (S. 4:36 hCC), cf. Zs. BOROS, in A. KÖRÖS (ed.), *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 58. G. JOBBÁGYI, in A. OSZTOVITS (ed.), *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja (Large Commentary on the Act No. V/2013 and on the Related Statutes)*, Vol. II., Budapest, Opten, 2014, p. 35. O. SZEIBERT, in L. VÉKÁS – P. GÁRDOS (eds.), *Kommentár a Polgári Törvénykönyvhöz (Commentary on the Civil Code)*, Budapest, Wolters Kluwer, 2014, p. 652.

⁹⁷ Zs. BOROS, in A. KÖRÖS (ed.), *Családjog (Family Law) – Az új Ptk. Magyarázata III/VI. (Commentaries on the New Civil Code)*, 2nd revised edition, Budapest, hvgorac, 2014, p. 59.

- He or she can request his or her registered partner to be *legally declared dead* by the court, if his or her registered partner has been missing for at least five years and there has been no information of any kind during this period to indicate that he/she is alive. If the registered partner has been declared dead, there is no impediment any more to the subsequent heterosexual marriage.
- Otherwise (in lack of such special situation as above), he or she has to *request the dissolution* of the registered partnership at the court or at the notary public. The latter is not possible without the consent of his or her registered partner and without their agreement on maintenance (alimony), use of the common home and division of the common property (excluding the division of joint property on immovables).
- He or she can also bring an *action for annulment of the registered partnership* and can try to get the impediment out of the way, if there was a cause of invalidity regarding the registered partnership and all other conditions for an action of annulment are met in this regard.

107. It is noteworthy that according to the paraphrased S 4:13 Para 2 hCC, the latter marriage shall become valid

- from the date of dissolution of the previous marriage (or registered partnership), and
- if the court declared the previous marriage (or registered partnership) annulled, retroactively from the date when the latter marriage took place;

108. it means that if the former registered partnership has been dissolved, or has been declared annulled, then the subsequent heterosexual marriage becomes valid and it is not possible to contest it on the base of the former registered partnership.

109. If the invalidity action with regard to the subsequent marriage has already been submitted and the court procedure is in progress, but the defendant contests the validity of the former registered partnership or brings an action for the dissolution thereof in order to get the cause of invalidity cured, the court process on the invalidity of the subsequent marriage has to be suspended.⁹⁸ According to S. 153 Para 1 of Act No. III/1952 on the Code of Civil Procedure:⁹⁹

“If the outcome of the hearing depends on the existence or validity of marriage, or on the court’s decision as to the family status of a child, and an action is in progress in this respect, the hearing shall be stayed until the final conclusion of such hearing.”

VI. Recognition of Foreign Registered Partnerships in Hungary

1. Rules on the Applicable Law, Recognition of Foreign Registered Partnerships

110. Since neither European nor international law covers the recognition and validity of marriage and registered partnership, the private international law rules of the respective state apply. In Hungary it was (and until 31st December 2017 still is) Law Decree No. 13/1979 on International Private Law (hereinafter referred to as PiL Decree or PiLD) that applies. From the 1st January, 2018 on, this law decree is going to be replaced by the new private international law legislation, i.e. by Act No. XXVIII/2017 on International Private Law (hereinafter referred to as PiL Act or PiLA).

⁹⁸ Similar A. KÖRÖS (ed.), *A családjog kézikönyve (Handbook of Family Law)*, Vol. I, Budapest, hvgorac, 2007, electronic access via hvgorac/LexisNexis online, commentaries on S. 7 of Act. No. IV/1952 on Marriage, Family and Tutelage (not in force any more), because family law has been integrated into the (new) Civil Code of 2013 as its 4th book.

⁹⁹ On 1st January, 2018 Act. No. CXXX/2016 on the Code of Civil Procedure (i.e. the new civil procedure act) replaces the above cited civil procedure act. The new act contains, however, the same rule (cf. S. 125 Para 1 thereof).

111. According to S. 41/A Para 1 PiLD and S. 37 Para 1 PiLA, in terms of contracting (existence or non-existence), validity and legal effects – subject to some exceptions in favour of the parties specified in the subsequent paragraphs of the Act¹⁰⁰ – the provisions on marriage (including the validity and legal effects thereof) apply accordingly to registered partnerships. The relevant provision in PiLA contains an exception: the rules on marriage do not apply to the right of using a married name.

112. Though the conflict of law rules on the existence or non-existence and on the validity of marriage (and of registered partnership) changed slightly, the marriage and the registered partnership is to be considered as existent and/or valid only if the substantive legal conditions are satisfied according to the personal laws of both parties; while the law in force at the place and date of the marriage (establishing of the registered partnership) shall apply to the formal requirements. (S. 37 Paras 1, 3 and 4 PiLD and S. 26 Paras 1-3 PiLA.) Neither marriage nor registered partnership can be entered into in Hungary if there is an insuperable obstacle to them according to Hungarian law (S. 38 Para 2 PiLD, S. 26 Para 4 PiLA). The personal law of a person (human being) is regulated in S. 11 PiLD and in S. 15 Paras 2-6 PiLA.¹⁰¹ Consequently, the registered partnership entered into abroad can be recognized only if it meets the substantive requirements of the personal law of both parties. If one of the parties' personal law is Hungarian law, the recognition is possible only if the substantive preconditions of a registered partnership are met under the (Hungarian) Registered Partnership Act.

113. Additionally, according to S. 65 of Act No. I/2010 on Registry Procedures (Register Act) Hungarian citizens are obliged to initiate the domestic registration of their marriage or registered partnership entered into abroad.

114. To sum it up, foreign registered partnerships of same-sex couples are recognized in Hungary as registered partnerships. The legal framework necessary thereto is present. Same-sex couples can, however, face problems if the registered partnership entered into abroad also provides rights which are not provided to registered partners according to Hungarian law, like the right of taking the registered partner's family name or to opt for a joint family name with a dash (see the next subchapter below).

2. No Recognition of the Right to use of Each Other's Name

115. As already pointed out, according to S. 3 Para 3 RPA, *rules on spousal names* shall not apply to registered partners. It means that registered partners *cannot take each other's name* as spouses can. A conflict between the Hungarian law and the foreign law arises if the foreign law under which the

¹⁰⁰ According to S. 41/A Para 2 PiLD and S. 37 Para 2 PiLA: “Contracting registered partnership shall not be prevented where the national law of the proposed registered partner fails to recognize the concept of registered partnership among couples of the same sex, nor it shall have any bearing, provided that: a) the proposed registered partner of citizenship other than Hungarian is able to verify his/her right to contract marriage under his/her national law, and b) at least one of the proposed registered partners is a Hungarian citizen or resides in the territory of Hungary.” According S. 41/A Para 4 PiLD and S. 37 Para 3 Hungarian law shall apply as regards the legal effects of registered partnerships in this case.

¹⁰¹ The personal law is the law of the state of which one is a citizen. (S. 11 Para 1 Sentence 1 PiLD, S. 15 Para 2 PiLA.) If a person has multiple citizenships, and one of his citizenships is Hungarian, his personal law will be the Hungarian law (S. 11 Para 2 PiLD). S. 15 Para 3 PiLA adds however an exception to the rule: unless he or she has a closer relationship to his or her other citizenship. The PiLD and the PiLA contain different rules for the case a person has multiple citizenships and none of them is Hungarian. According to S. 11 Para 3 PiLD, the personal law shall be the law of the state in the territory of which his or her place of residence is, or the Hungarian law if he or she also has a place of residence in Hungary. In the case of a person who has several places of residence abroad, his or her personal law shall be the law of the state with which he or she has the closest ties. By contrast, S. 15 Para 4 PiLA declares directly that particular law applicable with which the person has the closest ties regarding the important circumstances of the case. In the case of a person whose personal law cannot be established on the basis of the previous subsections and has no place of residence, his or her personal law shall be determined by his or her usual place of abode. In the case of a person who has several usual places of abode and one of them is in Hungary, his or her personal law shall be the Hungarian law – so stipulates S. 11 Para 4 PiLD. Meanwhile, S. 15 Para 5 PiLA provides the following rule for the identification of the personal law of a person who has multiple citizenships and none of them is Hungarian and he or she does not have a close tie to any of his or her citizenships: in this case the law of his or her usual place of abode applies as his or her personal law.

registered partnership was entered into, allows the registered partners to take each other's name or to take a joint family name, which is for example constructed from both family names with a dash in between. If one of the registered partners is of Hungarian citizenship and, therefore, the (foreign) registered partnership must be registered in Hungary according to S. 65 of the Register Act, he or she cannot get his or her new family name (i.e. his or her "registered partner name") registered in Hungary. This is confirmed by S. 37 Para 1 PiLA too, pursuant to which the rules on marriage apply accordingly to registered partnerships, except, however, for the right of using a "married name".

116. In a complaint procedure the Hungarian ombudsman (commissioner for fundamental rights) examined this inconsistency.¹⁰² A German and a Hungarian citizen entered into registered partnership in Hannover (Germany). They opted for a joint family name (constructed from their own family names with a dash in between) and the party having Hungarian citizenship initiated the domestic registration in Hungary. The registration of the joint family name was rejected by the Hungarian authorities, and the Hungarian passport was issued for the birth name. The joint permanent residence of the couple was in Germany, hence German law was applicable according to S. 39 Para 2 PiLD.¹⁰³ The Hungarian authorities insisted on refusing the registration of the joint family name with reference to *ordre public*. They stressed that the Hungarian rules on (domestic) registration do not provide the possibility for registered partners to get a joint family name registered due to the lack of the appropriate detailed rules and to the fact that the Hungarian law does not recognize the joint family name of the registered partners at all. The Commissioner of fundamental rights came to the conclusion – in agreement with the statements made in the relevant decisions of the Constitutional Court – that it is in line with the Basic Law to reserve the right to use of each other's name and to opt for a joint family name to married couples (registered partners can still change their birth names within the frame of the ordinary procedure of changing name), however the opposite solution (granting this right to registered partners too) would be constitutional too. Consequently, the commissioner restricted the examination to the inconsistency issue between the private international law rules and the Register Act, and stressed that this contradiction infringes indeed the constitutional standard of the predictability of law and thereby the principle of the rule of law. Moreover, he reminded that the right to the name is a fundamental right derived from the right to human dignity.

117. In sum, as pointed out above, the new act on private international law contains now an exception with reference to the right to the name, the conflict of law rules applicable to marriage do not apply to registered partnerships in this respect.¹⁰⁴

3. Recognition of Foreign Same-sex Marriage in Hungary as Registered Partnership?

118. Since the Hungarian constitution (which is called the "Basic Law") defines marriage as "the conjugal union of a man and a woman based on their voluntary and mutual consent" (Art. L Para 1), marriage is reserved for different-sex couples in Hungary. However, more and more countries open marriage to same-sex couples. Due to the constitutional definition of marriage as the conjugal union of a man and a woman, same-sex marriage cannot be recognized in Hungary as a marriage, this would certainly infringe *ordre public*.

¹⁰² Cf. the Commissioner's report No. AJB-1278/2014, accessible at: https://www.ajbh.hu/documents/10180/1957691/Jelent%C3%A9s+az+%C3%A9lett%C3%A1rsi+n%C3%A9vvisel%C3%A9sr%C5%91+1278_2014/0e451c40-ca29-4610-b8f7-3bc30573a624?version=1.0, last download 16th June, 2017.

¹⁰³ The result would be the same if the new private international law rules had already been enacted and in force at that time, cf. S. 27 Para 2 PiLA. (However, the former rules, i.e. Law Decree 13/1979 did not contain the explicit exception regarding the right to the name, which is now part to S. 37 Para 1 PiLA.)

¹⁰⁴ According to the opinion of the Hungarian LBGT Alliance on Draft Bill No. T/14237 on the Private International Law (this draft bill was enacted later on by Parliament and promulgated as Act No. XXVIII/2017, which is abbreviated as PiLA), this practice is not in line with the case law of the Court of Justice of the European Union and infringes the free movement of persons. The opinion refers explicitly to two particular cases, namely to C-148/02 (Carlos Garcia Avello) and to C-353/06 (Grunkin Paul). The opinion of the LBGT Alliance is accessible here: http://lmbtszovetseg.hu/sites/default/files/mezo/file/lmbtszov_ogynkozi_2017marc.pdf, pp. 3-4. Last download 16th June, 2017.

119. The question is whether same-sex marriage can be recognized in Hungary as a registered partnership, which is the closest “relative” of same-sex marriage in Hungarian law. This thought is not completely new and is not considered as a “legal heresy” either, since this is exactly what is proposed in the most prestigious handbook on (Hungarian) private international law.¹⁰⁵

120. The Ministry of Justice seemed to follow this suggestion, since in the draft bill on the (new) private international law as it was posted for social debate on 13th February 2017 (thus, in an earlier version when citizens and civil organizations were allowed to make comments on the draft) S. 37 stated that the foreign marriage of same-sex couples shall be recognized as registered partnership according to Hungarian law, if the formal requirements of the law at the place and date of the marriage were met and the substantive preconditions of the registered partnership according to the applicable law as identified by S. 35 of the draft bill are complied with, too.¹⁰⁶ However, the legislator made up his mind in the meantime, because this “benevolent” rule of “healing reinterpretation” of same-sex marriage as registered partnership was removed from the wording in the later version of the draft bill as it was submitted to Parliament and the new act on private international law was finally adopted without the lenient reinterpreting rule.¹⁰⁷

121. The outcome equals to a vicious circle or “Catch-22”, because on the one hand, same-sex marriage is not recognized in Hungary in any form, not even as a registered partnership; but on the other hand, a same-sex couple (married previously in another country legally) cannot enter into a registered partnership in Hungary, either, because the substantive preconditions of entering into a registered partnership must be met according to their personal law (cf. paras 111-112 above)¹⁰⁸, which means in practice that the spouse of foreign citizenship shall provide documentary evidence that there are no obstacles to enter into a registered partnership due to his or her personal law, which is not possible, because he or she is already married according to his or her personal law. This “Catch-22” situation overlooks that the spouse (the person is already married with according to the respective foreign law) and the person he or she wishes to enter into registered partnership with (according to the Hungarian law) is the same. This is why the lack of the special rule (on recognition of the same-sex marriage as registered partnership) seems to have very unfair consequences.¹⁰⁹

VII. Summary

1. Registry of Civil Status in Hungary

122. The Registry of civil status is kept and recorded electronically by the registrars (public officials of the local municipality administration). The Registry – in the absence of proof to the con-

¹⁰⁵ F. MÁDL – L. VÉKÁS, *Nemzetközi magánjog és nemzetközi gazdasági kapcsolatok joga (The Law of Conflicts and of International Economic Relations)*, Budapest, ELTE Eötvös Kiadó, 2016, marginal No. 583, p. 444.

¹⁰⁶ See “Előterjesztés NMJ 2017. évi ... TV 17. 02. 10.pdf”, pp. 8 and 60. Accessible here: <http://www.kormany.hu/hu/dok?page=4&source=5&type=302&year=2017#!DocumentBrowse> last download: 16th June, 2017.

¹⁰⁷ See also the critical remarks in the opinion of the Hungarian LBGT Alliance on Draft Bill No. T/14237 on the Private International Law accessible here:

http://lmbtszovetseg.hu/sites/default/files/mezo/file/lmbtszov_ogynkozi_2017marc.pdf, pp. 2-3. Last download 16th June, 2017.

¹⁰⁸ See also S. 13 Paras 1-2 of the Register Decree.

¹⁰⁹ There is already a pending litigation regarding this problem. A same-sex couple got married in Belgium. One spouse is Hungarian citizen while the other is the citizen of the USA. The spouse with Hungarian citizenship initiated the domestic registration of the same-sex marriage in Hungary as a registered partnership. The Hungarian authorities refused the registration with regard to the above analysed situation, based on the opinion issued by the Ministry of Justice. The plaintiff contested the rejecting administrative decree in court, and referred to the relevant decisions of the Constitutional Court; to the “Catch-22” situation that they cannot get their marriage registered but they cannot enter into registered partnership in Hungary, either; additionally the plaintiff was of the view that the practice of the Hungarian authorities infringes the free movement of persons. The lawsuit was allowed in the first instance, but the judgement is not yet final and binding today (16th June, 2017), since there is right to appeal. (Cf. the 1st instance judgment No. 27.K.32.541/2016/6 – Fővárosi Közigazgatási és Munkaügyi Bíróság – Budapest-Capital Administrative and Labour Court, 25th April, 2017.)

trary – registers and certifies authentically the entries and records registered therein in connection with “registry events” (birth, death, marriage and registered partnership) as well as their changes including termination, dissolution or annulment of marriage and registered partnership.

2. The Different Types of Civil Union Recognised by Hungarian law: (Simple) Cohabitation

123. There are two different types of civil union recognised by Hungarian law. First, “simple” cohabitation (civil partnership) and second, “registered partnership”. The (simple) *Cohabitation* (or civil partnership)

- does not constitute a civil status;
- is available to both different-sex and same-sex couples;
- comes into being upon the realisation of the factual elements provided for in the civil code (emotional and financial community, common household); though cohabitation can be registered in the “National Register on Cohabitation Statements” kept by the “Hungarian Chamber of Civil Law Notaries”, but this voluntary registration has only declaratory nature establishing a rebuttable presumption on the existence and commencement date of the cohabitation;
- the default property regime is that of “participation of acquisitions” (i.e. there is a claim for division/share of the property acquired during the cohabitation by either parties when the cohabitation ceases to exist – in this regard, the proportion of their contribution matters including work in the household or in the business of the partner and caring for children –, but during the partnership, the mere fact of cohabitation does not establish joint ownership); the cohabitants can enter into a property agreement and opt for a different regime or regulate their financial relationship substantially;
- cohabitation does not establish presumption of paternity, the cohabitants cannot adopt a child jointly (only either of them as an individual), but different-sex couples can take part in artificial human reproduction procedures as a couple;
- judicial practice developed an obligation to support each other during cohabitation, which is still not covered in the civil code;
- there is no intestate succession between the cohabitants after one another;
- cohabitants cannot take each other’s name as a common name (but they can change their birth name within the usual name change procedure);

124. Cohabitation terminates

- if either of the cohabitants dies (or gets declared legally dead), or
- if the cohabitants marry each other or establish a registered partnership with each other; or
- if their community of life ends (i.e. the constituting elements of cohabitation cease to exist, which is again a factual issue).

3. The Different Types of Civil Union Recognised by Hungarian law: Registered Partnership Specific to Same-sex Couples

125. The Registered Partnership thus

- constitutes civil status;
- is available exclusively to same-sex couples;
- comes into being through mutual, congruent and personally made declarations before the registrar, who registers the establishment of the registered partnership in the registry immediately;
- the default property regime is that of “community of property” (just like in the case of marriage, i.e. all assets acquired during the registered partnership by either of the parties or by

- both of them come into their joint ownership, except gifts, inheritances, revenues from intellectual property rights, compensation received for personal injury, goods for personal use of customary value and their surrogates); the registered partners can also enter into a property agreement and opt for a different regime or regulate their financial relationship substantially;
- the legal consequences of registered partnership are almost the same as in the case of marriage, but registered partnership does not establish presumption of paternity, the registered partners cannot adopt a child jointly (only either of them as an individual) and they cannot take part in artificial human reproduction procedures (neither together as a couple, nor as individuals);
 - since the rules on marriage apply, registered partners have a codified obligation to support each other during cohabitation;
 - there is intestate succession between the registered partners after one another (the same way as spouses are the legal heirs of each other), moreover, a registered partner has a right to the compulsory (reserved) share as spouses have if the deceased made a last will in favour of somebody else;
 - registered partners cannot take each other's name as a common name (but they can change their birth name within the usual name change procedure);

126. Registered partnership terminates

- if either of the registered partners dies (or gets declared legally dead), or
- if the court dissolves the registered partnership (the rules on divorce of marriage apply accordingly); or
- if the notary public dissolves the registered partnership upon the mutual agreement of the (registered) partners, provided that neither of them has a child in relation to whom both of them are obliged to provide maintenance, and they agreed upon maintenance towards each other, the use of the common home and the division of common property (except for jointly owned immovables);
- if either of the partners gets married or establishes a registered partnership while the former registered partner is declared legally dead but later appears alive – in this case, the former registered partnership is dissolved by the subsequent marriage or registered partnership if the parties (of the subsequent marriage or registered partnership) were in good faith (i.e. they were not and could not have been aware of the fact that the former registered partner was alive).

4. Registered Partnership as an Impediment to a Subsequent (Heterosexual) Marriage

127. If the homosexual union in question is “just” a simple cohabitation, then it is not an impediment to a subsequent heterosexual marriage, since a simple cohabitation does not constitute a civil status.

128. As far as the marriage-like *registered partnership* reserved for same-sex couples is concerned,

- the still existing registered partnership (i.e., not terminated by death, neither dissolved, nor annulled) is an impediment to a subsequent heterosexual marriage:
- the registrar has to inspect ex officio whether the former registered partnership was terminated or annulled, and this must be certified either by the electronic registry or by the respective original deeds; and
- the registrar has to refuse to conduct the marriage procedure if there is a former registered partnership not yet terminated (by death or dissolution or annulment);
- notwithstanding, if the subsequent marriage comes into being (which is very unlikely and happens extremely rarely in reality), a court action for annulment can be brought either by either of the spouses or by the public prosecutor or by a third party having a legal interest.

129. Consequently, if the registered partner intends to get married, he or she has to

- request the dissolution of the registered partnership either at the competent court or by the notary public (the latter is possible only with the consent and cooperation of the other partner), or
- bring an action for annulment of the former registered partnership if there is a reason of invalidity, or
- to initiate a court procedure to get his or her former partner declared legally dead if the prerequisites of such a procedure are met (the partner has been missing for at least five years).

5. Recognition of Foreign Registered Partnerships in Hungary

130. The existence (or non-existence) just like the validity (or invalidity) of the registered partnership (entered into abroad) depends on the personal laws of the parties. The registered partnership is existent and valid only if it complies with the personal laws of both parties. If either of the parties is Hungarian citizen, he or she has to get the registered partnership registered in Hungary, too.

131. If a same-sex couple entered into registered partnership abroad under a law other than Hungarian, and that particular law provides them any rights beyond those which are granted to registered partners under Hungarian law, then those particular rights which are not provided to them in Hungarian law, cannot be exercised (and cannot have any legal effects or consequences) in Hungary. For example, the joint family name or the quasi-married name of the registered partners (or of either of them) granted by German law is neither recognized nor registered in Hungary.

132. Same-sex marriage (necessarily entered into abroad under a law other than Hungarian) is not recognized as marriage in Hungary, since the constitutional notion of marriage is restricted to the conjugal union of a man and a woman. Unfortunately, it is not recognized as registered partnership, either, despite prestigious suggestions in the legal literature. This is a twofold unfair result, because on the one hand, it is not recognized as registered partnership; but on the other hand, the parties cannot even enter into registered partnership in Hungary under Hungarian law, because the “spouse” having a citizenship other than Hungarian cannot provide the required documentary evidence that he or she can enter into a registered partnership under Hungarian law, because he or she is considered to be already married due to his or her personal law. This formalistic and unfair mindset ignores the differences among the laws of the member states in this respect and the fact that the party – though married due to his or her personal law – wishes to enter into registered partnership in Hungary with the same person in order just to get their relationship acknowledged and registered also there in a form wherein it is allowed by Hungarian law.

Annex No. 1.: Chart on Similarities and Differences among Marriage, Registered Partnership and “Simple” Cohabitation (aka Civil Partnership)¹¹⁰

	Marriage	Registered Partnership	Cohabitation (aka Civil Partnership)
Gender	Different-sex couples only	Same-sex couples only	Both different- and same-sex couples
Minimum age	18, but 16 with permission of the guardian authority	18	None
Legal nature	Civil status, authentically certified by the Registry (kept by special municipality officials, e.g., registrars)	Civil status authentically certified by the Registry (kept by special municipality officials, e.g. registrars)	Not a civil status, but a fact with legal consequences (the register kept by the Notaries’ Chamber is only a declaratory one; the aim of the registration is to facilitate the proof, i.e., to establish a rebuttable presumption)
Establishment	Mutual and congruent (personal) declarations before the registrar	Mutual and congruent (personal) declarations before the registrar	Community of life commences (emotional fellowship, common household, economic community)
Dissolution	Court procedure (divorce)	Court procedure (divorce) or Notary public upon agreement	Automatically upon separation
Rules on spousal names, taking the partner’s name	Yes	No	No
Paternity presumption	Yes	No	No
Joint adoption	Yes	No	No
Artificial human reproduction as a couple	Yes	No	Different-sex couples: yes Same-sex couples: no
Default property regime	Community of property	Community of property	Participation in acquisitions
Property agreement	Possible	Possible	Possible
Alimony / maintenance after dissolution	Yes (if the former spouse is in need without fault)	Yes (if the former registered partner is in need without fault)	Yes - if the former registered partner is in need without fault, and - the partners have a common child (i.e., available only to different-sex partners), and - the community of life lasted at least one year.
Intestate succession	Yes	Yes (as spouses)	No

¹¹⁰ For a more comprehensive overview (including the above indicated factors) with regard to other fields of law beyond civil law (refusal of testimony, family status in immigration, conflict of interest, etc.), but published before the new civil code’s entering into force (!) cf. the chart at LBG T GUIDE, p. 14.

Annex No. 2: Translation of Act. No. XXIX/2009 on Registered Partnership and Related Legislation and on the Amendments of Other Statutes to Facilitate the Proof of Cohabitation¹¹¹

ESTABLISHMENT OF REGISTERED PARTNERSHIP

1. § (1) Registered partnership is established if two persons of the same sex who have reached the age of eighteen years and are both present in front of the registrar personally declare that they wish to establish registered partnership with one another.

(2) Permission to enter into registered partnership shall not be granted for minors.

(3) Following the declaration, the registrar records the establishment of the registered partnership in the registry.

(4) The establishment of registered partnership takes place publicly, in the presence of two witnesses.

2. § (1) Before entering into registered partnership, future registered partners shall declare in front of the registrar that to the best of their knowledge there is no legal impediment to the registered partnership, and they shall verify that the legal requirements for the establishment of registered partnership are satisfied.

(2) If either of the parties has a life-threatening health condition, the statement of the parties shall suffice to verify all legal requirements for the establishment of registered partnership, and registered partnership may be established immediately upon notification.

LEGAL CONSEQUENCES OF REGISTERED PARTNERSHIP

3. § (1) Unless this act stipulates otherwise or this act forecloses its application

- a) all rules that apply to marriage shall apply to registered partnership,
- b) all rules that apply to spouse or spouses shall apply to registered partner or registered partners,
- c) all rules that apply to widow shall apply to surviving registered partner,
- d) all rules that apply to divorced person shall apply to registered partner whose registered partnership was dissolved,
- e) all rules that apply to unmarried person shall apply to person who has not been married or who has not entered into registered partnership,
- f) all rules that apply to married couple shall apply to registered partners.

(2) Rules on adoption by spouses shall not apply to registered partners. Rules on presumption of paternity shall not apply to registered partners.

(3) Rules on spousal names shall not apply to registered partners. Upon entering into registered partnership a person shall no longer be entitled to bear the name of her former husband with the spousal marker, and this right shall not resume upon the dissolution of her registered partnership. If a registered partner has been using the name of her former husband with a spousal marker until the time of establishing registered partnership, she is not entitled to change her name to any other spousal name, but shall use her birth name.

(4) Rules on procedures aimed at human reproduction concerning spouses shall not apply to registered partners.

(5) Unless this act stipulates a different legal consequence to the existence or dissolution of marriage and of registered partnership, and if an entitlement or obligation concerns both widows and surviving registered partners equally, declarations about family status shall only be required in a way that “spouse”

¹¹¹ Credit goes to the “Háttér” (Background) Society (one of the largest and most active LGBTQI organizations in Hungary, cf. <http://en.hatter.hu>) for preparing an almost complete English translation of the Registered Partnership Act (I translated only S. 16). This translation is published with the kind permission of the “Háttér” Society.

and “registered partner” “widow” and “surviving registered partner” and “divorced” and „divorced registered partner” are listed as one option.

(6) In registries containing data on family status – except for the system of civil status registers and personal data and address registers – family status shall be an entry that lists “spouse” and “registered partner,” “widow” and “surviving registered partner” and “divorced” and “divorced registered partner” as one option.

TERMINATION AND DISSOLUTION OF REGISTERED PARTNERSHIP

4. § (1) Registered partnership shall cease to exist

- a) in the event of the death of one of the parties;
- b) if dissolved by court order; or
- c) if dissolved by a public notary.

(2) Rules that apply to the termination of marriages shall apply to the termination of registered partnerships.

(3) In case both parties agree on all aspects of the divorce, the public notary dissolves the registered partnership in a non-contentious civil proceeding.

5.-15. §§ Abrogated.

16. § (1) This act – with the exemption indicated in (2) – enters into force as from the 1st day of the 2nd month after their promulgation.

(2) 9. § (2) and (4) as well as 10. § (4) enters into force as from the 1st day of the 8th month after their promulgation.

17.-18. § Abrogated.