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1. MARRIAGE LAW

CONCORDAT (1855)

The **Concordat** of 1855 transferred the jurisdiction in matrimonial affairs back to the Catholic Church, whereby between 1857 and 1871 no longer the **ABGB** (General Civil Law Code), but rather the matrimonial law of the church was again used. The Concordat ordered that decisions regarding matrimonial affairs were to be made “according to the regulations of the holy canon laws and, namely, in accordance with the orders of the Council of Trent” (10th Article). Detailed regulations on the purpose of marriage, on marriage engagements, the validity and invalidity of marriages, as well as on separations or divorces from bed and board were issued in 1856 in the “**Law on the marriage of Catholics in the Empire of Austria**” and in the “**Order for the ecclesiastical courts of the Empire of Austria**”.

2. PROCEDURAL LAW

In their practices the newly established (archi)episcopal Marriage Courts of Vienna and St. Pölten usually followed the procedures which had been used during matrimonial proceedings in the consistorial courts before 1783. The judges were to act not only in accordance with matrimonial laws set in canon law, but also in accordance with the “**Instructions for the Ecclesiastical Courts of the Empire of Austria**” (“Anweisung für die geistlichen Gerichte des Kaiserthumes Oesterreich”), which was published as an appendix to the Patent of October 6, 1856.

This instruction stipulated that the first step in the separation procedure was for the party who requested the divorce or separation from bed and board to approach their parish priest. The priest was to issue a summons to both parties and to do everything possible to persuade the couple to remain married. If the priest was unable to achieve reconciliation, he was to

wait for 8 days, and then make a repeated attempt to mediate. After three unsuccessful attempts, each with an 8-day pause between, he was to hand in a report to the marriage court. In this report he was to state to what extent the complaints were founded. The third attempt could be omitted if it was already obvious that no chance of reconciliation was possible. If a party refused to appear before the priest, the priest could request the intervention of the secular authorities.

Matrimonial proceedings could be initiated again only through the filing of a complaint by the husband or the wife. In most cases the complaints were filed in written form. In very few cases the complaint was brought forward by the plaintiff only at a hearing. The matrimonial court had the right to initiate investigations by right of office (*ex officio*) only in annulment proceedings. The initiation of *ex officio* proceedings was usually elicited by a report made by a third party (usually the priest).

With the initiation of divorce proceedings, the plaintiff had the possibility to request a separate domicile and provisional maintenance. If the marriage court decided in favour of the request it was required to inform the secular court of its decision. The secular court, in turn, decided upon the conditions and the amount of maintenance to be paid.

Generally, the married parties were subject to the episcopal jurisdiction of the parish in which the husband resided. Exceptions to this rule included married couples who were separated from bed and board, and wives who had been “maliciously” abandoned by their husbands. These parties were permitted to file their complaints at the marriage court in the parish in which they lived. Once the summons was officially delivered by the court no change in the court jurisdiction could be made.

Married parties who questioned the jurisdiction of the court or for other reasons refused to appear before the court had the right to justify their failure to appear within a stipulated period of time. If the court found these grounds to be “inadmissible” or if the party failed to justify their absence altogether, the marriage court could call upon the secular court for assistance.

The marriage court consisted of a president, a recording clerk and up to six councillors, all of whom were appointed by the bishop. Complaints received by the court were assigned by the

president to a councillor who was referred to as a “referee”. If the parties involved lived too far away from the seat of the marriage court, the ecclesiastical court usually appointed local parish priests or deans as “investigation commissars”.

The role of the investigation commissar was to investigate the facts of the case. In the preliminary investigation he had to question the married parties and all witnesses. In the case of a divorce from bed and board he was also required to cross-examine the spouses. In contrast to the matrimonial proceedings in front of the secular court, the investigation commissar had the right to question witnesses who were not called by either of the opposing parties, but from whom he thought it was possible to gain further information. The records of the preliminary investigation were to be sent to the marriage court which decided if the preliminary investigation should be continued, evidence proceedings should be initiated or if a verdict could already be proclaimed.

In contrast to the practices of ecclesiastical courts until 1783 and the secular courts as well, the “Instructions for the Ecclesiastical Courts” stipulated that the investigation commissar was to formulate the questions which were directed at the witnesses. However, in the case of divorce from bed and board, the commissar was supposed to align his questions with any questions submitted by the opposing parties.

REASONS FOR SEPARATION AND DIVORCE

A permanent divorce could be pronounced by the marriage court only in the case of proven or admitted adultery. If the plaintiff accepted or allowed the act of adultery, if it was brought about by actions of which the plaintiff him or herself was guilty, or if the plaintiff also committed adultery, the court was not to accept the charge of adultery. The right to a permanent divorce was also forfeited if the plaintiff had explicitly or implicitly forgiven the guilty party.

A temporary separation could be pronounced if one of the married parties abandoned the Christian faith or if he or she tried to seduce the other party into committing the act of apostasy or to commit vice or crimes. Mistreatment or persecution which threatened the health or the life of the spouse, severe and long-lasting mortification, as well as contagious and protracted physical illnesses could result only in a temporary separation from bed and

board. The same applied when property rights or the honour of the opposing party was affected to great disadvantage. If one party was maliciously abandoned the temporary separation was to be considered valid until the other party declared their readiness to resume their marital duties.

VERDICTS AND POSSIBILITIES FOR APPEAL

The marriage court was required to make its decisions with an absolute majority vote. In the case of a parity of votes the president's vote turned the balance either in favour of or against the claim. Invalidity proceedings presented an exception to this rule. In such cases vote parity always resulted in a decision to declare the marriage as valid. In divorce proceedings the question of guilt had to be settled and stated in the verdict. If the court decided that one of the parents could for moral reasons not be awarded custody over a child, this was to be recorded in the verdict statement. The verdicts were delivered to the disputing parties by the court bailiff. The marriage court also informed the competent regional or district court and the local priest of the outcome of the proceedings.

If a disputing party felt that the judgment of the ecclesiastical court was unjust, they could file an appeal against this verdict within 10 days after receiving the verdict. In the case of the Viennese Archiepiscopal Marriage Court the Marriage Court of Prague functioned as the second instance, while the Marriage Court of Salzburg served as the third instance. An appeal could be submitted until the validity of the marriage or the divorce had been pronounced in two, or in the case of the invalidity of the marriage in three, verdicts.

SEPARATION AND DIVORCE CONSEQUENCES

After a separation or a divorce from bed and board was pronounced the marriage court had to attempt to achieve conciliation in regards to the division of property, the amount of maintenance to be paid and/or the custody of any children. If the opposing parties were unable to reach an agreement, they were directed to the secular court. If both parties insisted on settling the separation or divorce consequences at the marriage court, the marriage court could act as a court of arbitration.

The Municipal Court of Vienna and the Diocesan Court of St. Pölten served as marriage courts for the marriage proceedings in the Archduchy of Austria under the Enns. In contrast to secular jurisdiction, divorce proceedings once again required a plaintiff. Consensual divorces were no longer possible once the “Instructions for the ecclesiastical courts of the Austrian Empire” came into force. In addition, the Catholic marriage courts were once again able to pronounce a temporary separation.

Unfortunately, only sources relating to proceedings in the last quarter of 1867 could be found in the Municipal Archive of Vienna. The Diocesan Archive of St. Pölten, on the other hand, houses 23 boxes filled with files on marriage proceedings from 1857-1868 and 1872, as well as two books containing the minutes from the council meetings that were kept by the St. Pölten Marriage Court during the aforementioned period.

While we were able to examine only the judicial practice of the Municipal Court of Vienna at the end of its jurisdiction, the extensive sources of the St. Pölten Marriage Court made it possible to analyze the judicial practice at the beginning (January to June 1857) and at the end (September to December 1867) of its jurisdiction.

3. DECEMBER CONSTITUTION (1867) AND MAY LAWS (1868)

The **December Constitution** on the general rights of citizens of 21 December 1867 stipulated that all citizens are equal before the law (Art. 2). The marriage law of the Roman Catholic Church contradicted this principle. The “Reichsrat”, the parliament of the Cisleithan half of the empire, passed three laws that limited or completely repealed the provisions of the Concordat. Emperor Franz Joseph I enacted all the laws for Cisleithania on 25 May 1868, and since then they have been referred to as the May Laws.

The **first law** made marriage jurisdiction over Catholics subject to the provisions of the General Civil Law Code of 1811. The *Instruction for the Ecclesiastical Courts* was suspended (Art.1). The so-called emergency civil marriage was introduced for people who could not marry due to religious, but not state-recognized, obstacles to marriage or who did not belong to any of the recognized denominations or religions. The Concordat was formally terminated on 30 June 1870 by means of a handwritten imperial statement. It was not until

the **law** of 7 May 1874 that the Concordat was repealed “in regard to its full content”.

Andrea Griesebner/Isabella Planer 2017, translation Jennifer Blaak

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