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1. MARRIAGE PROPERTY REGIME

LAND LAW DRAFT (1526)

In the Archduchy of Austria under the Enns, the bride and groom usually entered into a community of property. According to the **Lower Austrian Land Law draft of 1526**, the **marriage portion (Heiratsgut)** (dos) brought into the marriage by the bride (or her parents) and the **counter-marriage portion (Widerlage)** (donatio) brought in by the groom (or his parents) was to be roughly the same. The **morning-gift (Morgengabe)**, also known as the “lost property”, was considered “a reward for virginal honour”. It was supposed to be worth approximately half of the marriage portion and was owed to the bride who was entering into her first marriage or to the groom if he was a bachelor and married a widow.

The amount and time of the transfer of the marriage portion, counter-marriage portion and morning gift had to be specified in written form in a marriage contract. While the morning gift belonged solely to a spouse who had not previously been married, the marriage portion and the counter-marriage portion were intended as joint start-up capital in order to “cover the financial burdens of marriage”. In addition, assets could be brought into the marriage as so-called **paraphernalia**. These assets, usually brought in by women, could be managed by the husband to the economic benefit of the married couple, but remained excluded from the marital community of property and were legally owned by the person who brought them into the marriage.

In the marriage contract it was also necessary to record how the marital property should be divided after the death of one of the spouses. It was customary to make provisions which took the number of potential children into account. If the marriage was childless, the surviving spouse usually received at least two thirds of the marital property, the relatives of the deceased received one third. If the marriage was “blessed” with only one child, one third

went to the child. If two or more children emerged from the marriage, half of the marital property remained for the surviving spouse. The other half went equally to the sons and daughters of the deceased spouse as paternal or maternal inheritance.

The secular consequences in the event of an annulment, separation or divorce of the marriage were not explicitly regulated in the Lower Austrian Land Law draft: Who was given custody of which minor children? How was the marital property divided and in which contexts was a spouse entitled to maintenance?

THERESIAN CODE (1766)

In the context of civil and criminal codification efforts, regulations in the area of marriage and family also increased. Maria Theresia issued a plethora of norms which were intended to limit access to marriage for the Austrian Lands. While canonical law saw the free will of both spouses as the most important prerequisite for marriage, secular ordinances also emphasized the need of approval from the parents and civil authorities. It was important to the secular authorities that the bride and groom had sufficient assets to establish a new household, so that the couple and their children would not become a burden to the local community in terms of poor relief obligations.

In a **decree from 1 July 1746**, it was said, for example, that “people without a trade and without means” were not allowed to marry. The outflow of earned or inherited assets should be prevented. However, the legal focus was only on women: widows with professions and aristocratic or wealthy “female persons” should no longer be allowed to marry “foreigners” without express permission, as two court resolutions from 1752 stated. A **court rescript from 1753** stated that consensus for marriage to rural population groups should be given more easily. Their land could be divided and the children not yet suitable for heavy farm work could work in flax cultivation and on the spinning wheel in order to contribute to the family livelihood and at the same time promote linen weaving. As decrees from 1771 and 1775 stipulated, **soldiers** and **invalids** should be permitted to marry only if they could either provide evidence of sufficient support or if their future wives were willing to take on the maintenance.

In addition to this, the **Theresian Code**, compiled between 1753 and 1766, dealt with the

rights and obligations of marriage. Although these provisions did not attain formal legal force, they did summarize fundamental normative considerations and were later incorporated in the **General Civil Law Code** of 1786.

In Part 1, Chapter 2, Section 4 “On the household”, the Theresian Code first regulates which persons belonged to the household. Quite generally, all persons who “live under a master of the house in a domestic setting” are included, therefore, the wife, children and servants. Second, the duties of the wife and husband are defined. The wife was obliged to bear the name (and possibly the coat of arms) of her husband, to let him determine the place of residence and to render all the help in the household “which was in accordance with her status, strength and abilities”. The husband, on the other hand, was “bound to feed and maintain her in accordance with his status, as well as to represent and protect her both in and out of court”.

Part 1, Chapter 3 “On the marriage bonds” deals, among other things, with assets brought into the marriage: marriage portion, counter-marriage portion, gifts and the property belonging to one spouse (paraphernalia). The **marriage portion**, also called the marriage tax, dowry or bridal treasure, was seen, according to the Theresian Code, not as a legal prerequisite for entering into marriage, but rather as a “general propriety”. In addition to the amount, it was also to be stated in writing whether this was to be paid before or during the marriage. The marriage portion was either raised by the bride’s parents or financed by the bride with her own property. In the latter case, the bride’s marriage portion was not to be more than a third of the property that she owned at the time of the wedding. For the poorer classes, the marriage portion could also amount to up to half of the bride’s fortune. The **counter-marriage portion**, also called counter-legacy, was to be paid by the groom or his parents. The counter-marriage portion was not to exceed the value of the marriage portion and, if brought in by the bridegroom, was never supposed to exceed a quarter of his property. The purpose of the assets brought in was differentiated according to the time:

“The nature of the counter-marriage portion (Widerlage) is, by the way, the same as that of the marriage portion (Heiratsgut), except that the marriage portion aims to ease the burdens of marriage on the side of the man over the course of the marriage, while the purpose of the counter-marriage portion is to care for the woman after a marriage

has been dissolved.”

Should the marriage be annulled, the marriage portion (and, analogously, the counter-marriage portion) could be reclaimed:

“If, therefore, the marriage does not take place for whatever cause with or without the fault of one or the other party, or the contracted marriage is declared invalid due to a marriage-breaking obstacle, and the presumed spouses have therefore been divorced, all rights to the marriage portion and counter-marriage portion cease to exist, that not only what is promised cannot be demanded, but also what has already been given and received can be reclaimed by the other without cause.”

The regulations described so far make it clear that the rule of the **marital property regime** was not the community of property but rather the separation of property. It is therefore also not defined how the marital property (community of property) should be divided in the event of annulment. Once again, regulations were made only for the separation of property: In the event that the bride or groom was to blame for the annulment because he or she was aware of an impediment to marriage before the wedding, the Theresian Code granted the “betrayed” the right to “seek compensation and returns for losses from the guilty culprit”.

In the event of separation or divorce, the assets brought into the marriage could not simply be reclaimed. If the husband was to blame for the separation or the divorce of bed and board, he lost the right to use the wife’s property for the period in which the couple was permitted to live separately:

“If the man had given cause for the legal separation of bed and board through his infidelity, through acting too harshly or through malicious abandonment, then he loses the right to use the marriage portion.”

If the husband was declared a “spendthrift”, he did not in fact lose the right of usufruct of the

marriage portion. However, the wife could demand “that it be sufficiently safeguarded or otherwise securely provided for, but always with the right to usufructu reserved for the husband”. A securing of the marriage portion was also planned in case the husband lost his assets due to committing a criminal offence:

“Likewise, the marriage portion (Heiratsgut) should be brought to safety during the marriage, if the man has forfeited his fortune for the sake of crime”.

Although, as stated, the **counter-marriage portion** was intended to provide for the wife after the husband’s death, it is worth noting, that the Theresian Code does not contain any analogous provisions to protect the counter-marriage portion.

2. REGULATION OF “WORDLY MATTERS”

Even if we have not found any normative regulations from before the end of the 17th century, it seems to have been undisputed in practice that the consistories also had the right to determine provisional maintenance and custody of children during the main proceedings.

COURT ORDER FOR ECCLESIASTICAL COURTS

An undated **edict on the court order for ecclesiastical courts**, which presumably dates from the late 17th century, was addressed to the lawyers. The primary objective was to shorten the duration of the proceedings. Under point 14 it is regulated that a set amount of the provisional maintenance was to be paid even if an appeal was made against it. Indirectly, we learn not only that the consistories have the right to award provisional maintenance, but also that they have the right to determine the amount. The edict not only stipulated that the maintenance obligation would not be suspended by the appeal, but also ordered that the awarding and determination of the amount of maintenance should not take place in two separate proceedings, but if possible in one step, so that the payment of the provisional maintenance would not be delayed.

With the argument that this would help to avoid disputes over jurisdiction between the secular and the ecclesiastical authorities, an **ordinance from October 1753** instructed the ecclesiastical courts not to decide upon marriage portion, child bed (puerperal) costs and “child support payments” in marriage vow, defloration and paternity lawsuits. In addition, the consistories were deprived of the right to decide on maintenance in the event of separation or divorce proceedings.

The regulation of “secular matters” should in future be reserved for the secular courts alone. Even if the spouses had agreed in advance on a certain amount of maintenance, the decision and thus also the execution in the event of default was incumbent upon the secular authorities from this point in time forward. At the same time, the ordinance forbade any legal disputes to be brought to secular or ecclesiastical courts outside of the Austrian Hereditary Lands without first obtaining the permission of the higher authority. Secular courts were also instructed not to recognize or to implement any provisions concerning marriage portion, child bed (puerperal) costs and maintenance attached to the verdicts of the ecclesiastical courts. On the other hand, the ordinance did not doubt the jurisdiction of the ecclesiastical court in its decisions in the main proceedings, i.e. on marriage vows, defloration or paternity suits, as well as in proceedings regarding the separation or divorce of bed and board.

THERESIAN CODE (1766)

The **Theresian Code of 1766** confirmed the demarcation between ecclesiastical and secular competence in matters pertaining to marriage:

“The bond that exists between man and woman, insofar as it directly affects the marital status itself, is subjected to canon law, however, all of the effects in temporal matters are subject to the secular law.”

The decisions about whether a marriage was valid and whether a couple was permitted to live separated from one another were to continue to be made by the ecclesiastical courts. The Theresian Code ascribed supporting functions to the secular courts in cases of unauthorized separations: “the secular court must assist if necessary, so that the illicitly

separated spouses can be forced to resume conjugal life.” If a spouse had already separated him/herself from the partner or wished to separate, it was said that, “our subordinate courts and authorities should pursue a temporal redress, and at best try to unite the estranged couple by imposing a punishment appropriate to the improper conduct, and encourage them to live peacefully.” In addition, secular courts are not barred from “using all amicable mediation to reconcile separated spouses.”

Even if the Theresian Code confirmed the ecclesiastical jurisdiction in matrimonial matters, it deprived the consistory of the right to decide on the worldly consequences of the annulment and divorce consequences respectively: **The division of property following the annulment** of a marriage should be reserved to the secular courts alone:

"mutual claims concerning the property brought into the marriage, for example if one party may be withheld from the other, or losses suffered by one party or the other as a result of the invalid marriage can be carried out only at the secular courts."

When determining the maintenance after a divorce of bed and board decided by the consistory, the secular judges were to take the consistory’s “substantiated guilt of one or the other party” into account. The question of guilt was to decide “whether the man should continue to maintain the wife or be relieved of paying further maintenance.” In addition to the decision of whether and if so to what amount and in which way the husband had to pay maintenance, the decision on the “**rearing and maintenance of the children**” was also to be reserved for the secular courts. If possible, the couple was to settle these arrangements out of court.

The amount of maintenance was to be determined according to “the status and dignity of the man, the amount of his property and the amount of marriage portion provided and other means belonging to the woman”; in the case of poorer classes, “according to the wages, earnings, trade, and the ability of the woman to feed herself”. The maintenance was meant to enable only a proper and fitting lifestyle and, if necessary, also a proper funeral. Not considered to be part of the maintenance was everything “that serves for splendour and superfluous leisure.” Given the fact that the separation of a married couple from bed and

board was supposed to last only for a temporary duration, the Theresian Code also warned of the dangers of excessive maintenance:

“Primarily, the focus should be directed so that neither the woman’s emotional distance is strengthened by an high amount of maintenance, while the man is exhausted of resources, deprived of food, or the proper rearing of the children is hindered, nor the man is discouraged from offering reconciliation by all-too-low support payments.”

In the Theresian Code, however, it remains vague as to whether the **demand for and amendment of provisional maintenance** during ongoing marriage proceedings was a matter of ecclesiastical or secular judicial competence. The basic tenor was that if wives turned to the secular authorities based on substantiated claims they should be helped:

Except in the case of divorce, judicial decisions regarding the maintenance of the wife are rare. However, when there is a well-founded cause for the complaint, the secular court must quickly take precautions to ensure that the maintenance owed is paid, and when amicable attempts have failed, to grant judicial assistance [to the wife], according the above mentioned stipulations.

3. ENFORCEMENT LAW (1655)

ORDER OF ENFORCEMENT (1655)

The **Enforcement Order for Austria below the Enns** from 1655 defined the steps which were to be taken by the court in enforcement proceedings. The requirement for the approval of enforcement was the presentation of a legally binding verdict or a legally binding contract.

WRIT OF ENFORCEMENT

In response to the first lawsuit and without hearing the defendant, the court was to issue a “writ of execution”. This included the demand for payment within a certain period of time (usually 14 days). If the debtor did not comply with the claim, the court was to issue a “letter of warning” at the request of the plaintiff, which, if the debtor had not paid in the meantime (“if nothing is received”), threatened seizure with a shorter deadline (usually 8 days). If the debtor also allowed this deadline to elapse, the appropriation or execution of the verdict was to be approved upon a third application.

SEIZURE

The courts had to instruct the bailiff to carry out the seizure (“the appropriation”). The bailiff’s task was to provide the court with a description (list of seized goods).

If the goods described in the list were not enough to cover the debts, the plaintiff was to ask the court to order the debtor to disclose further possessions to the debtor within three days (otherwise resulting in personal arrest). If he or she did not comply with this request, the court was to once again issue a three-day deadline for the disclosure of the “additional goods”.

If the debtor stated that he or she had no goods at all or no further “additional goods”, but the plaintiff could substantiate that the debtor did in fact possess goods that were not specified, the court could instruct the debtor to take a physical oath that he or she “has no better means of payment in their assets”.

The seized goods passed into the provisional possession of the court and were to be put up for auction by “edict” with a six-week deadline. During this time, the debtor still had the opportunity to pay his or her debts. If he or she paid, the court was required to lift and reverse the appropriation (“relaxation of appropriation”).

DEVOLUTION

If the six-week period passed without the debtor having paid his or her debts, the court, again at the request of the plaintiff, was to approve the “devolution” (transfer of the goods) and “estimate”. If the defendant objected to the estimate, for example by refusing to submit an extract from the land register, he or she could be arrested. If a party felt disadvantaged by the estimate made, they could apply for a “commission on the overestimation”.

*Susanne Hehenberger, Andrea Griesebner, December 2020, Translation Jennifer Blaak
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Next sub-item: **Method**

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