1. Marriage law
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1. MARRIAGE LAW

In the 16th century the discussion of whether or not secular sovereigns had the right to include matrimonial affairs in their legislation began also in the predominantly Catholic territories. Throughout the course of the 17th century the opinion of a “double competency of church and state” (Stephan Buchholz) in marital affairs asserted itself in large areas of central Europe. Marriage was increasingly defined as a “civil contract” and a sacrament, from which Catholic sovereigns could derive the legitimation of regulating the “civil effects” of marriage.

Joseph II’s Marriage Patent (1783)

Joseph II’s Marriage Patent of 1783 defined marriage as “a civil contract” and transferred the legal jurisdiction in matrimonial affairs to the “courts of the sovereign” (§ 1). Maintaining that contracts could be dissolved only if mutually agreed upon, the Marriage Patent allowed only “uncontested divorces” in the first years of its existence. The rules for a divorce varied according religion and confession. For Catholic couples the Marriage Patent adhered to the doctrine that the matrimonial bond can be undone only by either annulation or by the death of a spouse. With the stipulation that a valid marriage contract “is indissoluble, and that this (marriage) bond, as long as both spouses lived, under no pretense can be dissected” (§36), remarrying was still forbidden for divorced Catholics.

In addition to the conditions under which a marriage of Catholics could be declared invalid, the institution of divorce from bed and board was also adopted. The main difference to canon law was that the separation could no longer be limited in duration, and that the divorce was to be possible only if both parties agreed. Additionaly the application for a divorce required the presentation of a written testimony from the priest stating that the attempts that had been made to “reunite” the couple had been fruitless.

The possibility of a divorce of Catholic couples was made even more difficult to achieve through the required consent on the division of the property. Specifically, the Marriage Patent defined that the secular courts were authorised to grant a divorce from bed and board only

> "when both spouses mutually agree to live separately; and both are in agreement over what each party is provisionally to receive without a judicial inquiry or a judicial decision in this case being carried out" (§ 45).

Although the representatives of the Catholic Church feared an increase in divorces since it, and this was their central criticism, required nothing more than the testimony of the priest, in practice, Joseph II's Marriage Patent provoked exactly the opposite in the first years of its existence, namely a decrease in divorces.

Royal Decree (1786)

Three years later the Royal Decree of October 13, 1786 readmitted divorce claims in very specific contextes. The decree stipulated that, in general, a divorce still presupposes the "consent of both parties", but in cases where "one party or the other simply for the sake of malice did not consent to the divorce" and the court considers the accusations of malice to be legitimate, a divorce could be granted. The decree did not mention which grounds should qualify for divorce.

Josephinian Code (1786)

The Marriage Patent but not the Royal Decree of 1786 was integreated into the General Civil Law Code, issued on November 1th 1786. To differentiate this Civil Code from the Civil Code of 1811, the Civil Code from 1786 was renamed in Josephinian Code.

Royal Decree (1791)

The Royal Decree (Hofdekret) of 10. November 1791 (JGS, Nr. 219) opend the possibily to file

for the seperation of the assets if the couple was not able to reach an out of court settlement.

General Civil Law Code (1811)

The Marriage Law of the Josephininan Code was transferred, with a few amendments, into the General Civil Law Code passed in 1811. The General Civil Law Code declared the man to be “the head of the family” and entitled him to “lead the household” and to choose where the family was to live. It was his duty to “provide a decent living for his wife, according to his means” and to “be her representative in all circumstances”. In return the woman received the man’s name and social status and the right to material maintenance during the marriage. Her duty was to “follow her husband to his home”, to “diligently assist him in housekeeping and earning” and, “as far as the domestic order requires, to follow the rules made by her husband and make sure that others living in the household also follow them”.

The grounds which legitimized filing for a contested divorce were listed. The courts had to accept adultery, conviction of a capital crime, “malicious” abandonment, unorderly conduct, severe mistreatment, repeated and severe mortification and contagious illnesses as legitimate grounds for applying.

The ABGB also reintroduced the possibility that the threatened spouse could be granted the right to move to a “separate domicile” already before a decision was made in the divorce proceedings.

Royal Decree 1819

The Royal Decree of 23 August 1819 once again stipulated that an uncondested divorce “does not allow any reservation of further legal negotiations on the maintenance of the spouse and children, disputes of the property or other reciprocal claims of the spouses.”If the couple is disagreeing in one of these points the “divorce has to be decided by legal decision” (§ 8).

Paragraph 12 again specifies that a contest divorce can be approved only for the reseans stated in the civil code of 1811 and prescribes that the sentence had to explicitly identify if

one party, both parties, or no party “bore the blame for the divorce”.

2. PROCEDURAL LAW

The procedure of litigation at secular courts was regulated in the General Court Order (Allgemeinen Gerichtsordnung) of 1 May 1781, which came into effect on 1 May 1782. According to the General Court Order the parties decided on the course of their proceedings with their petitions. As was usual before the ecclesiastical courts, the court proceedings (with the exception of uncontested divorce proceedings) could be initiated only with a written complaint. It was not allowed any longer that a judge open action *ex officio* (meaning by right of office).

The plaintiff was allowed, at all times, to abandon the claim. In such cases the plaintiff was then required to pay the legal expenses of the defendant. The plaintiff was not allowed to alter the claim. If he or she wanted to modify the claim, the complaint had to be withdrawn and a new complaint had to be submitted. The possibility to end court proceedings through a settlement was allowed for both parties throughout the entire course of the court proceedings.

In the **complaint** the plaintiff was to state all the facts in chronological order. Two or more claims could be listed in one complaint, but only if they had a connection in content. The complaint had to be submitted to the court in duplicate, whereby one copy was delivered to the defendant by a bailiff. The judge made record of the date of arrival on the statement of complaint, and determined in an official order when both of the married parties were to appear before the court.

At the hearing both parties – in contrast to the ecclesiastical matrimonial proceedings – were allowed to provide **only two statements:** the complaint and the reply to exception on the part of the plaintiff, and the exception to the complaint and the rejoinder to the plaintiff`s reply on the part of the defendant.

In the **complaint** the plaintiff had the possibility to present the allegations made in the complaint. Some wives and husbands also used this opportunity in order to add further

demands and accusations. In the **exception** the defendant was to address each individual allegation made by the plaintiff. The **reply** was meant to give the plaintiff the opportunity to respond to the exception. In the **rejoinder** the defendant had the possibility to respond to the reply. The submission of new complaints was – with very few exceptions – not permitted in the reply or the rejoinder.

In contrast to the consistories a failure to appear at a court hearing was not a possible way to protract the proceedings or to elude taking part. If one of the parties failed to attend the hearing without the court's approval, the court order stated that the party who appeared before the court was to be believed and a so-called **contumacy judgment** should declare "what is legal" (AGO, § 29). As the Court Decree (Hofdekret) of 23 August 1819 stipulated, such contumacy judgments were to be pronounced only after the party who did not attend the hearing was issued a warning.

Reaching a verdict

In order to reach a verdict the complaint, the protocol of all hearings and the evidence submitted by the married parties had to be "collated" (*inrotuliert*). That means that documents relevant for reaching a verdict were merged together in the presence of the opposing parties and several members of the court personnel. These documents, of which a court clerk compiled a list, and which was called a *Rotulus actorum* or file register, formed the basis upon which the judge made his decision.

The collated documents were delivered to a referent who compiled a so-called document extract, in which the claims and statements of both parties were summarised. Following the synopsis the referent drafted a **suggested verdict** including the "**reasoning**". Both of these texts were presented by the referent to the council. Following this presentation the councillors decided in a **vote** either for or against the suggestion of the referent. In the case of a tied vote the presidium decided.

In the practice of the civil court the majority of the divorce proceedings were not decided upon by the court, but rather the vast majority of married couples agreed on a divorce settlement. The judges were instructed to convince the parties to make such a settlement. If

the couple were able to arrange an agreement both in regard to the divorce, as well as in regard to the therewith resulting consequences (division of material goods, maintenance regulations or custody of children) the court granted the divorce from bed and board by means of official notification without examining the contents of the settlement.

3. EVIDENCE PROCEEDINGS

In the case of contested separations, the allegations raised against the opponent had to be proven. In accordance with the court order the parties had **five means of submitting evidence** at their disposal:

1. confession
2. certified documents
3. proof through witness statements
4. expert witness
5. party oaths.

The different types of evidence were given varying evidential values, whereby one differentiated between a half proof and a full proof. The provision of at least two half proofs amounted to a full proof. It was only through a full proof that the allegations made by the plaintiff could be considered proven. The court order assigned the status of full proof to confessions, certain certified documents, two consistent witness testimonies, the congruent opinions of two expert witnesses and the party oaths provided by the accused party.

The first two types of evidence, the confession and the documents, did not require evidence proceedings. In contrast, the other three types of evidence, namely the witness statements, expert witness and party oaths, made the initiation of evidence proceedings necessary. That means that the hearing of evidence and the assessment of evidence took place in a separate stage of the proceedings. If evidence was admissible, and for what it was considered to be evidence, was decided upon by the court through a so-called judgment of evidence.

Judgment of evidence

The judgement of evidence had to include a (pre-) decision stating if the claim would be allowed under certain circumstances. Therefore the judgments of evidence were "**conditional final verdicts**" which were of great importance to the opposing parties. The result of the evidence proceedings was dependent upon the question of whether or not the parties were successful in proving the allegations which they had presented before the court. The only purpose of the so-called "**final verdict**" is to either confirm or nullify the conditions of the "judgment of evidence".

The plaintiff was to report to the court within three days after the judgment of evidence had taken legal effect. If this party failed to do this, they lost their rights. A verdict became legally valid 14 days after its being proclaimed. That means that the party with the burden of proof had, in total, 17 days to hand in an application for evidence proceedings. The legal remedies of the appeal as well as the revision could be used to contest a judgment of evidence.

The conditional final verdict (also called the judgment of evidence), as can be seen in the example of the divorce proceedings of Constantia Sandner against her husband, had a standardized form. In the verdict from September 6, 1810 the judge ordered Constantia Sandner to prove the alleged violent actions carried out by her husband through testimonial evidence from witnesses and her own testimony under oath. According to the wording of the conditional final verdict, the requested divorce from bed and board

> "should be granted and the defendant should pay her […] the maintenance of 1 Gulden per day, if the plaintiff is able to prove, as stated in the complaint, through witness testimony and her own oath, that she had been grossly mishandled by her husband".

CONSEQUENCES OF DIVORCE

In addition to the divorce itself in many cases the plaintiff requested a court ruling over the division of property, the amount of maintenance and/or the maintenance and custody of the children. Starting in 1791, at the latest, such connected demands could no longer be dealt

with in one proceedings; each demand was to have its own separate proceedings. This meant that the consequences of a divorce could not be dealt with until the judgement had been made in the divorce proceedings.

POSSIBILITIES OF APPEAL

Both parties had the right to submit an **appeal** within 14 days after the delivery of the court decision. During the appeal proceedings no additional facts or evidence were allowed to be submitted. All documents from the proceedings in first instance were handed over to the Lower Austrian Court of Appeal. This court of second instance passed a new verdict whereby it either confirmed or amended the verdict of the first instance, or it rejected the appeal altogether.

The calling of the third and last instance (the Supreme Court) was referred to as a **revision**. Here the parties had to adhere to the same deadlines as with the appeal. A revision could be initiated only against the ruling of the second instance which had amended the ruling of the first instance. If the Lower Austrian Court of Appeal had confirmed the decision of the first instance court, a revision was not possible.

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Next sub-item: Method