The Austrian Law on Marriage and Divorce

By GERARD E. PELIKAN *

(*Continuation*)

SEPARATION

It is a sad, but well known fact, that not all marriages fulfill the expectations with which they were entered into. Differences in human character, outside influences, changes in the financial situation of the spouses, diseases, etc. make the continuation of marital relations in some cases anything but desirable. Only few contract marriage in order to fulfill some abstract duty towards the State, society or mankind, but rather for the idealistic reason of promoting their individual happiness. In a number of cases, the result is not very gratifying, and even the legislators of 1811, however much they may have been influenced by the doctrine of indissolubility of marriage, evolved by the *concilium Tridentinum* and dominating in Austria at the time of the passage of the Civil Code had to realize the wisdom of the Austrian proverb that "an end with terror is preferable to a terror without end" in its application to the important social institution of marriage. Since powerful conservative influences prevented a general divorce legislation, at least for Catholic marriages, the Code liberally granted the alternative of separation to spouses whose married life had proved to be a failure.

1. *Separation by Mutual Consent.* The spouses have a right to be granted a decree of separation "mensa et toro", if they both demand it and have reached an agreement with regard to support and conjugal property (Par. 103).

Before filing their petition for separation, the spouses may present themselves three times before their (parish) priest and inform him as to their intention to obtain a decree of separation, giving their reasons therefor. It shall be the duty of the priest to remind them of their solemn promise made at the wedding and to call their attention to the disadvantageous consequences of a separation. If these admonitions show no result, the priest shall give the spouses a certificate to that effect, which shall be attached to the petition for separation.

---

* Ph.D. (Univ. of Gratz); LL.B. (Univ. of the Philippines).

Unless the petition is accompanied by such certificate, it shall be the duty of the judge to endeavor to persuade the parties to reconcile themselves (Act of Dec. 31, 1868). The petition shall not be heard before eight days after such attempt to reconcile the spouses have elapsed. In case the spouses insist on having their petition heard, the Court shall summon them to appear personally and to confirm that they have reached an agreement with regard to their separation as well as their regard to alimony and partition of the conjugal property; and if the parties shall so confirm, the Court has to issue a decree of separation without further investigations.

The "Landesgericht" (Court of First Instance) of the District wherein the spouses reside has jurisdiction to hear petitions of separation.

2. *Separation at the Instance of only one of the Spouses.* If one party does not agree to the separation and the other has a just cause to demand it, the offended party may commence an action for separation.

This action has to be accompanied with a certificate of the proper priest, as mentioned under sub-section 1, or otherwise the hearing will be preceded by an official attempt to reconcile the spouses.

The Civil Code does not enumerate all causes of separation, but merely cites a number of them *exempli gratia* in paragraph 109: conviction of the defendant in separation proceedings of adultery or of a crime; abandonment of the innocent spouse, disorderly habits, whereby a considerable part of the fortune of the plaintiff or the morals of the family are endangered; attempts at the life or safety of the plaintiff; grave injuries or repeated serious insults; incurable, contagious diseases. The Supreme Court decided, that the enumeration of the grounds for separation in par. 109 is not complete, but other similar grounds will suffice to obtain a decree of separation. Theft was held to be a sufficient ground, if committed on the property of the wife (Dec. July 17, 1884), also impotence (Dec. Sept. 13, 1687).

Even prior to the decision of an action for separation, the Court may order the defendant to pay the plaintiff alimony during the pendency of the proceedings, and authorize the innocent party to establish a separate residence, if in the discretion of the Court it is necessary for the safety of the party concerned.

In case property rights are involved in the action of separation, the Court shall try to induce the parties to reach an amicable agreement in respect thereto, but if this appears to be impossible, the parties must litigate these claims in a separate, ordinary action.

The same Courts, which have jurisdiction to hear petition for separation by mutual consent, have also jurisdiction over the action mentioned in this section.

3. *Reunion.* The separated spouses may at their pleasure, resume their married life. In order to vacate the decree of separation and to rescind the agreements entered into in connection therewith, the spouses have to notify the competent Court of their reunion. (Par. 110).

Reunion without the required notice leaves the decree of separation in full force and effect (Dec. Jan. 26, 1897). The notice has to be given by both spouses (Dec. June 4, 1902) and the Court does not have to give his consent thereto (Dec. Sept. 26, 1916).

In case the parties desire to separate again, the same rules apply as for the first separation.

DISSOLUTION OF MARRIAGE

1. *For Catholics.* "The marriage tie between Catholic persons can only be dissolved by the death of one of the spouses. The marriage tie is just as indissoluble, if only one party professed the Catholic faith at the time of the celebration of the marriage" (Par. 111).

This paragraph clearly lays down the rule with regard to Catholic marriages: there is no divorce for Catholics in Austria. This does not only apply to Roman Catholics, but also to Greek Catholics (Dec. July 23, 1873). Decisive for the question whether the marriage may be dissolved is the denomination to which the spouses belonged at the time of the celebration thereof of and at the time of the action for divorce, but not any change of religion in the meantime (Dec. Jan. 25, 1916).

This principle is applied to all marriages of Austrian citizens, whether contracted in Austria or abroad. But if they acquire another citizenship after the marriage, and are lawfully divorced by a foreign court, the Austrian courts will recognize this divorce (Dec. May 27, 1913). Austrian courts, however, may not pronounce a judgment of divorce of a marriage of aliens contracted abroad, against the principle of paragraph 111 (Dec. Apr. 26, 1921).

Presumption of death alone is not enough to dissolve the marriage. In addition thereto, the dissolution of the marriage has to be decreed by the court in whose district the presumably dead spouse had resided. This court, after receiving a petition to that effect, appoints a curator whose duty it is to make investigations as to the whereabouts of the absent spouse. The absent is summoned by an order of the court, if necessary published in Austrian or foreign newspapers, requiring him to appear before such court within one year.

If this period passed without results, the court shall appoint a *defensor matrimonii* and shall decide the petition after due hearing of the said defender and the petitioner. In case the court renders a decree of dissolution on the presumption of death, such decree has to be confirmed by the superior court.

The periods after the disappearance of a person, necessary for presumption of death are as follows (Par. 24):

70 years from the birth and 5 years since last notice;

30 years from the birth and 10 years since last notice;

If severely wounded in war or otherwise lost, he failed to give notice of his existence within 3 years after the end of such war.

If he was on a vessel that sunk and if he was not heard of for three years.

2. *For Non-Catholic Christians and Persons belonging to denomination placed on the same basis.* Non-Catholic Christians are permitted to divorce for important reasons, in accordance with their religious ideas (Par. 115). The adherents of the Islam, through an Act of July 15, 1912, were placed on the same basis. No other Non-Christian denomination has applied for recognition in Austria. By a decision of the Supreme Court, however, dated Feb. 1913, non-denominationals were granted divorce on the strength of paragraph 115.

In its second part, paragraph 115 enumerates the grounds for divorce, which enumeration was held to be complete (Dec. March 8, 1911):

(*a*) Conviction of adultery or another crime punished by imprisonment of no less than 5 years. Contrary to the rule laid down in Sec. III of Act 2710, the Austrian law does not deprive a spouse of the right to demand divorce for the reason that this very spouse is also guilty of adultery (Dec. Jan. 24, 1905).

(*b*) That one spouse maliciously abandoned the other and, in case his residence is unknown, did not appear within one year after having been summoned by publication.

(*c*) Attempts at life and health.

(*d*) Repeated severe maltreatments. The Supreme Court decided in this connection, that maltreatments which were provoked, are not a sufficient ground for divorce (March 12, 1907).

(*e*) Insuperable incompatibility of character, wherefore both spouses demand a divorce. In this latter case, the Court may not immediately render a decree of divorce, but shall first decree separation "toro et mensa", if necessary in view of the circumstances even several times. This incompatibility must not be bilateral, but it is sufficient that only one of the spouses finds the continuation of married life impossible (Dec. Jan. 27, 1892, often confirmed by later decisions), as long as both parties agree on the divorce. This ground has to be proved, if necessary by the testimony of the spouses (Dec. Feb. 14, 1901).

As already said, these are all the ground for divorce and they may not be increased *per analogiam*. So it was held, that incurable insanity does not constitute a good ground for divorce (Dec. March 8, 1911).

In case one of the spouses was converted to Catholicism after the celebration of marriage, only the non-Catholic spouse may demand divorce (par. 116).

With regard to the procedure to be followed and the settlement of property rights, the same applies as said on the respective points in the chapters on the annullment of marriage and on separation.

A decree of divorce operates to dissolve the marriage tie and allows the divorced spouses to marry again. This right to remarry, however, is subject to a few restrictions. Paragraph 119 makes it an impediment to marry the person who through adultery or unjust influence has brought about the divorce. The Imperial Court Chancellery Decree of Aug. 26, 1814, restricts the right to remarry to non-Catholics, viz. the divorced spouse may only marry a person not belonging to the Catholic church. This applies only to Austrian citizens, and an Austrian citizen may marry a Catholic alien, whose first marriage has been legally dissolved by a foreign Court of Justice (Resolution of Dec. 11, 1924). In this respect, citizens of the Austrian province of Burgenland, where the Hungarian Marriage Law was maintained in force, are considered as aliens.

Moreover, the wife may not marry again, if she is pregnant, until she gives birth, and if her pregnancy is doubtful, not before 180 days have elapsed since the dissolution or invalidation of the former marriage. A second marriage contracted in contravention of this act is not invalid, but the wife loses all advantages due to her by virtue of the "Ehepacten" (contract with regard to the property of the spouses), "Evertraege" (contract with regard to inheritance) or last will and testament of her former husband. The second husband loses the right to have the marriage declared void on the ground of the pregnancy of his wife.

3. *For Jews.* The influence of the Church never extended to the marital relation amongst the Jews in Austria. The Civil Code, in its policy to follow as far as possible the rules laid down by canonical law, at the same time giving due regard to the divergent religious ideas of non-catholic sects, is in a position to concede even greater individual consideration to the Jewish conception of marriage, inasmuch such action could not be regarded as an infraction of the principles established by the powers that be.

So we find a slight modification in the impediment of blood relationship: amongst the lateral relations it only extends to marriages between brother and sister. Also the impediment of affinity appears to be modified: it extends to marriages between the husband and ascendants, descendants and the sister of his former wife, whereas the wife may not marry the ascendants, brother, and son or grandson of her former husbands brother or sister.

With regard to separation, the same rules apply as are in force concerning the Christian marriages. Not so, however, in respect to divorce. Here the influence of the Jewish religious ideas on this subject is clearly noticeable in the Civil Code. The grounds for divorce enumerated in paragraph 115 find no application. Jewish marriages may be dissolved in two ways: either by delivery of a "letter of Divorce" (Scheidebrief) by mutual consent, or by delivery of a letter of divorce pursuant to a final conviction of adultery.

In case of divorce by mutual consent, the husband hands the wife a letter of divorce before a court of competent jurisdiction, and the latter accepts the same. It is, however, the duty of the court to endeavor to persuade the parties to reconcile themselves and for that purpose, the court may postpone the delivery of the letter of divorce for one or two months, if,

in its discretion, there is hope that the spouses might change their mind and continue the marital relations. Otherwise, the marriage is legally dissolved by the delivery of the letter of divorce and both spouses may marry again, if they so desire.

In case of adultery on the part of the wife only, the husband may dissolve the marriage by delivery of a letter of divorce to her, even against her will. In this case he has to commence an action for divorce in the competent court, which shall be proceeded within the same manner as an ordinary litigation. But not the judgment rendered therein, only the delivery of a letter of divorce given to the wife by her husband pursuant thereto operates to dissolve the marriage.

As already mentioned, only adultery of the wife gives rise to this action, not vice versa. An action of divorce, brought by the wife against her husband, has to be dismissed a limine (Dec. July 16, 1879).

THE NEW DOCTRINE ON THE DISPENSATION FROM THE IMPEDIMENT OF THE EXISTING MARRIAGE TIE

The marriage law as evolved by the Civil Code and its subsequent amendments represents a fairly satisfactory solution of this important social problem, if we consider the time of its adoption. In the spirit of the "Tolerance Patent" of the great emperor Josef II which established the principles of freedom of conscience in Austria even before the French revolution, due consideration is given to the religious conceptions of the future spouses. The marriage before the priest of the spouses has proved to be a considerable advantage to both the State, which hereby avoids the expenses for an army of Government employees to keep the corresponding registers, and the spouses, who are not confronted by the inconvenience of a double celebration of marriage, once before the spiritual and once before the worldly authorities.

As far as the termination of the marriage relations is concerned, the law largely follows the religious precepts: persons belonging to denominations admitting divorce may obtain dissolution of their marriages, and although this is denied to Catholics in accordance with the rules of the church, they nevertheless may avail themselves of the alternative of separation.

This system, which appeared to be perfectly workable at the time when the Civil Code was passed, soon failed to fulfill the increasing demand of more and more numerous Catholics for a possibility to have their marriages dissolved. The in-

dustrial age, the French revolution, changes in the social structure of the population has brought about the fact, that a great number of persons are merely nominal adherents to a denomination, and although this applies to Catholics as well as to other Churches, in this particular case, only the former (and the less numerous Greek-Catholics) found themselves deprived of the possibility to contract a second marriage, since the Austrian laws grants them no divorce.

In spite of the increasing demand for more liberal legislation, no steps were taken in this direction under the ancient régime. The reason for this failure is apparently an erroneous conception amongst the conservative parties with regard to the maintenance of religion among the people. An attempt to legislate metaphysical ideas, to forcibly apply the conceptions of a religious organization to the conduct of the average citizen, besides reminding dangerously of the "cuius regio, eius religio" of the Middle Ages, is by the very nature of the subject-matter of such legislation condemned to remain a vain effort. It is the perfect right of a denomination to declare marriage indissoluble, and such ruling is binding on its convinced adherents. But what can be gained by the State's enforcing such a conception against the unwilling, merely nominal Catholic, or Greek-Catholic?

A forced compliance with a religious precept is no compliance at all, and the person attempting to obtain a divorce has committed a sin, even if he could not carry his designs into effect because of the impossibility to do so on account of the laws of the State whose citizen he happens to be. The strictest legislation, however, cannot influence a person's inner conviction, which is the thing that counts from the point of view of religious merit.

The criterion of a good law is the freedom which it gives to individual self-expression and development without impairing the public welfare, *bonos mores* and the healthy constitution of society. Does a reasonable divorce law endanger the basis of civilized society, the family? It is not the purpose of this paper to discuss this much-debated question, its scope being merely the law as obtaining in Austria. The wisdom of the Austrian legislators, by the very law which makes divorce impossible to a vast number of its citizens, has rendered an opinion on this question: the Non-Catholic may be granted divorce! It would be grotesque to maintain, that this privilege was granted to the Protestants, Jews, Mohammedans and Non-

Denominationals in direct opposition of public policy and *contra bonos mores,* undermining the basis of society!

Divorce, already in 1811, was simply considered as a matter of conscience, and regulated by law in accordance with this idea. Nothing is in the Civil Code, which would make it appear an evil *per se.* At present, and already for several decades before the revolution of 1918, the popular conceptions have undergone a far-reaching change, but nothing has been done to bring the law into harmony with public opinion. The reason for this failure is merely political. The same opposition to a modern and liberal divorce law, which hindered progressive legislation in the former Monarchy, makes itself felt in the Republic. The Austrian political situation is very similar to the one prevailing at present in England: a strong conservative and an about equally strong socialist party, and a third group with liberal ideas, which is in a position to sway the balance. Only, whereas the socialist in England are very mild in their doctrines, the Austrian socialist party is rather radical and consequently brought about a rally of all bourgeoise elements in a majority coalition. The conservative Christian-Socialists (the Catholic party) and the Pan-German, liberal party have come to a working agreement, which in view of the preponderance of the former, makes a modernization of the divorce law highly improbable.

It seems, however, that the Latin poet's words "naturam expellas furca, tamen usque recurret" are also true with regard to public opinion. And when, through a peculiar political constellation, public opinion has no chance of expressing itself in appropriate legislation, it takes refuge to revolutions, lawlessness or sometimes to strange subterfuges, and it is an irony of fate, that no lesser person than the pope should have made the first step in a development which finally led to an equivalent to divorce for Catholics. In 1863, the pope annulled a marriage. The Civil Code, however, considers Catholic marriage as indissoluble. In order to give the couple, which was canonically single, but legally married, the possibility to contract second marriages, the emperor granted them dispensation from the "impedimentum vinculi."

This was the first case of a dispensation from this marriage impediment, often referred to in Austrian jurisprudence as the "impediment of catholicism." Immediately the question arose, whether the dispensation from the *impedimentum vinculi* is legal or not. The Civil Code fails to give an answer on this

point; it merely says, that the political magistrate may grant dispensation from marriage impediments in accordance with the circumstances of the case (Par. 83). Prof. Dr. Ehrenzweig, the eminent commentator, used to say in this connection, that the legislators had intentionally left this question undecided. An ordinance of the Minister of Interior of 1907 (16658) expressly declared, that the Austrian law knows no impediment, from which dispensation could not be granted. In pursuance to this ordinance, another "Dispensehe" (marriage by dispensation) was granted. But already in 1912, the same authority issued another ordinance (18133) prohibiting these dispensations by virtue of the former ordinance. The Supreme Court has always maintained that no dispensation can be granted from this particular impediment (Dec. Apr. 11, 1905, confirmed by decisions of Feb. 7, Sept. 27, 1922, Jan. 16, Feb. 27, Apr. 10, 1923, etc., etc.), and has confirmed this doctrine by a famous opinion to the same effect. On the other hand, the granting itself of the dispensation is an administrative matter of quasi-judicial nature, affecting the rights or interests of private citizens; decisions in these matters are rendered in the last instance by the Administrative Court, which, ever since its organization by the Republican Constitution has held, that dispensation from the *impedimentum vinculi* is possible. As soon, however, as a dispensation was granted and a new marriage contracted, the Government would institute annullment proceedings, which would be decided by the Supreme Court in favor of the first marriage, declaring the dispensation from the impediment of Catholicism to be invalid and consequently annulling the second marriage. This is a clear case of a positive conflict of jurisdiction between two branches of the Government, which has to be decided by the "Verfassungsgerichtshof" (Constitutional Court). The Verfassungsgerichtshof decided and continues to decide this conflict of jurisdiction in favor of the Administration, holding that the preliminary question of dispensation is within the exclusive jurisdiction of the Administration and that the courts of justice are bound to abide by the Administration's decision of this point, so that after the proof of dispensation the annullment proceedings have to be dismissed. In spite of this constant decisions, the Supreme Court has not changed its point of view and continues to annull all marriages appealed to it.

In strict legality, the Supreme Court seems to have a stronger case. Even if the Civil Code omitted to declare which impedi-

ments are subject to dispensation and which are not, it seems obvious, that certain impediments, by their very nature, cannot be removed, such as impotence. Others could not easily be made the object of dispensation without grave injustice so obvious and palpable, that the idea of dispensation therefrom was never advanced. Such, for example, are the impediments of insanity or force and intimidation. It would work a serious and unwarranted injustice on the offended party, if the guardian of the insane spouse, or the spouse who unlawfully forced the other one into the marriage, could thwart the annullment proceedings by obtaining a dispensation from his own unlawful act. With regard to the *impedimentum vinculi,* two paragraphs have to be taken into consideration: par. 62, which forbids a person already married and whose marriage is not dissolved to contract a second marriage; and par. 111, which declares that a Catholic marriage can be disolved only by the death of one of the spouses. It is unquestionable, that our Courts have no authority to change the law; they are confined to the application thereof. Nor do our administrative magistrates have any such authority. In exercising their right of dispensation they are strictly confined to the limits granted by the Code, viz. to grant dispensation from the impediment of the existing marriage tie, *if* such dispensation can be granted. But what is the effect of the dispensation? It is not the removal of the impediment. If dispensation is granted, e. g. from the *impedimentum disparitatis cultus,* such dispensation does not change the religions of the persons concerned; it merely has the effect to prevent the operation of the consequences attached thereto by law with special regard to the entering of a marriage contract. A dispensation from the *impedimentum vinculi* does not dissolve the former marriage (which by express provision of the law can only be done by the death of one of the spouses), but merely avoids the effect of the former marriage with regard to the celebration of a second one.

It seems obvious that such an abnormal state of affairs cannot have been contemplated by the legislators when they did not declare which impediments are subject to dispensation. The right of the political magistrate to grant dispensation is not an arbitrary one, but has to be exercised in accordance with the general principles of law as well as with due consideration of the individual case. That a person bound by two indissoluble marriage ties is a phenomenon certainly not in ac-

cordance with the whole idea of European marriage law, is too clear to need comment.

But whereas the judiciary is right in respect to the legal merits of the case, it is, on the other hand, also certain, that the Supreme Court has no authority to enforce its view on the Administration, which is the proper authority to decide the preliminary question of dispensation. If its decision may not satisfy the legal mind, it is nevertheless the decision of the competent authority, as fortunately was held by the Constitutional Court. In this case, Austria seems lucky to have an Administration with enough independent courage to flout the law to commit a legal mistake in order to correct the inefficiency of the legislation.

After describing the historical development which led to this unique legal feature and after a short discussion of the legal aspect of the same, it still remains to show the actual working of the system. What has a Catholic to do in order to contract a second marriage during the life-time of his first spouse?

The first step to this end will be *separation* from his present spouse. The proceedings leading thereto have been described in the foregoing pages.

Before presenting himself before the political magistrate for the solemnization of the second marriage, (as no Catholic priest will celebrate such a marriage) he has to obtain *dispensation* from the impediment of the existing marriage tie, since separation does not mean a dissolution of the *vinculum*. The practice has developed two requirements for such dispensation: separation of the first marriage, and consent of the first spouse. It has become common use to insert into the separation contract a clause, whereby both parties bind themselves not to oppose a petition for dispensation, or whereby they even consent in advance to the second marriage. It depends on the residence of the petitioners, how soon this dispensation will be obtained, provided no individual objections arise against a specific case. Dispensation is granted, as already pointed out in a previous chapter, by the Landeshauptman (Governor of a "Land") or in Vienna by the City Magistrate. If a person has the good fortune to reside in Vienna, the City Magistrate, whose party affiliations are socialistic, will grant the dispensation without further difficulties. The same is usually the case in Carinthia, where the Landeshauptmann belongs to the

Pan-German party. In the other "Laender" (provinces), the Landeshauptmann is conservative and will refuse to grant said petition. In this case the aggrieved parties have an appeal to the Federal Chancellery. Now, the Federal Chancellor, at present, is a conservative, and no matter what his private opinions might be, party discipline forbids him to grant a dispensation. The second government party, however, the Pan-Germans, have no such compunctions, and the two parties arrived at a strange, but practical agreement. When such petitions arrive at the Federal Chancellery, they are submitted at a time, when the Federal Chancellor is either absent or otherwise occupied. In this case, it devolves upon the Vice-Chancellor to decide these petitions on appeal, and belonging to the Pan-German party, this gentleman finds no difficulty to remove whatever obstacle might be in the way of the petitioners' marital happiness.

With the dispensation finally granted, the future spouses (if they still persist in their intentions) present themselves before the political magistrate and may have their marriage solemnized.

But their tribulations are not ended by this ceremony. As soon as the Government takes cognizance of this fact, it will institute *proceedings in the courts of justice* to have the second marriage *annulled.* If the case would be litigated to a final decision, the Supreme Court is sure to pronounce a decision declaring the marriage void. In order to avoid the expenses of this proceeding, the parties make it a practice to *appeal immediately to the Constitutional Court,* which in accordance with a long line of decisions handed down in such cases, will declare that the judiciary has no jurisdiction over these proceedings. The case is dismissed and the second marriage remains in force.

To recapitulate again: proceedings have to be had before the following authorities:

Court of Justice: separation.
Landeshauptman: dispensation.
(Appeal from Landeshauptman to Federal Chancellor in certain cases).
Political Magistrate of First Instance: celebration of marriage.
Court of Justice: annullment proceedings.
Constitutional Court: conflict of jurisdictions.

This strange legal creation, the "Dispensehe" (marriage by dispensation) is, however, no divorce, although it produces

some of its effects. As we have seen, the first marriage does not seem to be dissolved (although up till now this question has not been tested in court), and dispensation from the *impedimentum vinculi* can only be granted in view of a second marriage. Still, this legal monster seems to be preferable to the old, rigid law, or otherwise people would not contract "Dispensehen" in increasing number. It is to be hoped, however, that the present abnormal stage of development of the marriage and divorce law might arouse the Parliament to face questions more important to the general welfare than the time-honored democratic game of dividing the spoils, so that in not too distant a future the "Dispensehe", instead of a last refuge, may be considered a legal *curiosum* of by-gone days.