THE HISTORY OF MARRIAGE LAW IN AUSTRIA AND GERMANY: FROM SACRAMENT TO CIVIL CONTRACT*

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I. *Introduction*

The institution of marriage has always been considered important and clearly distinguished from non-marital unions. Although the details may differ from culture to culture, marriage is generally regarded as something desirable that should be supported.

Marriage and marriage law are closely linked to historical, religious, and social changes. Marriage laws often reflect the moral views of a certain period and/or social class. They may also be used as an instrument to foster or uphold certain social structures and developments. By binding sexuality, the creation of families, and children to marriage, an essential part of human relations could be controlled by those who have influence over marriage rules and laws. Over the centuries, various parties in society have thus had an interest in controlling marriage laws. Among these parties, the Catholic Church and more recently, the Protestant Church as well, on the one hand, and the state on the other, were most prominent. Marriage in Europe has therefore always been strongly influenced by religion, with the Catholic Church claiming sole authority over matrimonial matters for many years. From the Early Modern Period on, the history of marriage in Austria and Germany has thus been one of struggle between the Christian denominations and between the Catholic Church and the power of the state.

As a consequence of this, Western marriage, in the form we know it today, has its roots in several very different ancient cultures, of which the Roman, Hebrew and Germanic were most important. It has been shaped by the doctrines and policies of the medieval Christian Church, the Protestant Reformation, the philosophical ideas of the Age of Enlightenment and the French Revolution, and the social impacts of the Industrial Revolution. This paper will, however, focus only on the development of marriage law from the Early Modern Period, starting with the Protestant Reformation of 1517, to the end of the nineteenth century.

II.   *Marriage Law Until the Sixteenth Century: An Overview*

The development of marriage law in the Early Modern Period must be seen in its historical context. The beginning of the Early Modern Period in Germany and Austria was marked by the Protestant Reformation, which was sparked by the publication in 1517 of Luther's 95 theses against abuses by the Catholic Church. The religious, social and political upheaval that followed also had major consequences for marriage law. First, however, a very short overview of the origins of marriage law in Germany and Austria will be given, omitting the law of the Romans.

In Germanic and early medieval times, marriage was essentially a secular business contract between the bridegroom and the bride's father; a sale marriage, which neither required the consent of the bride nor forbade divorce on the part of the husband. An essential aspect was the *Munt*, a kind of universal wardship that the father held over his daughter and which transferred to the husband upon marriage.[1] This, however, stood in opposition to the Christian concept of marriage, which saw the mutual consent of bride and bridegroom as a constitutive element of marriage and also forbade divorce. Based on the alleged primacy of ecclesiastical (divine) law over secular law, the Catholic Church gradually strengthened its claim on the exclusive validity of canonical marriage law and ecclesiastical jurisdiction on matrimonial matters from the ninth century on.[2]

III.   *Reformation and Counterreformation*

By the beginning of the Early Modern Period, this development had reached its conclusion. By then, marriage law was exclusively canon law and the Church had sole jurisdiction.[3] Marriage between Christians had become a sacrament of faith, constituted through the mutual and free consent of the bride and bridegroom and generally unable to be dissolved once consummated. Quite a few impediments to marriage also existed. Such impediments either (1) rendered the contracting of the marriage unlawful and sinful, without rendering the marriage invalid, or (2) proscribed the contracting of marriage, and if it was contracted, then nullified and dissolved it completely, thus representing the only possibility to dissolve a consummated marriage.[4]

The Reformation and emergence of the Protestant faith and a Protestant marriage law, however, brought the universal power of the Catholic Church and the predominance of its marriage law to an end. One of the most obvious and revolutionary Protestant departures from Catholic traditions regarding matrimony was the immediate desacramentalization of marriage, namely, the transfer of legal jurisdiction from ecclesiastical to secular authority, the possibility

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[1] Uwe Wesel, *Geschichte des Rechts*, Munich 1997, 269.

[2] Karin Mader, *Ehebruch als Scheidungstatbestand*, Linz 2002, 4.

[3] In this paper, "marriage law" refers only to personal marriage law, and not matrimonial property law, which developed along different lines. See also in detail, Wilhelm Brauneder, *Die Entwicklung des Ehegüterrechts in Österreich*, Salzburg 1973.

[4] John Witte Jr., "The Reformation of Marriage Law in Martin Luther's Germany: Its Significance Then and Now", 4 (2) *Journal of Law and Religion* 293, 305 (1986).

of divorce, and a reduction in the number of impediments to marriage.[5] Martin Luther called marriage an "outward, physical, and worldly station". The secularization of marriage courts in the Holy Roman Empire was, however, neither universal nor as radical as Luther had envisioned. Austria and a number of cities and territories, particularly in southern Germany, remained devoutly Roman Catholic and retained canon law and the ecclesiastical courts, thus becoming the heart of the Counterreformation. Within the Protestant territories, princes often simply ordered local church consistories to decide all marital disputes.[6] Legislative power remained with the Protestant sovereign — usually the prince of the Protestant territory — but was exercised in accordance with the function of the prince as head of the regional Protestant Church and thus scripture-oriented. Protestant marriage laws were arranged within Church Orders and marriage came to be defined as a holy blessed state and thus a matter of religion. Also, Protestant marriage law was not a complete system, so it was often necessary to resort to canon law. This meant that while two different concepts of marriage law did exist within the Holy Roman Empire from the sixteenth century, both Catholic and Protestant marriage law remained ecclesiastical law throughout the Early Modern Period.

Within this context, two events were important in the development of marriage law, one being the Council of Trent of 1563 and the other, the Peace of Westphalia of 1648. The Council of Trent was the reaction of the Catholic Church to the Reformation and led to a reform of the canonical marriage law. Among other things, the sacramental character of marriages between Christians and the sole competence of the Catholic Church on all questions of marriage was repeated. The most important change to canonical marriage law was, however, that the validity of marriage was made dependent upon its fulfilling certain formal requirements — in particular, that it take place in the presence of a priest and two witnesses.[7] These formal requirements for marriage continued to apply to Catholic marriages until the twentieth century.[8]

On the other hand, the Peace of Westphalia,[9] which ended the Thirty Years' War, codified the principle that each prince would have the right to determine the religion of his own state, the options being Catholicism, Lutheranism, and Calvinism (*cuius regio eius religio*). Thus, at the very least, the idea of princes having competence to make marriage law was transferred to the Catholic territories as well.[10] The Peace of Westphalia weakened the Holy Roman Empire because it recognized the sovereignty of princes and contributed to the gradual decline of the Catholic Church in the seventeenth and eighteenth centuries. It also led to a fragmentation of the Empire and the development of absolutism within the territorial states.[11] Thus, over the course of the seventeenth and eighteenth centuries, the early modern state emerged, with the rivals Austria and Prussia having the most importance.

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[5] Joel F. Harrington, *Reordering Marriage and Society in Reformation Germany*, Cambridge 1995, 84.

[6] Witte, 317.

[7] Among other things, clandestine marriages should be prevented.

[8] Peter Leisching, *Vertrag-Frauenraub-Partnerschaft. Ehe gestern heute morgen*, Munich 1971, 96-98.

[9] The Peace of Westphalia did not, however, apply to the Habsburg's Hereditary Lands.

[10] Ralf Frassek, *Eherecht und Ehegerichtsbarkeit in der Reformationszeit*, Tübingen 2005, 16.

[11] Andreas Große-Boymann, *Heiratsalter und Eheschließungsrecht*, Münster 1994, 162.

IV. *Marriage Law in the Age of Absolutism*

Although Austria under the rule of the Habsburgs was strictly Catholic, the absolutist idea of princes ruling by God's grace fostered the development of two theories that helped bring marriage law under the legislative power of the Austrian state. One was the absolutist notion of the supremacy of the state within its borders, i.e., that all other institutions, including the Church, must recognize the state's authority.[12] The other was the French concept of marriage having the dualistic nature of both a contract and a sacrament. Since the contractual part of marriage was secular, the state could claim exclusive authority over that.[13] As mentioned above, legislative competency on matrimonial matters in the Protestant territories resided with the state from the beginning, but only through the increasing influence of natural law doctrine in the seventeenth century, was Protestant marriage recognized not only as a holy blessed state, but also as an institution of the civil law. This led to a rise in legislation by the state regarding matrimonial matters in the seventeenth and eighteenth centuries.[14]

The Catholic and Protestant absolutist states, Austria and Prussia, made use of this "new" competency for most of the seventeenth and eighteenth centuries mainly to implement a system of marriage requisites and impediments, which were motivated by ideas of *raison d'état* and their public utility to the absolutist *Policey-Staat* (police state). However, under the influence of the ideas of the Enlightenment at the end of the eighteenth century, Protestant and Catholic rulers changed their legislative policy towards marriage. Whereas previously they had dealt only with certain points of marriage law, they now turned to creating closed legal systems covering the whole field of marriage law.[15] The "modern" state of enlightened absolutism could not tolerate the fact that the institution of marriage, which constituted the nucleus of society, stood outside their jurisdiction, since this meant that the principles of enlightened absolutism could not be applied to the organisation of marriage.[16]

V. *The Codification of Marriage Law*

Emperor Joseph II became the first European ruler to regulate the entire marriage law when he enacted the Marriage Patent for Austria in 1783. After Empress Maria Theresia had taken the first step towards creating a state-controlled Austrian marriage law with the enactment of the Engagement Act for Minors, Joseph II's Marriage Patent for the first time defined marriage as a civil contract and applied civil law and state jurisdiction to all marriages within the German Hereditary Lands.[17] Against the backdrop of the Patent of Tolerance of 1781, which allowed other Christian denominations a limited freedom to worship, the Marriage Patent not only regulated Austrian Catholic marriages, but also Protestant and Protestant-Catholic

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[12] Ulrike Harmat, *Ehe auf Widerruf? Der Konflikt um das Eherecht in Österreich* 1918-1938, Frankfurt a. M. 1999, 1.

[13] Leisching, 136-138.

[14] Leisching, 141.

[15] Leisching, 128.

[16] Mader, 15.

[17] Ursula Floßmann, *Österreichische Privatrechtsgeschichte*, Wien 2005, 75.

ones. Although the Marriage Patent assigned marriage law-making competency exclusively to the state, it did not thereby introduce mandatory civil marriage.[18] The Marriage Patent in fact mostly followed the concept of marriage of the different denominations so that, for example, the tenor of canon law would still apply to Catholic marriages.[19] Nevertheless, the Marriage Patent of Joseph II can be viewed as a milestone within the development of civil marriage because it actually put into practice the strict separation between marriage contract and sacrament of marriage.[20] The rules of the Josephinian Marriage Patent were essentially transferred to the 1811 promulgated Austrian Civil Code, the ABGB. In particular, the concept of differentiation between various denominations was kept, resulting in a separate denomination-oriented marriage law for Catholics, non-Catholic Christians, and Jews. The fact that the French *Code Civil*, following the marriage law of the French Revolution, had meanwhile introduced mandatory civil marriage[21] had no influence on Austrian law-making in this area. After the end of the Holy Roman Empire in 1806 and under the influence of Napoleon, the *Code Civil* was, however, directly or indirectly applied until the end of the nineteenth century within a number of German states, and for a shorter period of time in some western parts of Austria.

Before the *Code Civil* of 1804 and ABGB of 1811 came into existence, the Prussian King Friedrich Wilhelm II enacted the *Allgemeine Landrecht* (ALR, General Civil Code for the Prussian States) in 1794, which also dealt comprehensively with marriage law. Prussia had in the course of the eighteenth century become an important European power. After the end of the Holy Roman Empire in 1806 and the formation of an independent Austrian Empire, Prussia became the leading power within "Germany". Thus, the marriage regulations of the ALR became groundbreaking for Germany.[22] The ALR was strongly influenced by natural law doctrine, making it rather unwieldy with more than 19,000 paragraphs.[23] But unlike the Austrian Marriage Patent of 1783 and the ABGB, its marriage law applied uniformly to all denominations. Moreover, while the general requirement of a religious wedding ceremony was retained,[24] provision was also made for the secondary possibility of a civil marriage.[25] The ALR and its marriage law were, however, greatly affected by the division of society into estates,[26] which had developed during the Middle Ages and become intensified during the Early Modern Period.[27] In particular, the various marriage impediments showed clearly that the ALR had an estate society in mind and took the preindustrial family as its model.[28]

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[18] Mader, 19.

[19] Harmat, 2.

[20] Floßmann, 75.

[21] Leisching, 134.

[22] Leisching, 142.

[23] Große-Boymann, 230.

[24] This was consistent with the prevailing attitude in Protestant states that the requirement that a wedding be performed by a priest made it possible for the state to control the formation of marriages.

[25] Leisching, 144.

[26] Wesel, 402.

[27] Große-Boymann, 162.

[28] Große-Boymann, 243.

VI.   *Marriage Law in the Nineteenth Century*

In the wake of the French Revolution and Napoleonic Wars, a movement towards moral and spiritual renewal took hold, which attacked to an increasing degree the concepts of marriage of the Enlightened Age, especially in Prussia. Although this had considerable influence on the marriage — and especially divorce — jurisdiction of those Protestant parts of Germany where the old non-codified common law was still used, it did not affect the codified marriage law of the ALR.[29]   On the contrary, the Revolution of 1848 brought new movements in favour of a complete secularization of marriage. The revolutionaries of the Paulskirchen Assembly had demanded, and in fact included in their Constitution, provisions for mandatory civil marriage. Although the Revolution eventually failed, its marriage regulations fostered the introduction of mandatory civil marriage to various degrees among the German states.[30]

1.   Developments in Austria

At the same time a very different development took place in Austria. The neo-absolutist Austrian state, which emerged after the 1848 Revolution, expected support for its cause through an alliance between "Throne and Altar". Encouraged by the earlier recognition of a new marriage impediment (*impedimentum catholicismi*) forbidding Catholics from remarrying for as long as the divorced spouse of one of the prospective marriage partners was still alive, the Austrian state concluded the Concordat of 1855 with the Catholic Church.[31]   The Concordat not only ended the equal treatment of the legally-recognized denominations and led to the return of privileges for the Catholic Church, but also overruled the marriage law of the ABGB in favour of the marriage regulations of canon law. Thus, the sovereignty of the Catholic Church in matrimonial matters and jurisdiction in Austria was restored.[32]

The Austrian defeat at Königgräz in 1866 and the collapse of the neo-absolutist system strengthened the liberal forces in Austria, gradually leading to a more constitutional form of state. Religious freedom was declared a constitutional right in the Austro-Hungarian Compromise (*Ausgleich*) in 1867, thus paying tribute to the fact that the monarchy was home to numerous religious faiths besides Roman Catholicism. In 1868, enforcement of the Concordat was suspended until it was finally abrogated in 1874. Catholic marriage was thus again placed under the rule of the ABGB and the sole jurisdiction of the state.[33]   As a rule, Catholic marriages still required the participation of a priest, but just as the ALR had done some 80 years previously, the ABGB now provided for the secondary possibility of civil marriage.[34] Austrian marriage law remained, however, a denomination-bound marriage law. Mandatory civil marriage was first introduced as late as 1938, after Germany had occupied Austria, and thus tainted by Nazi doctrine.[35] It was not, therefore, until after 1945 that mandatory civil

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[29] Carl Hermann Schleifer, *Die Ehescheidung im deutschen Rechtskreis während des 19. Jahrhunderts*, Kiel 1972, 32-33.

[30] Leisching, 150.

[31] Floßmann, 76.

[32] Wilhelm Brauneder, *Österreichische Verfassungsgeschichte*, Wien 2005, 147.

[33] Brauneder, 154, 158; Harmat, 7.

[34] Harmat, 8.

marriage in the modern sense was established in Austria.

2. Developments in Germany

While the development of the Austrian marriage law thus came to a temporary end in 1868, marriage law in Germany underwent further development in the last quarter of the nineteenth century. This period was characterized by several factors. First, industrialization led to major economic and social changes, necessitating some adjustments to marriage law. Secondly, the creation of the German Empire in 1871 and the so-called *Kulturkampf* in Prussia opened the path to a unification and further secularization of marriage law. Bismarck, the Chancellor of the newly-founded German Empire, sought to strengthen the power of the secular state by reducing the political and social influence of the Roman Catholic Church. In 1874, the Law on Registration of Civil Status and the Formation of Marriage for the Prussian Kingdom was promulgated, which also codified mandatory civil marriage for Prussia. When a similar law, the *Reichspersonenstandgesetz PStG*, was enacted for the entire German Empire a year later, the Prussian law served as a model. The PStG expressly declared any marriage which had not been formed before a public registrar void and also nullified all other regulations that were not in accordance with the PStG. The law of marriage impediments was largely harmonized as well.[36] Thus, with the enactment of the PStG, civil marriage became mandatory throughout the German Empire, bringing to an end the development of the concept of marriage from being a sacrament and an exclusive matter of the Church to being a civil contract and a matter of the secular state. While the PStG harmonized the law of marriage requisites — and to a large extent, marriage impediments as well — it did not regulate the consequences of a violation of the PStG. This was, however, achieved with the BGB of 1900 (1896), which regulated the formation of marriage and the marriage impediments according to the PStG, but further regulated all other legal aspects of marriage in a uniform manner across the entire German State.[37]

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[35] Brauneder, 249.

[36] Große-Boymann, 286-287.

[37] Große-Boymann, 290-291.