The Austrian Matrimonial Law – a Patchwork Pattern of History

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A. Introduction

The Austrian matrimonial law is a product of Austrian history. The provisions now in effect go back to three main periods: the definition of marriage (§ 44 of the General Civil Code, ABGB)[1] the provisions concerning the engagement (§§ 45, 46 of the ABGB), and most of the rules governing the marital property regime go back to the text of the ABGB[2] in its original form dated from 1 June 1811. The law of conclusion and dissolution of marriage is still governed by the German *Ehegesetz* (Matrimonial Law) of 1938[3] which was put into effect shortly after the *Anschluss* of the Austrian Republic by the Third Reich. Provisions that had been designed to execute the national-socialist racial ideology, such as the marriage impediment of § 4 of the Ehegesetz that prohibited mixed race marriage, were immediately eliminated after the end of the Second World War.[4] The remaining parts of the law were incorporated into the law of the Second Republic and some of them are still in effect.[5] The third main period started in the 1970s of the 20th century when the comprehensive family law reform was initiated by the socialist Christian Broda, Minister of Justice from 1970–

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1 § 44 of the ABGB defines 'marriage' as a 'contract through which two persons of different sex declare their will to live together in inseparable community, to procreate children, to educate them, and to give each other support'.

2 Kaiserliches Patent (Imperial Patent) of 1 June 1811, Justizgesetzsammlung 946.

3 Gesetz vom 6. Juli 1938 zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreichs und im übrigen Reichsgebiet, dRGBl 1938 I 807, kundgemacht für Österreich im GBlÖ 1938/244 (Statute of 6 July 1938 aiming at the harmonization of the law of marriage and the law of dissolution of marriage within Austria and the residual Reich, German Reich Law Gazette; dRGBl 1938 I 807, proclaimed for Austria, GBlÖ 1938/244).

4 Gesetz vom 26. Juni 1945 über Maßnahmen auf dem Gebiete des Eherechtes, des Personenstandsrechtes und des Erbgesundheitsrechtes, StGBl 1945/31 (Statute of 26 June 1945 relating to measures in the field of matrimonial law, law on civil status and law of eugenics, Federal Law Gazette; hereafter: StGBl).

5 See § 2 of the Rechts-Überleitungsgesetz (Act regulating the transition of laws), StGBl 1945/6.

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1983. Its main targets were the equality of rights for men and women, and the improvement of the legal status of the illegitimate child.[6] Since then family law has been under permanent review and reconstruction.[7] The most recent amendments are the Eherechts-Änderungsgesetz 1999[8] and the Kindschaftsrechts-Änderungsgesetz 2001,[9] which entered into force on 1 July 2001. Both statutes provide rather substantial modifications of the matrimonial law and the law of parent and child.

In family law, the Austrian legislator pursues a rather cautious policy of little steps aiming at the permanent adaptation of the law to the needs of society. In the past this rather conservative attitude had the positive effect that family law reform measures always could be adopted under unanimous, or at least high approval of all political parties and social groups concerned. There are, however, also negative effects. New approaches in lifestyle are very slowly incorporated into the law. Extra-marital cohabitation e.g., although very common especially with younger people without children and elder persons, has not been regulated by family law at all, yet. In general, extra-marital cohabitation has no legal effects comparable to those of marriage. Only in some particular situations the cohabitant is granted an equal status to the spouse.[10] As §

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[6] The amendments of the ABGB and the Ehegesetz were: BG über die Neuordnung der Rechtsstellung des unehelichen Kindes, BGBl 1970/312; BG, mit dem Bestimmungen über die Geschäftsfähigkeit und die Ehemündigkeit geändert werden, BGBl 1973/108; BG über die Neuordnung der persönlichen Rechtswirkungen der Ehe, BGBl 1975/412; BG über Änderungen des Ehegattenerbrechts, des Ehegüterrechts und des Ehescheidungsrechts, BGBl 1978/280, und BG über eine Änderung des Ehegesetzes, BGBl 1978/303.

[7] BG über Änderungen des Personen-, Ehe- und Kindschaftsrechts, BGBl 1983/566; BG, mit dem Bestimmungen zum Schutz des für einen Kredit mithaftenden Ehegatten getroffen werden, BGBl 1985/481; BG über eine Änderung der ehenamensrechtlichen Bestimmungen im allgemeinen bürgerlichen Gesetzbuch, BGBl 1986/97; Kindschaftsrecht-Änderungsgesetz, BGBl 1989/162; BG über die Gleichstellung des unehelichen Kindes im Erbrecht und die Sicherung der Ehewohnung für den überlebenden Ehegatten, BGBl 1989/656; BG, mit dem Regelungen über die medizinisch unterstützte Fortpflanzung getroffen sowie das allgemeine bürgerliche Gesetzbuch, das Ehegesetz und die Jurisdiktionsnorm geändert werden, BGBl 1992/275; Namensrechtsänderungsgesetz, BGBl 1995/25; BG zum Schutz vor Gewalt in der Familie, BGBl 1996/759. Most of these laws are amendments of the ABGB and the Ehegesetz.

[8] BGBl I 1999/125. See G. Hopf, and J. Stabentheiner, 'Das Eherechts-Änderungsgesetz 1999' in (1999) 54:22 and 23/24 *Österreichische Juristenzeitung*, pp. 821–829 and pp. 861–877; A. Deixler-Hübner, *Das Neue Eherecht* (Vienna, 1999); G. Hopf, 'Eherechts-Änderungsgesetz 1999 im Überblick' in *Eherechtsreform in Österreich* (S. Ferrari and G. Hopf (eds)) (Vienna, 2000) at pp. 1–35, and M. Hinteregger, 'Das Österreichische Eherechts-Änderungsgesetz 1999' in (2000) 1:4 *Die Praxis des Familienrechts*, pp. 643–658.

[9] BGBl I 2000/135.

[10] Important regulations are § 14(3) of the Mietrechtsgesetz (landlord and tenant law), § 2 of the Fortpflanzungsmedizingesetz (law on artificially assisted reproduction), and § 123 of the ASVG (Act on social insurance and security law) (§ 56 of the B-KUVG, § 83(8) of the GSVG). See also the explicit regulation of extra-marital cohabitation in procedural provisions (§ 32(1) of the Konkursordnung (Bankruptcy Act), § 4(1) of the Anfechtungsordnung (Law of avoidance)) and in criminal law (§ 72(2) of the StGB (Penal Code), § 203 of the StGB, § 152(1)((2)) of the StPO (Code of Criminal Procedure)).

44 of the ABGB defines marriage as a contract between two persons of different sex, it is a commonly-held opinion amongst legal scholars that the Austrian law does not allow the marriage of homosexuals.[11] Despite the developments in other European countries, there is no intention or even legal discussion regarding the admission of a registered partnership of homosexual partners. The lack of political will to engage in a comprehensive and sweeping reform of family law has also lead to a rather complicated and inconsistent family law. Austrian law, for instance, still provides for three different types of dissolution of marriage (nullity, annulment and divorce) with different legal consequences concerning the obligation to provide maintenance and regarding marital property. Also there are six different divorce regimes correlating with special maintenance provisions and different consequences for social security law.

B. The Austrian Law of Marriage

I. Conclusion of Marriage

1. Capacity to Marry and Equal Treatment of Men and Women

Until recently the capacity to marry was regulated differently for men and women. While men were only allowed to marry after having attained the age of 19, women were already able to marry at the age of 16.[12] This unequal treatment of men and women has now been abolished by the *Kindschaftsrechts-Änderungsgesetz* 2001 in effect since 1 July 2001. According to § 1 of the Ehegesetz as amended both, men and women, now have the capacity to marry after having reached the age of 18. Under certain circumstances this age limit can be reduced by the court to the age of 16.[13] This amendment of § 1 of the Ehegesetz eventually eliminates one of the three provisions that – despite all the efforts of the Austrian legislator in the last three decades – still have provided for direct sexual discrimination of men and women until now. The remaining discriminating regulations are § 180 of the ABGB that allows a lower minimum age for an adoption by a woman (28 years) than by a man (30 years), and § 23 of the Ehegesetz according to which a marriage can be declared void if its only purpose was to enable the woman to acquire her husband's nationality. This ground for nullity, however, is nowadays analogously applied by the courts if the situation is the other way round.[14]

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[11] G. Hopf and G. Kathrein, *Eherecht* (Vienna, 1997) § 44, margin number 3; M. Schwimann, in *Praxiskommentar zum Allgemeinen Bürgerlichen Gesetzbuch samt Nebengesetzen* Vol. 1 (M. Schwimann (ed.)) (Vienna, 1997, 2nd ed.) § 44, margin number 2.

[12] § 1 of the Ehegesetz as amended by BGBl 1973/108.

[13] § 1(2) of the Ehegesetz as amended by BGBl I 2000/135.

[14] Oberster Gerichtshof (Austrian Supreme Court; hereafter OGH) 24 November 1988, **Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- (und Justizverwaltungs-)sachen** (hereafter: SZ) 61/262.

2. *Preconditions of Marriage and Grounds for Nullity and Annulment of Marriage*

Marriage is concluded by a civil contract. The conclusion, the content and the dissolution of this contract, however, are not regulated by general contract law, but by the special rules of matrimonial law that usually have mandatory character. The preconditions of marriage are the minimum age of 18,[15] at least limited legal capacity[16], and the lack of marriage impediments. Austrian matrimonial law recognises only three marriage impediments: namely close relationship,[17] bigamy[18] and adoption.[19]

§ 15 of the Ehegesetz states that civil marriage is mandatory in Austria. That is to say that a marriage can only be lawfully concluded by a public registrar. The contraction of a marriage before a priest within the domestic territory has no legal effects ('*Nichtehe*'). A religious marriage by an Austrian citizen performed abroad, however, can be recognized by law, if its contraction was in accordance with the local formal requirements.[20] Details concerning the conclusion of marriage are provided by § 15 and § 17 of the Ehegesetz and § 24 and § 47 of the *Personenstandsgesetz* (Law on Civil Status).[21]

Once a marriage is concluded, it can only be dissolved by the death of one of the spouses or by a court decree. Austrian marital law has a comprehensive system of rules regarding the dissolution of marriage. Certain serious defects, such as the violation of one of the formal requirements provided by § 17 of the Ehegesetz,[22] full legal incapacity of one of the spouses,[23] marriage with the sole purpose to acquire the nationality or the name of the other spouse,[24] violation of the marriage impediment of bigamy[25] or close relationship,[26] constitute a *ground for nullity*. The nullity of marriage has to be asserted by an action filed either by one of the spouses or by the public prosecutor.[27] All grounds for nullity, except bigamy and close relationship,

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[15] § 1 of the Ehegesetz as amended by the Kindschaftsrechts-Änderungsgesetz 2001.

[16] § 2 and § 3 of the Ehegesetz. Persons without legal capacity are children of less than 7 years and mentally disordered persons. Persons with limited legal capacity are minors over the age of 7 years and persons placed under tutelage due to mental disorder: § 102(2) of the Ehegesetz. The Kindschaftsrechts-Änderungsgesetz 2001 now reduces the majority age from 19 to 18 years.

[17] § 6 of the Ehegesetz: relationship in direct line and between siblings.

[18] § 8 of the Ehegesetz.

[19] § 10 of the Ehegesetz.

[20] § 16(2) of the Internationales Privatrechts-Gesetz (Act on Conflict of Laws; IPRG).

[21] BGBl 1983/60.

[22] § 21 of the Ehegesetz. The marriage by an agent or without the simultaneous presence of both spouses before the registrar or the fact that one of the spouses subjects the marriage to a condition or a time limit would be considered as serious defects.

[23] § 22 of the Ehegesetz.

[24] § 23 of the Ehegesetz.

[25] § 24 of the Ehegesetz.

[26] § 25 of the Ehegesetz.

[27] For further details see § 28 of the Ehegesetz.

can be cured either by lapse of time or in the case of legal incapacity by confirmation of the incompetent spouse after having attained legal capacity. In general, the declaration of nullity operates *ex tunc*. This principle, however, is applied only rarely. The spouse who has adopted the name of the other loses this name from the date when the decree becomes final. With regard to maintenance and the dissolution of marriage settlements ('*Ehepakte*') the consequences of nullity depend on the fact whether one or both spouses knew the ground for nullity. If one of the spouses did not know the ground for nullity, he or she can plead for the application of divorce law. Divorce law is also applied if both spouses were unaware of the ground for nullity.[28] Children always stay legitimate. They keep their family name and custody is assigned according to divorce law.

Certain grounds enumerated in § 35 to § 39 of the Ehegesetz can entitle one of the spouses to file a petition for *annulment* of the marriage.[29] Grounds for annulment are defects of intent which existed when marriage was contracted, especially error of one spouse regarding the identity or personal characteristics of the other party.[30] All grounds for annulment can be cured and their assertion is limited in time.[31] The annulment of marriage has no retroactive effect. The consequences with regard to maintenance, marital property and custody are the same as after divorce.[32] As the right to maintenance after divorce strongly depends on the establishment of fault on the side of the other spouse, there are also specific rules concerning the assignment of fault in case of annulment.[33]

II. Legal Effects of Marriage

1. Family Name

The question of family name has been a hot issue during the last decades. In 1975[34] the law enabled the spouses for the first time to choose the wife's name as common family name. Without such an agreement the wife received the husband's name upon marriage – until then the only possible option. The new § 93 of the ABGB, however, was declared void by the Constitutional Court in 1985.[35] The Court found it to be a

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[28] For further details see § 31 of the Ehegesetz and M. Hinteregger, *Familienrecht* (Vienna, 2001, 2nd ed.) at pp. 45–46.

[29] The case of remarriage after a false official declaration of death underlies specific rules: § 43 and § 44 of the Ehegesetz.

[30] See § 36 and § 37 of the Ehegesetz.

[31] The time limit is one year: § 40 of the Ehegesetz.

[32] § 42(1) of the Ehegesetz.

[33] § 42(2) of the Ehegesetz. For further details see M. Hinteregger, *Familienrecht* (Vienna, 2001, 2nd ed.) at p. 48.

[34] BG über die Neuordnung der persönlichen Rechtswirkungen der Ehe, BGBl 1975/412.

[35] Verfassungsgerichtshof (Austrian Constitutional Court; hereafter: VfGH) 5 March 1985, **Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes** (hereafter: VfSlg) 10.384.

violation of the equality principle and therefore to be unconstitutional that the law allowed only the wife to add her maiden name behind the common family name, if she received her husband's name for lack of an agreement. The then revised § 93 of the ABGB[36] was again amended in 1995.[37]

The new § 93 of the ABGB, albeit very complicated in its wording, now offers many options. The spouses can formally declare in front of the registrar whether they want the wife's or the husband's name as common family name. The one whose name was not chosen as family name has the right to declare that he or she wants to put his or her name either before or after the common name. This person is now obliged to bear this double name all the time. Under the laws of 1975 and 1985 this was only a right, not a duty. Without such an explicit choice of names the law still provides that the wife receives her husband's name. In this case the wife is entitled to declare that she wishes to keep her own name. If she makes use of this privilege, husband and wife have different names, and they have to decide at least upon marriage which of the two names will be passed on to their prospective children. The construction of a double name for the children made up of the two names of the parents is explicitly not allowed. In the absence of such a declaration the law provides that the children receive the father's name.

In case of dissolution of the marriage by annulment or divorce, it is up to the spouse who bears the name of the other to decide whether to keep this name. If not, he or she can formally declare before the registrar to reassume a former name. The name of a former spouse, however, can only be assumed, if there is issue from this marriage.[38]

The new law regarding the family name gives rise to many technical problems. It is therefore widely discussed with vigour in literature.[39] The preferential treatment of the man's name by the legislator is being criticized especially by female authors.[40] The Austrian Constitutional Court,[41] however, has already declared that it holds the

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[36] Ehenamensrechtsänderungsgesetz, BGBl 1986/97.

[37] Namensrechtsänderungsgesetz, BGBl 1995/25.

[38] § 93a of the ABGB.

[39] See J. Hintermüller, 'Namensrechtsänderungsgesetz – Kurzinformation über die richtigsten Neuerungen für den Praktiker' in (1995) 5 *Österreichisches Standesamt*, pp. 46–48; W. Zeyringer, 'Neuregelung des Ehe- und Kindesnamensrechts' in (1995) 27:3 *Der Österreichische Amtsvormund*, pp. 76–80; W. Zeyringer, 'Das Namensrechtsänderungsgesetz' in (1995) 2 *Österreichisches Standesamt*, pp. 14–23; W. Zeyringer, 'Zweifelsfragen im Zusammenhang mit dem Namensrechtsänderungsgesetz' in (1995) 7:8 *Österreichisches Standesamt*, pp. 63–70; E. Bernat and H. Jesser, 'Meier & Müller, Meier-Müller oder Müller-Meier: Neue Grundsätze im Namensrecht' in (1995–1996) 6:1 *Juristische Ausbildung und Praxisvorbereitung*, pp. 54–61; I. Mottl, 'Ein Jahr neues Namensrecht' in (1996) 128:12 *Österreichische Notariats-Zeitung*, pp. 321–335.

[40] U. Aichhorn and E. Furgler, 'Das Familiennamensrecht' in *Frauen und Recht* (U. Aichhorn (ed.)) (Vienna, 1997) pp. 293–329, at 322–328; I. Mottl, 'Der Name der Ehefrau' in *Recht, Geschlecht und Gerechtigkeit* (U. Floßmann (ed.)) (Linz, 1997) pp. 217–233, at pp. 232–233.

[41] VfGH 18 December 1993, **Juristische Blätter** (hereafter: JBl) 1994, p. 326, annotated by **H. Pichler**, with regard to § 93 of the ABGB as amended by the Ehenamensrechtsänderungsgesetz, BGBl 1986/97. Differently the German Federal Constitutional Court which

opinion that such a subsidiary rule is no violation of the equality principle and therefore not unconstitutional.

2. *Organization of Marital Life*

The legal effects of marriage are regulated in § 89 to § 100 of the ABGB.[42] § 89 of the ABGB generally states that husband and wife have equal rights and duties. According to § 90 of the ABGB the spouses are obliged to live in a comprehensive conjugal community. They shall live together, be faithful, behave decently and support each other. Under certain conditions one spouse has also to assist the other in his or her enterprise, an obligation that has now become optional.[43] The organization of conjugal life is subject to the disposition of the spouses. According to § 91 of the ABGB as amended by the Eherechts-Änderungsgesetz 1999 the assignment of duties has to be fair and balanced ('*Gleichbeteiligungsgrundsatz*'). If both spouses have a job, housework must be shared. If one of the spouses is not employed, he or she is obliged to do the housework, and the other has to help out, if that can be reasonably expected.[44] Because of conflicting opinions between courts and legal scholars on this topic[45] the Eherechts-Änderungsgesetz 1999 also provided for a sophisticated regulation by which a spouse can deviate from such an agreement.[46] The violation of these duties is only sanctioned in divorce law. They can entitle the faultless party to file a petition for a fault-based divorce.[47]

There are special claims provided, for instance if one spouse wants to move the couple's residence without consent of the other, or if one spouse wants to leave the conjugal household.[48] Violence from one spouse entitles the other to require his or her removal from the household by police and court intervention, respectively.[49] § 97 of the ABGB provides for the protection of the housing needs

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declared § 1335 II(2) of the Civil Code (BGB) as void because of such a subsidiary rule: 5 March 1991, *Neue Juristische Wochenschrift* 1991, p. 1602.

[42] As amended by the BG über die persönlichen Rechtswirkungen der Ehe 1975, and the Eherechts-Änderungsgesetz 1999.

[43] § 90(2) of the ABGB as amended by the Eherechts-Änderungsgesetz 1999.

[44] § 95 of the ABGB as amended by the Eherechts-Änderungsgesetz 1999.

[45] F. Kerschner, 'Vereinbarungen der Ehegatten über die Gestaltung der ehelichen Lebensgemeinschaft' in **Familie und Recht** (F. Harrer and R. Zitta (eds)) (Vienna, 1992) at pp. 391–417; M. Schwimann, in *Praxiskommentar zum Allgemeinen Bürgerlichen Gesetzbuch samt Nebengesetzen* Vol. 1 (M. Schwimann (ed.)) (Vienna, 1997, 2nd ed.) § 91, margin number 5; OGH 29 January 1991, JBl 1991, p. 714, annotated by S. Ferrari-Hofmann-Wellenhof; OGH 26 February 1997, JBl 1998, p. 245, annotated by Ch. Holzner.

[46] See § 91(2) of the ABGB. For further details see M. Hinteregger, *Familienrecht* (Vienna, 2001, 2nd ed.) at pp. 56–57.

[47] See Section III.1 ante.

[48] § 92 of the ABGB.

[49] § 382b–d of the Exekutionsordnung (law of execution), § 38a of the Sicherheitspolizeigesetz (law regulating the Police Force) as amended by the Gewaltschutzgesetz, BGBl 1996/759.

of one spouse against the other. These claims are already enforceable by legal proceedings during marriage.

3. Maintenance and Marital Property Law

In general, both spouses are equally obliged to make their best efforts in order to cover the costs of living. According to § 94 of the ABGB there are three types of maintenance. Entitlement to maintenance is provided for the spouse who runs or who ran the conjugal household before separation, for the spouse who has a lower income than the other, and for the spouse who is unable to provide for him/herself. Until recently, courts held the opinion that maintenance was to be furnished *in natura*, if the spouses lived together. Money payment could only be asserted, if the obliged person did not meet his or her obligations or if the performance in kind was unreasonable for the claimant.[50] In order to improve the situation of the spouse without an own income the Eherechts-Änderungsgesetz 1999[51] now explicitly states that the dependent spouse is always entitled to assert maintenance payment in money. This request may only be denied if it causes undue hardship for the maintenance debtor. According to the explanatory commentaries[52] this may be the case, if the debtor cannot afford payment in money, or if performance in kind is adequate and reasonable for the claimant or disproportionately cheaper for the debtor.

The amount of the maintenance depends both on the needs of the dependent and the financial capacity of the debtor. In order to calculate the maintenance courts usually use certain *percentage rates*. According to the opinion of the courts the spouse who runs the household is entitled to 33 per cent of the income of the other, and the spouse with the lower income is entitled to 40 per cent of both incomes.[53] If the debtor must also meet maintenance claims of a child, the spouse's amount is reduced by 4 per cent per child.

This calculation has been criticized by several authors,[54] who note that it places the

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[50] OGH 14 September 1977, **Sammlung Ehe- und Familienrechtlicher Entscheidungen** (hereafter: EFSlg) 28.566; OGH 11 July 1996, **Evidenzblatt der Rechtsmittelentscheidungen** (hereafter: EvBl) 1997/10; OGH 18 December 1998, JBl 1998, p. 311; J. Stabentheiner, in *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* Vol. 1 (P. Rummel (ed.)) (Vienna, 2000, 3rd ed.) at § 94, margin number 12; W. Thöni, 'Geldunterhalt und Naturalunterhalt' in *Familie und Recht* (F. Harrer and R. Zitta (eds)) (Vienna, 1992) at p. 10; G. Hopf and G. Kathrein, *Eherecht* (Vienna, 1997) at § 94, margin number 15; M. Schwimann, in *Praxiskommentar zum Allgemeinen Bürgerlichen Gesetzbuch samt Nebengesetzen* Vol. 1 (M. Schwimann (ed.)) (Vienna, 1997, 2nd ed.) at § 94, margin number 59.

[51] § 94(3) as amended by the Eherechts-Änderungsgesetz 1999.

[52] 1653 Beilagen zu den stenographischen Protokollen des Nationalrates (hereafter: BlgNR) 20. Gesetzgebungsperiode (hereafter: GP) p. 22.

[53] OGH 26 September 1991, SZ 64/135; OGH 18 March 1992, EFSlg 67.682 etc.

[54] Critical H. Lackner, 'Gleichbehandlung im Unterhaltsanspruch der Ehegatten?' in (1992) 70:3 *Ostereichsiche Richterzeitung*, p. 62; F. Kerschner, 'Gesellschaftspolitische Tendenzen in der

spouse who reduces his or her working hours or career expectations in order to care for the household and the children systematically at disadvantage. There are no reasons that can justify why the dependent without an income is conceded only one third of the income of the other. If both spouses have earnings, the spouse with the lower income will only get maintenance from the other, if the difference between the two incomes is high enough. This unfavourable position of the spouse with no or a relatively low income is further aggravated by the fact that the Austrian law provides for *separation of goods* as the statutory marital property regime.[55] Consequently, usually the spouse with the sole or higher income becomes the owner of the goods purchased during marriage. The combination of restricted maintenance and separation of goods as marital property regime puts the spouse with no or low income economically in a weaker position. During marriage he or she has no right to the marital surplus. Except for the home, where § 97 of the ABGB provides for some restrictions, the other spouse can freely dispose of all the goods purchased in his or her name, and after his or her death they are part of his or her estate. In this case the surviving spouse can only participate in the marital surplus by succession.[56] The situation only becomes different when the marriage is broken, as the marital surplus is equally divided between the two spouses after dissolution of the marriage *inter vivos*.[57]

This rather unfavourable situation could be altered by a marriage contract. In Austria, however, contractual regulations of marital property rights are not very common, except in rural areas where spouses frequently stipulate community of property with regard to farms. It would be up to the legal practice to create appropriate marital property regimes. The existing statutory regulations regarding marital property would be no impediment, since Austrian law unlike other countries does not restrict contractual freedom in this area. For the development of such contractual rules it would, however, be of no help either, as it consists of obsolete provisions regarding the agrarian world of the 18th century that were already out of use when the ABGB came into effect in the year 1811.[58]

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Zivilrechtsjudikatur' in (1995) 73:12 *Österreichische Richterzeitung*, pp. 271–275, at p. 272; M. (Gimpel-) Hinteregger, 'Reformnotwendigkeiten im österreichischen Ehe- und Scheidungsrecht' in *Recht, Geschlecht und Gerechtigkeit* (U. Floßmann (ed.)) (Linz, 1997) pp. 193–216, at pp. 198–203.

55 § 1237 of the ABGB.

56 According to § 758 of the ABGB the surviving spouse is entitled on intestacy to household goods and has a right to continue to live in the marital home. § 757 of the ABGB also provides for a statutory right to the estate of the deceased. If there are descendants of the deceased, the surviving spouse inherits one third of the estate. With parents or their descendants the share is 1/2, with grandparents 2/3. If the deceased has appointed somebody else his/her heir, the surviving spouse has a right to a compulsory portion of half of the intestate share.

57 For further details see Section III.4 post.

58 See §§ 1218–1258 of the ABGB, which deal with very specific aspects of the matrimonial property, such as dowry etc.

III. Divorce Law and Legal Consequences of Divorce

1. Types of Divorce

The Austrian law of divorce is highly complicated. It distinguishes between two main types of divorce, namely divorce for fault and divorce for other grounds. According to § 49 of the Ehegesetz[59] a spouse can petition for divorce, if the other has culpably caused an irretrievable breakdown of marriage by a dishonourable or immoral conduct or by committing a grave violation of marital duties, such as adultery, violence or mental cruelty. Divorce for other grounds comprises several very different types of divorce. § 50, § 51 and § 52 of the Ehegesetz that provide for divorce because of breakdown of the marriage due to mental disorder, or mental disease, or infectious or disgusting illness of one spouse are applied very rarely. Of general importance are § 55 of the Ehegesetz that provides for divorce after three respective six years of separation, and § 55a of the Ehegesetz, the divorce by mutual agreement, which nowadays is the most common ground for divorce for being the easiest and cheapest way of a dissolution of marriage. It only requires a joint application of both spouses in which they declare that their marriage is irretrievably broken, and that they have been separated for at least six months, and a written agreement in which the spouses settle the legal consequences of divorce, such as spousal maintenance, the separation of marital property, and custody and maintenance for the children.

All the different types of divorce can lead to different maintenance claims and different consequences in social security law. Only the rules regarding the family name[60] and the separation of marital property are the same for all types of divorce.

2. Maintenance

In general, the spouses are free to settle the question of maintenance by contract (§ 80 of the Ehegesetz). With respect to the divorce by mutual agreement such a contractual agreement is even a prerequisite for divorce.[61] Without a settlement the right to maintenance depends on the type of divorce. If the marriage is dissolved according to § 49 of the Ehegesetz, the spouse who is at fault is obliged to maintain the other if he or she is not able to support him or herself (§ 66 and § 67 of the Ehegesetz). These provisions also apply for divorces on the basis of §§ 50–52 of the Ehegesetz, if the claimant is at fault (§ 69(1) of the Ehegesetz). If both spouses are equally at fault, the spouse who cannot support him or herself may only claim for a contribution to maintenance in order to cover a part of the costs of living.[62] If the marriage is dissolved

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[59] As amended by the Eherechts-Änderungsgesetz 1999. Until then the Ehegesetz provided three different grounds for fault-based divorce: adultery (§ 47 of the Ehegesetz), refusal to procreate children ('Verweigerung der Fortpflanzung', § 48 of the Ehegesetz) and the other grave violation of marital duties (§ 49 of the Ehegesetz).

[60] § 93a of the ABGB.

[61] § 55a(2) of the Ehegesetz.

[62] § 68 of the Ehegesetz.

according to §§ 50–52 or § 55 of the Ehegesetz without a fault *dictum*, the defendant may claim maintenance from the petitioner for reasons of equity (§ 69(3) of the Ehegesetz). § 69(2) of the Ehegesetz provides for a special maintenance claim, especially designated to support former housewives who were left by their husband and are divorced against their will. These spouses are entitled to maintenance as if they were still married. As the preconditions – petition for divorce by the other spouse, fault *dictum* to the detriment of this spouse and at least three years of separation – are rather demanding this provision is not very often applied in practice.

Maintenance is suspended, if the dependent lives in an extra-marital cohabitation[63] and terminated if he or she remarries (§ 75 of the Ehegesetz), or dies (§ 77 of the Ehegesetz), or if he or she leads an immoral or dishonourable life, or if he or she is guilty of a serious infringement of the interests of the maintenance debtor (§ 74 of the Ehegesetz). A divorced spouse who cannot support him or herself because of his or her own fault is only entitled to maintenance support at the subsistence level (§ 73 of the Ehegesetz).

This already rather complicated system was supplemented by three further maintenance provisions[64] by the Eherechts-Änderungsgesetz 1999. The most important regulation is § 68a of the Ehegesetz that provides for two new types of claims. According to § 68a(1) of the Ehegesetz a divorced spouse is entitled to maintenance, if he or she cannot be expected to support him or herself because he or she has to care for a common child. § 68(2) of the Ehegesetz provides for maintenance for the spouse whose inability to support him or herself was caused by the organization of marital life, e.g. by the exclusive assumption of household and childcare duties. Both maintenance claims are irrespective of a fault *dictum* in the divorce decree. Thus, even the solely or predominantly guilty spouse or the spouse who him or herself petitioned for divorce according to §§ 50–52 or § 55 of the Ehegesetz[65] may be entitled to this type of maintenance claim. Both claims, however, are limited in time[66] and in amount. Maintenance under § 68a of the Ehegesetz is restricted to the necessary needs, while maintenance on the basis of § 66 of the

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[63] OGH 19 May 1954, SZ 27/134; OGH 29 March 1977, EFSlg 29.651; OGH 30 January 1991, JBl 1991, p. 589; OGH 28 October 1997, EvBl 1998/54. Critical B. Verschraegen, '"Samenleven Buiten Huwelijk", "Cohabitation" oder "die nichteheliche Lebensgemeinschaft" in niederländischer, englischer und österreichischer Theorie und Praxis' in (1983) 24 *Zeitschrift für Rechtsvergleichung*, pp. 85–141, at p. 131; M. (Gimpel-) Hinteregger, 'Der Unterhaltsanspruch des geschiedenen Ehegatten bei Eingehen einer Lebensgemeinschaft' in *Familie und Recht* (F. Harrer and R. Zitta (eds)) (Vienna, 1992) at pp. 633–646; A. Lammer, 'Zum "Ruhen" des Unterhaltsanspruchs bei Eingehen einer Lebensgemeinschaft' in (1999) 54:2 *Österreichische Juristenzeitung*, pp. 53–64.

[64] § 68a, § 69a and § 69b of the Ehegesetz.

[65] § 69b of the Ehegesetz as amended by the Eherechts-Änderungsgesetz 1999.

[66] Maintenance according to § 68a(1) of the Ehegesetz is limited with the fifth birthday of the child. The time limit for maintenance according to § 68a(2) of the Ehegesetz is usually three years. Both maintenance claims can be extended, usually for periods of three years. Under exceptional circumstances it is even unlimited.

Ehegesetz must be reasonable according to the debtor's standard of living. For fear of abuse, the parliament[67] has provided a comprehensive equity clause in § 68a(3) of the Ehegesetz.

3. Social Security Law

During marriage, spouses without a compulsorily insurable employment are jointly insured with the other spouse in health insurance and in social security pension insurance. Accident insurance for housekeepers is not provided for by Austrian social security law.

After divorce, the joint health insurance is finished by law and the divorced spouse has to care for insurance by him or herself. An exception is only provided for the faultless divorcee of a civil servant.[68]

If the surviving spouse is still legally entitled to maintenance, his or her survivor's benefits in accident insurance and social security pension insurance may remain valid despite divorce.[69] The survivor's pension is of the same amount as the maintenance obligation of the deceased spouse,[70] except for the maintenance according to § 69(2) of the Ehegesetz where the surviving spouse is entitled to the full survivor's pension if certain further conditions are met.[71] A splitting of accrued pension rights after divorce is not provided for.

4. Separation of Marital Property

In case of divorce, annulment or nullity of marriage the marital surplus is divided between the former spouses independently from the formal ownership. This claim, if not settled by contractual agreement, can be legally enforced within one year from the date when the divorce decree became final. It was created by BGBl 1978/280, and is regulated by §§ 81–98 of the Ehegesetz. The particularity of the Austrian solution lies in the fact that the claim does not only aim at a cash settlement between the former spouses but at the surrender of possession of the goods acquired during marriage. Despite many problems that had lead to numerous court decisions and critical articles[72] these provisions have proved effective.

5. Mediation

During the last years mediation has become a popular method of conflict management especially in divorce and custody matters. In order to promote the

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[67] Justizausschussbericht (JAB) 1926 BlgNR 20. GP, pp. 2–4.
[68] § 56(7) of the B-KUVG.
[69] § 258 of the ASVG, § 136 of the GSVG, § 127 of the BSVG.
[70] § 264 of the ASVG, § 136 of the BSVG, § 145 of the GSVG.
[71] § 264(10) of the ASVG, § 136(10) of the BSVG, § 145(10) of the GSVG.
[72] H. Pichler, in *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* Vol. 1 (P. Rummel (ed.)) (Vienna, 1992, 2nd ed.) at § 81–§ 98.

acceptance and to improve the functioning of this new instrument the Eherechts-Änderungsgesetz 1999 and the Kindschaftsrechts-Änderungsgesetz 2001 have now regulated some crucial issues. The formation and the occupation of a mediator, however, has not been regulated by special laws so far. According to § 99 of the Ehegesetz (as amended by the Eherechts-Änderungsgesetz 1999) and Article XVI of the Kindschaftsrechts-Änderungsgesetz 2001 the mediator is obliged to discretion regarding all the information he or she was entrusted with during the process of mediation. This obligation is even subject to criminal prosecution.[73] With regard to such information the mediator must not give evidence in civil and criminal proceedings.[74]

Mediation is not provided by the courts themselves. In family matters, though, courts are obliged to inform the parties of such an option.[75] In order to enable the parties to make use of mediation the law provides that the commencement and the running of prescription or other time limits are suspended during the mediation process.[76]

All these provisions only apply to professional mediators with specialized training. Conciliation efforts by friends or family members are not affected.

6. *Custody*

With regard to legitimate children both, father and mother, are entitled to custody of the child during marriage (§ 144 of the ABGB). For an illegitimate child the law determines the mother as custodial parent (§ 166 of the ABGB). Upon joint agreement both parents can be awarded joint custody (§ 167 of the ABGB as amended by the Kindschaftsrechts-Änderungsgesetz 2001). Custody includes the right and duty to care for the child and to determine his or her education, the administration of the child's property, and the legal representation (§ 144 of the ABGB).

After dissolution of marriage the law used to provide that custody is to be awarded to one parent alone (§ 177 of the ABGB). Upon divorce courts were obliged to award custody to either father or mother. Parents were allowed to present a proposal to the court which the court had to follow, if it was in the best interest of the child. The parent who was not awarded custody was restricted to a visitation right, and the right to be informed and to comment with regard to important matters concerning the child (§ 178 of the ABGB). Joint custody despite divorce was only possible if both parents continued to live in the same household.

§ 177 of the ABGB was heavily criticised by legal scholarship[77] and two times

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[73] § 99(2) of the Ehegesetz and Art. XVI § 2 of the Kindschaftsrechts-Änderungsgesetz 2001.
[74] § 320 (141) of the ZPO, § 152(1)((5)) of the StPO.
[75] § 460((7a)) of the ZPO, § 182e(2), § 222(1) and § 23 (2) of the Außerstreitgesetz.
[76] § 99 of the Ehegesetz and Art. XVI of the Kindschaftsrechts-Änderungsgesetz 2001.
[77] F. Harrer, 'Pflege, Erziehung und Verwaltung des Vermögens des Kindes nach Scheidung der Elternehe' in (1984) 39:17 *Österreichische Juristenzeitung*, pp. 452–457; H. Pichler,

under consideration by the Constitutional Court. In both decisions, though, the Constitutional Court came to the conclusion that § 177 of the ABGB was not unconstitutional.[78]

The Kindschaftsrechts-Änderungsgesetz 2001 now provides for a radical change in favour of joint custody. Parents of an illegitimate child, as well as divorced parents, can now be awarded joint custody upon their request regardless of a common household with the child.[79] In both cases parents need to present the court a joint proposal concerning the main residence of the child. The court has to approve of the proposal, if it is in the best interests of the child. The parent with whom the child has his or her main residence always must have full custody.[80] The custody of the other parent may be restricted.[81] It is hereby important to stress that joint custody does not include an obligation to joint decision making. Even in case of joint custody each parent can still decide alone for the child. Only in very important matters the approval of the other parent or sometimes also the court is needed.[82]

Upon divorce parents can still decide to award custody to one parent alone.

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cont.

'Bestehen verfassungsrechtliche Bedenken gegen die alleinige Zuteilung der Obsorge an einen Elternteil nach Scheidung (Trennung)?' in (1989) 21:4 *Der Österreichische Amtsvormund*, pp. 115–118; D. Henrich, 'Auch weiterhin kein gemeinsames Sorgerecht Geschiedener Eltern in Österreich' in (1990) 37:5 *Deutsche Zeitschrift für das gesamte Familienrecht*, pp. 483–484; H. Stolzlechner, 'Die Übertragung der Obsorge auf einen Elternteil nach Eheauflösung bzw nach einer nicht bloß vorübergehenden Trennung der Eltern (§ 177 ABGB) im Lichte des Art 8 MRK sowie des Art 5 des 7. Zprot' in **Familie und Recht** (F. Harrer and R. Zitta (eds)) (Vienna, 1992) at pp. 785–798; S. Ferrari-Hofmann-Wellenhof, ***Zum Obsorgerecht bei Trennung der Eltern und bei Scheidung, Aufhebung oder Nichtigerklärung der Ehe Festschrift für Gunter Wesener*** (G. Klingenberg, J. Rainer, H. Stiegler eds.), in (Graz, 1992) at pp. 119–129; A. Deixler-Hübner, 'Die Obsorgerechtsregelung nach der Ehescheidung' in (1993) 48:21 *Österreichische Juristenzeitung*, pp. 722–728; S. Engel, 'Probleme der Obsorgezuteilung bei Trennung der Eltern' in (1994) 49:16 *Österreichische Juristenzeitung*, pp. 542–549; B. Verschraegen, 'Gemeinsame Obsorge – Ausländisches Recht und UN-Kinderrechtekonvention' in (1996) 51:7 *Österreichische Juristenzeitung*, pp. 257–264; H. Pichler, 'Probleme der gemeinsamen Obsorge' in (1996) 51:3 *Österreichische Juristenzeitung*, pp. 92–97; C. Kolbitsch, 'Wider die gemeinsame Obsorge nach Scheidung' in (1997) 52:9 *Österreichische Juristenzeitung*, pp. 326–328; B. Gründler, 'Die Neuregelung einer Teilnahme an der Obsorge nach Trennung und Scheidung der Eltern durch den Entwurf des KindRÄG 1999' in (2000) 55:9 *Österreichische Juristenzeitung*, pp. 332–343.

78 VfGH 22 June 1989, VfSlg 12.103; VfGH 10 October 1995, VfSlg 14.301.

79 § 167 and § 177 of the ABGB in force since 1 July 2001.

80 See § 144 of the ABGB.

81 E.g. only legal representation or property administration.

82 The approval of the other parent is needed in the following matters: change of name, joining a church or a religious community or secession from a church, placement of the child in foster care, acquisition or renunciation of the citizenship, premature termination of an apprenticeship or a vocational training or contract of employment, acknowledgement of paternity (§ 154(2) of the ABGB). Approval from the other parent and the court is needed for extraordinary measures of property management (§ 154(3) of the ABGB).

Custody of one parent has to be awarded by the court, if the parents cannot make a decision concerning the child's main residence in time or if the parents' proposal is not in the best interest of the child.[83] If joint custody has been awarded but does not turn out well, each parent has the right to apply for a termination of joint custody. In this case the court must award custody to one parent alone according to the child's best interests.[84]

C. Conclusions

Austrian matrimonial law incorporates all the concepts of a modern and functional law of marriage. The cautious attitude of problem-orientated adaptation during the last decades, however, has lead to an inconsistent and immensely complicated matrimonial law. In this author's opinion, the Austrian matrimonial law is now in urgent need of a comprehensive and thorough revision. The first aim of such a reform should be the elimination of the German Ehegesetz. Matrimonial law should again be incorporated into the ABGB as a whole. Many provisions that have proved effective, like the provisions regarding the conclusion of marriage, most of the regulations concerning the nullity of marriage or the separation of marital property in case of divorce could be maintained. Obsolete provisions, like the annulment of marriage[85] or the antiquated provisions of the ABGB concerning matrimonial property[86] should be abolished. Divorce law and the corresponding maintenance provisions need to be radically simplified. There is no reason to have so many different types of divorce and even more types of maintenance claims, all different in preconditions and amount. The dominance of fault in divorce should also be reconsidered, as fault-based divorce has become an exception in European divorce laws in the last years. Such a comprehensive revision of matrimonial law must also include a reasonable solution of the position of the housekeeper in social security law.

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[84] § 177a(2) of the ABGB as amended by the Kindschaftsrechts-Änderungsgesetz 2001.
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