

# ‘CRIMINAL LAW DOES NOT PROTECT LOVE...’<sup>1</sup> – THE DYNAMICS OF CRIMINAL LAW PROTECTION OF MARRIAGE\*

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*Marriage is the foundation of our society and the ‘final cause of its existence’ (Vámbéry 1901b, 3), an indisputably complex phenomenon which, by its very nature, lends itself to multi-faceted research (Móra 1964, 128). However, due to its thousand shades, even a partial exploration of it requires great courage from anyone who dares to use its colours to create something new. Its typically sensitive emotional charge makes it particularly sensitive to the possibility of conflicts, some with fatal outcomes, which have accompanied each section of this form of coexistence from its beginnings up to the present day, at times in a latent and other times in an open way (Merényi 1990, 197). Nothing illustrates this better than the fact that, even in the first ‘true’ marriages of birds in animal societies, which represent the origin of the institution under study, the form of marriage almost inevitably involved the classic ‘complementary’ crime of adultery: sometimes, it was revenged by the community on the side of the injured party; other times, it was the male who paid with his life for his forgiving behaviour at the beaks of the cheating female and her lover (Vámbéry 1901b, 8; Lombroso 1895, 16, 30–31).*

*In light of this, the present study examines how criminal law – which, as expressed in the quotation, ‘does not protect love’ – has nonetheless sought to safeguard the institution of marriage throughout history, capturing the changing dynamics and underlying tensions that define this enduring relationship between law and emotion.*

## Keywords

marriage, criminal law protection, love, historical development, dynamics, changes

## Introduction

The purpose of the present paper is to examine both *historical and contemporary questions* concerning the criminal law protection of marriage, with a particular focus on its evolving nature. The objective is to demonstrate the *ongoing interaction* between marriage and criminal law and to highlight the essence and changing dynamics of this relationship.

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The discussion begins with a *historical overview* of scientific and doctrinal research on the criminal law protection of marriage, which serves to illustrate how deeply rooted and yet continuously transforming this connection has been. This is followed by an outline of how criminal law, which itself also has undergone and is still undergoing far-reaching changes, is capable of approaching an institution with such a rich and exceptionally diverse *historical past*, as well as with *embeddedness* in innumerable – without claiming completeness, including moral, particularly sexual morality, as well as religious, ecclesiastical, in-time civil law, and even constitutional law – fields, which institution is also facing European Union and international legal *challenges*, moreover, being so sensitive to social and cultural changes and to the transformation of human relations. It is therefore essential to *examine historical development*, as this perspective enables identification of the elements that determine the *dynamics of criminal law protection*.

The primary objective of this exploration is, as far as possible in a nutshell, to examine the development of protection in each of the periods indicated, organised around almost *identical questions*, in order to illustrate the dynamics emphasised above, highlighting, on the one hand, the issues relevant to the criminal law protection of marriage in the period as *shaping factors* and, on the other, the *specific manifestations of protection*. The latter is also divided to outline the *contours* of the protective net and further dashes of colour, followed by the *more narrowly defined manifestations of protection by criminal law* under consideration. The description of the shaping factors provides an opportunity to incorporate aspects other than criminal law in the narrow sense, which, at the same time, are fundamental to the nature of the protection.

In consideration of the question posed in the paper's title, the present research examines contemporary issues in criminal law protection, transitioning from the questions raised during the era of Vámbéry to an evaluation of the present situation and challenges concerning the criminal law protection of marriage. The principal outcome of the research is to reveal the enduring character of the topic — one that, in every age, mirrors the society from which it arises.

## **1. Protection of marriage under criminal law**

### **1.2. Brief historical overview of the scientific research on the present topic**

In consideration of the contents of the initial section of the present paper, it is therefore inevitable that the *bastion of criminal law was the first to be built* around marriage in the system of fortifications of protection, which was already beginning to take shape with the first signs of the awakening of social self-consciousness (Buday 1902, 6). The bastion mentioned above, to protect the primary cell of society, undoubtedly offered a variety of measures in terms of punishment for the relevant criminal offences regarding the various nations and eras of history, doing this with a degree of creativity which surpassed even the average degrees of cruelty that may be considered general everywhere and at all times until the Age of Enlightenment (Vámbéry 1901b, 430). Besides this, the criminal law assessment remained dominant even with the private law nature of the institution, which solidified over time.

In this context, it is even more surprising that the protection of marriage under criminal law – even though the institution itself is a thousand-year-old and enormously extensive subject of scientific research in the history of humankind (Buday 1903, 12–28) – has been examined only by a *few researchers* in foreign and Hungarian legal literature as well. Concerning the latter, the figure of *Rusztlem Vámbéry*, whose work entitled '*Protection of Marriage under Criminal Law*', written in 1901, is still the only monograph on the subject to date, should be highlighted.<sup>3</sup> The writing, which is now purely an elaboration of legal history, is also only partial, as it is solely dedicated to adultery, the first volume of a trilogy which was not accomplished for unrevealed reasons. What is more, according to the author, the work was initially intended to be more or something different: it was intended *to draw the lines of demarcation between criminal and civil law protection*. However, upon discovering the time-consuming nature of the task – partly due to the large number of private law studies required for the work – Vámbéry decided at the very beginning of the process that the part concerning the protection of marriage was worthy of saving from the '*shipwreck*' of his planned work, which was intended to encompass the protection of all private law interests (Vámbéry 1901b, Preface).

## 1.2. Examining the relationship between marriage and criminal law

In the context of an examination of the relationship between marriage and criminal law, it is noteworthy that there is a *paucity of analyses of this connection*, with only a limited number of studies that address related issues. In this respect, on the one hand, among the criminological studies that present particular colour spots, should be highlighted the result of the research on the role of marriage as a deterrent to crime (Lyngstad & Skardhamar 2010, 235–238), the influence of cohabiting relationships, which is less decisive or at least more complex in this respect (Gottlieb & Sugie 2019, 503–531), and the effect of relatives with a criminal background 'acquired' through marriage in reducing positive outcomes (Andersen 2017, 438–464), as well as the lower recidivism rate among married couples (Kendler 2017, 655–663). It should also be noted that there have, of course, been a large number of studies on marriage and crimes specifically affecting the family, such as intimate partner violence and harassment, but without any particular focus on the marriage bond or the dynamics of marriage and criminal law. However, the place where the territory of debate may be found without any doubt, concerning the present subject, is the field concerned with the *meanings and limits of the institution of marriage* (Hull 2006, 1).

The institution that has not been characterised as static so far is undergoing, in a global sense, one of the most significant transformations in its history at the beginning of the 21st century, bearing the contrasting labels of '*spiritual*' or rather '*legal bond*', '*personal commitment*', and '*pillar of civilisation*', as well as '*dying institution*', '*site of gender inequality*', and '*tool of sexual regulation*' at the same time (Hull 2006, 1). On the other hand, amid the changes (Wardle 2006, 54) and growing challenges in cultural-social perceptions, it is even more critical to observe the direction of transformation in the legal regulation, which is constantly following this development of the marriage, as

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<sup>3</sup> In contrast, the works of *Kálmán Merényi* contain shorter elaborations, also focusing on legal history.

well as the phenomenon, as various partner relationships ‘signal’ their claim to the status of marriage, and which processes may justifiably raise the question: should all these be identified as a new stage in the evolution of the institution or as a crisis in need of urgent remedy (Lenkovics 2022, 35–36)?

In the effort to avoid a reduction in the scope of research on the criminal law protection of marriage along the lines outlined above, which should be described as a ‘shipwreck’ in *Vámbery’s* words, the closer questions of what should serve as a *starting point* for research and, in this context, how to *select* among the factors evaluated by criminal law are also reached. In order to accomplish this objective, it is imperative to establish the *fundamental premise* that the *connection* between *marriage and criminal law* should be defined in terms of two main factors: one is the prevailing understanding of criminal law, and the other is that of marriage, supplemented by their respective moral content (Szabó 1973, 89). The latter component is not only of particular importance concerning criminal law, considering that it is the most representative of the common ‘roots’ of legal and moral norms among the branches of law (Irk 1991, 31), but also and above all about marriage, the nature of which means that the assessment of criminal acts against it is inherently determined by moral norms (Merényi 1990, 197). However, as mentioned in some of its elements above, marriage has a very complex function in society, and, accordingly, many branches of law contain regulatory and protective provisions in relation to the institution (Szabó 1973, 92). At the same time, as has also been mentioned, it is essential to note that marriage and the family it typically entails have a solid emotional basis (Lenkovics 2022, 40; Frivaldszky 2018, 209). In this context, it is the task of criminal law to examine the functions defined by the prevailing moral concepts to decide which of them require or is possible to act upon, and by doing this, it is impossible to assess each of these factors independently of historical periods. The criminal law protection of marriage, supported by the above-mentioned very general formula, should not, therefore, be defined as ‘correct’ or at least ‘complete’ in its elements. Indeed, due to the variable content of its components, it is typically a subject that highlights the ‘*relativity*’ of criminal law solutions (Masset 2009, 230).

## 2. Outlining the dynamics of criminal law protection

### 2.1. The era of the Code of Csemegi<sup>4</sup>

In the structure described above, it is possible to follow how, in the era of the *Code*, the traditional approach of intertwining the history of sexual offences and the history of crimes against marriage is being broken down. Even the idea of separate treatment of the latter group is being promoted, a process that is given a significant boost by the change in attitude towards the image of marriage, which has been elevated to the status of a legal institution. In the ‘heat’ of all this novelty, the outlines of a pervasive but fragmented body of legislation are emerging, and the Code also makes several other points that precisely assess marriage, marital status, and the contract of marriage. In this way, the protection of marriage ‘meets’ the violation of personal liberty, the criminal

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<sup>4</sup> Act V of 1878 on the Hungarian Criminal Code (hereinafter the Code of Csemegi, the Code).

offence of indecency, and the criminal acts against property and human life. The main elements of the protective net in this period are adultery, bigamy, criminal offences, and provisions relating to the contract of marriage and the criminal act of agitation against matrimony.

## **2.2. The era of the so-called ‘Socialist’ Criminal Code<sup>5</sup> and the Criminal Code of 1978<sup>6</sup>**

The period from Act V of 1961 to the current legislation is characterised by a very different type of protection compared to the era of the Code of Csemegi, although it is worth noting that criticism of the extensive protection was already voiced in the latter era. The seeds of change sown earlier seem to be sprouting in *Act V of 1961*, which, as a shaping factor, is permeated by the challenges to the institution of marriage and family relationships, the developing perception of the role of criminal law in society, and the emergence of constitutional defence. All this is accompanied by decriminalisation processes at all further levels, as a result of which the scope of defence beyond the protective net has been reduced to criminal offences of violence against sexual morality, while the only concrete manifestation of the criminal law protection of marriage is the criminal act of bigamy, which is criminalised in a much narrower form compared to the Code of Csemegi.

The *previously effective Criminal Code* is characterised by the accumulation of phenomena related to the institution of marriage and family relationships, the changing and, at the same time, increasing constitutional defence of marriage, and a developing approach to criminal law, in addition to which, even though the further dash of colour of the protective net is now also ‘disappearing’ concerning the criminal offences of rape and sexual assault – the reference to marital cohabitation for passive subjects is abolished – bigamy is an unchanged manifestation of criminal law protection.

## **2.3. The era of the effective Criminal Code**

As regards the *effective Criminal Code*, among the shaping factors, in addition to the current challenges, the cooperative dynamics between criminal law and family law, the need to address domestic violence, the evolving concept of family relationships, the positive trend in domestic statistics on the contract of marriages, and the issue of prioritising constitutional defence are highlighted. It is of particular relevance to the criminal act of bigamy that the amendments concerning the criminal law protection of same-sex couples’ relationships and the criminal offence of harassment, the statutory offence of harassment, which was already introduced in the previously effective Criminal Code, are also relevant to the issue.

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<sup>5</sup> Act V of 1961 on the Criminal Code (hereinafter Act V of 1961).

<sup>6</sup> Act IV of 1978 on the Criminal Code (hereinafter the previously effective Criminal Code).

### 3. Emerging issues and perspectives

Reflecting on the ideas raised in the title of the present paper, the question rightly arises: what does criminal law defend about marriage? Vámbéry, as the author of the reflection in question, argues that criminal law protects the *morality of marriage* rather than love (Vámbéry 1901a, 333; Vámbéry 1901b, 471) and thus also draws the final line at the limits of the mission of criminal law to protect marriage. He envisages that, at a sufficient degree of moral maturity (Vámbéry 1901a, 329), the public perception of *society* – as a factor more potent than criminal law – will condemn anyone who does not respect the morality of marriage, and the *individual* will have a more fully expressed power of self-restraint over desires that threaten the order of society, at which point criminal law may cease to function.

However, the passionate confidence in a future with more advanced conditions, which is also characteristic of Vámbéry's time, does not allow us to really separate the protection outlined from the novelistic object of love, and, what is more, it is precisely in Vámbéry's world of thought that it is the essential element of marriage and almost contradicts the quoted thought: the '*sanctity of love*' is in itself described as a force which distinguishes marriage from other contracts as the only surplus, and which cannot be replaced even by the sanctity of the form, and the withdrawal of criminal law from the protective fortifications surrounding marriage, as discussed above, may also take place '*...when love is considered a prerequisite for marriage and marriage a prerequisite for love...*' (Vámbéry 1928, 636).

However, going beyond the era of Vámbéry, even in the decades of the 20th century that are getting closer to the present and even reaching the 21st century, it still cannot be said that the desired and outlined moral superiority and the fullness of love prevail, which in an idyllic state, the criminal law – or anyone undertaking research of the chosen subject – may, after the storms of legal history, withdraw with relief from the protection of marriage. While the task of grasping the concept of marriage has not become any easier nowadays – indeed, the impossibility of creating a comprehensive concept of marriage has been acknowledged even by civil law, which operates in a 'domestic context' (Szeibert 2014, 33) concerning the issue – regarding the changes rooted primarily in the development of society, it should be considered that the *possibilities for examining the protection of marriage under criminal law*, even in their evolution, *have not diminished*.

Among the interconnected factors that induced the change, the transformation of the *relationship between spouses* should be highlighted; they are now equal in the broad sense of the word, they maintain their sexual autonomy within the bonds of marriage, and thus, from the perspective of criminal law, may become both perpetrators and victims of the relevant crimes. Moreover, criminal law is increasingly repositioning itself in its most sensitive contacts with moral relations and is thus also abandoning the definition of the moral content of marriage, limiting itself to tracking the changes that occur.

In the context of these changes, it is of crucial importance that, with the emergence and expansion of partnerships, criminal law protection is also becoming more relative, as it is no longer limited to the marriage, which was first formally contracted as a church ceremony and then, as it evolved historically, became compulsory before a

public official and whose evolution is determined by several factors. Accordingly, with regard to marriage, given its retreat mixed with transformation, it should be stated that criminal law protection has not yet reached its resting point.

### Closing remarks

Coming to the concluding reflection of the present research, it should be considered that the examination of the criminal law protection of marriage, faithfully to the line of thought of the bond at the heart of the study, is at once '*something old, something borrowed, something blue, something new*' (Görgényi 2017, 137; referring to the following publication: Morris & Gelsthorpe 2000, 18) in terms of research on criminal law.

It is a subject that is *eternal* and, at the same time, *ever-evolving*, and the excitement of its treatment is heightened by its *gap-filling* nature and its *natural interaction with private law* and its *constant change*, given that as the starting point for the legislation concerning the discussed research – by virtue of the very purpose of criminal law, which is to protect the order of the existing society at all times –, *marriage* should be in the form and with the content in which and with which it is recognised and regulated by the *law* in the society concerned (Vámbéry 1901b, 466).

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