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The Controversy Surrounding Marriage Law in 20th Century Austria with a Special Emphasis on Constitutional Court Decisions Regarding the 'Dispensation Marriages'*

Abstract

In Austria, the concept of civil marriage and of a divorce irrespective of the spouses' religious affiliations had not been introduced earlier than 1938. Previously it aroused a lot of controversy between the Social Democratic and Christian Social Party without any hope of solution. In this situation, the Social Democratic Governors of some Austrian Lands, particularly of the Land of Vienna, applied a section of the General Civil Code to grant a dispensation from the impediment of *ligamen* (§ 83 ABGB), which meant that they allowed an already married person to remarry. Many juristic problems resulted from this practice, and the attempt of the Austrian Constitutional Court to solve the problem as a "conflict of jurisdiction" made the dispute even worse. In 1938, the Nazi regime introduced the concept of civil marriage, and of divorcibility of marriages also in Austria. The Marriage Act of 1938 has remained valid in Austria to this day.

Key words: Austrian Constitutional Court, Austrian marriage law, dispensation marriages, Hans Kelsen, conflict of jurisdictions.

1. The initial situation

The conflict between the state and the church regarding the public sphere in post-1918 Austria focused primarily on two areas: school laws[1] and marriage laws. These two legal fields shared the characteristic that they had not been fully wrested from the church during the period of Maria Theresa and Joseph II. Instead, the state and the church had entered into a peculiar, co-operative relationship which was not devoid of conflict, and

* Translated into English by Roman Pils, DipTrans.

[1] On school law in the First Republic: Th. Olechowski, *Die behördliche Einstellung der „Pädagogischen Blätter" 1936. Schulpolitik, Presserecht und Verwaltungsgerichtsbarkeit in der Zeit des Autoritären Ständestaates*, "Beiträge zur Rechtsgeschichte Österreichs" 2011, No. 1.

where sometimes the one, then the other party got the upper hand. The Catholic faith of the ruling dynasty, however, meant that the potential for conflict was alleviated at least to an extent where the system of co-operation itself was not challenged. This only changed when Austria abandoned the monarchic principle and the republic was proclaimed in 1918.[2]

In regard to marriage law, specifically, the situation in Austria in 1918 was, by and large, identical with that created more than a hundred years earlier by Emperor Joseph II's Marriage Patent of 1783. The marriage law provisions were part of the General Civil Code (*Allgemeines bürgerliches Gesetzbuch*, ABGB) of 1811 and thus formally state law. However, in terms of their substantial content they incorporated the requirements of the different religious denominations, i.e. Catholic and non-Catholic Christians as well as Jews.[3] This incorporation of denominational requirements was firstly relevant to the conclusion of marriages, which had to take place before a cleric, "whether his denomination, according to the difference of the religion, be parson, pastor or otherwise" (section 75 ABGB); only in exceptional cases could a couple marry before a secular registrar.[4] Secondly, it also meant that a Catholic marriage could only be ended by death – even if only one of the partners was a Catholic (section 111 ABGB). While in certain situations it was possible to obtain a 'separation from bed and board', this did not allow either of the former spouses to marry a third person for as long as the other remained alive ('impediment of ligamen').[5] This legal situation remained unchanged during the First Austrian Republic, i.e. until the National Socialists took power in 1938. Elsewhere, the concept of a divorce irrespective of the spouses' religious affiliations had been introduced earlier – in the German Empire and Switzerland in 1875, in Hungary in 1895, and in Czechoslovakia in 1919.

In a changing civil society in which the moral doctrines of the Catholic Church were increasingly disregarded, the unavailability of a divorce for Catholic marital partners constituted an ever-growing problem. Accordingly, various attempts were made to work towards a reform of marriage law as well as to find legal constructs that would, on a case-by-case basis, open the way for a second marriage. Those who had enough time and money and were prepared to invest some effort could try to acquire the citizenship of another country, establish their residence there and then obtain a divorce. From 1895 onwards, Hungary proved to be particularly attractive because it counted as a 'foreign country' in regard to civil law and citizenship matters but was nevertheless part of the

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[2] For a general overview H. Wagner, *Die Katholische Kirche Österreichs im 20. Jahrhundert. Ein kirchenhistorischer Rückblick anlässlich 90 Jahre Republik (1918–2008)*, "Historisches Jahrbuch" 2012, No. 132.

[3] This did not constitute a full adoption of the canon law provisions on marriage: St. Schima, *Das Eherecht des ABGB 1811*, "Beiträge zur Rechtsgeschichte Österreichs" 2012, No. 2, p. 17; St. Přibyl, *ABGB und das kanonische Eherecht*, "Journal on European History of Law" 2011, No. 2.

[4] This 'civil marriage under exceptional circumstances' *(Notzivilehe)* had been an option since 1868 if the cleric refused to marry a couple for a reason that was not accepted as valid by the state. From 1870 onward, this instrument was also accessible for persons not affiliated with any religion and for members of religious groups that were not officially recognized. For Muslims, on the other hand, a secular marriage according to the law of 1870 was the only option, even after their religion had been officially recognized in 1912.

[5] H. Kelsen, *Autobiographie* [in:] M. Jestaedt (ed.), *Hans Kelsen Werke, Band I*, Tübingen 2007, p. 69.

Habsburg Empire.[6] For the general population, however, this was obviously not a suitable option.[7]

2. The dispensation marriages

However, there was also another option that allowed Catholics to remarry. Section 83 ABGB read: "On account of important reasons the dispensation from marriage impediments can be applied for to the *Landesstelle*, which shall proceed further in the matter according to the nature of the circumstances."

The law did not specify these "important reasons;" neither did it imply that the legislator had only had specific impediments in mind. And so it happened that one day a *Landesstelle* (i.e., a provincial governor, more specifically the *k.k. Statthalter* until 1918, then the *Landeshauptmann*) applied section 83 ABGB to grant a dispensation from the impediment of ligamen, meaning that he allowed an already married person to remarry. When and where this occurred for the first time we do not know. Later reports refer to a total of 14 'dispensation marriages' which were made possible in this manner until 1918. It seems that they all concerned cases where an already married marriage candidate had at least previously gone through a separation from bed and board, and where additional circumstances favoured the granting of a second marriage opportunity. And although only one case (from 1915) concerned the marriage of a public figure, namely Franz Conrad von Hötzendorf, Chief of the Austro-Hungarian General Staff, it was precisely this case that contributed significantly to the increasing publicity of the dispensation practice. At the same time, however, it also caused people to think that such dispensations were only available to very privileged members of society.[8]

Following the establishment of the republic three years later, two members of the Provisional National Assembly in particular, the Social Democratic delegate Albert Sever and his German Nationalist counterpart Julius Ofner, strove for a marriage law reform. A bill that was submitted to the Assembly was rejected on 24th January 1919 due to the resistance of the Christian Social Party.[9] But when the Constituent National Assembly was elected in February 1919, which resulted in the Social Democrats entering into a coalition with the Christian Social Party, the Social Democrats' eagerness for a marriage

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[6] U. Harmat, *Ehe auf Widerruf? Der Konfllikt um das Eherecht in Österreich 1918–1938* (= Studien zur Europäischen Rechtsgeschichte 121), Frankfurt am Main 1999, pp. 61–64; Ch. Neschwara, *Eherecht und „Scheinmigration" im 19. Jahrhundert: Siebenbürgische und ungarische, deutsche und Coburger Ehen*, "Beiträge zur Rechtsgeschichte Österreichs" 2012, No. 2; E. Herger, *The Introduction of Secular Divorce Law in Hungary, 1895–1918: Social and Legal Consequencs for Women*, "Journal on European History of Law" 2012, No. 2.

[7] Cf. the statement by Julius Ofner in the Provisional National Assembly on 23rd January 1919, *Stenographische Protokolle der Provisorischen Nationalversammlung*, 1918/19, p. 511: "The rich man goes to Hungary and gets married; the pauper has to remain in Austria and live in concubinage."

[8] According e.g. to H. Kelsen, *Autobiographie…*, p. 70; cf. also Ofner's remarks in *Dispensehe*, p. 209. Regarding the actual practice U. Harmat, *Ehe auf Widerruf?...*, p. 153.

[9] U. Harmat, *Ehe auf Widerruf?...*, p. 87; H. Kalb, *Das Eherecht in der Republik Österreich 1918–1978*, "Beiträge zur Rechtsgeschichte Österreichs" 2012, No. 2, p. 30.

law reform dwindled at once. State Chancellor Renner from Social Democratic Party declared that he did not intend to submit a bill on that matter anytime soon; a unilateral attempt by Sever did not even pass through the Social Democratic caucus. Constitutional lawyer Hans Kelsen later reported that back in those days, a compromise had been established "according to which the Social Democratic and German Nationalist parties would forgo the implementation of the projected marriage reform, whereas the administration would grant dispensations from the impediment of a prior Catholic marriage more liberally than during the years of the monarchy."[10]

There are no records that would prove Kelsen's claim correct but certainly the change in the hitherto restrictive administrative practice occurred almost immediately after the establishment of the Social Democratic/Christian Social coalition, namely on 3rd April 1919. It was hardly a coincidence that on the same day as well, the Habsburg Act and the Nobility Abolition Act were passed. At that time, Renner himself was also presiding over the Department of the Interior, which was the supreme instance to decide on dispensations. When he granted his first dispensation on 3rd April, he did not provide any specific legal grounds for his decision but only remarked that one could not "ignore the spirit underlying the current dynamics in the law."[11] The other state agencies interpreted this as a signal to broaden the practice of granting dispensations. Half a year later, around 5,000 individuals had received a dispensation from the impediment of ligamen.[12] Albert Sever, who meanwhile had become the provincial governor of Lower Austria (which at this stage still included Vienna and thus comprised more than half of the Austrian population), occasionally granted more than a hundred dispensations per day. Thus, the dispensation marriages became popularly known as 'Sever marriages', even though Sever was not the inventor of the phenomenon and only held the office for a short period of time (1919–1921). Many more 'Sever marriages' were concluded under the Social Democratic governor of Vienna, Karl Seitz (1923–1934), than under Sever himself. By contrast, no dispensations at all were granted in Lower Austria once the province had been separated from Vienna in 1922, causing all political power to be concentrated in the hands of the Christian Social Party; the same was true for the other provinces governed by this party, Upper Austria, Salzburg, Tyrol and Vorarlberg. Only Carinthia, and for a short while Styria, followed the Viennese model while they had a governor who belonged to either the Social Democrats or the Pan-Germans, or was otherwise unaffiliated with the Christian Social Party. People rightfully complained that under these circumstances "the enjoyment of one's civil rights [...] was dependent upon the religious denomination of a provincial governor or state minister."[13]

Dispensation candidates whose application had been rejected by the provincial governor could appeal to the Department of the Interior (from 1920: Ministry of the

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[10] H. Kelsen, *Autobiographie…*, p. 71. This passage did not find its way into R.A. Métall, *Hans Kelsen. Leben und Werk*, Wien 1969, and thus also not into U. Harmat, *Ehe auf Widerruf?...*; it does, however, constitute something of a 'missing link' to what follows hereafter.

[11] U. Harmat, *Ehe auf Widerruf?...*, p. 159–161.

[12] *Ibidem*, p. 175; H. Kalb, *Das Eherecht…*, p. 32.

[13] According to the president of the 'Association for Marriage Law Reform', Karl Frantzl, in a statement dated 25th January 1921; cited in U. Harmat, *Ehe auf Widerruf?...*, p. 190. Imprecisely: Ch. Neschara, *Kelsen als Verfassungsrichter. Seine Rolle in der Dispensehen-Kontroverse* [in:] St.L. Paulson, M. Stolleis (eds.), *Hans Kelsen. Staatsrechtslehrer und Rechtstheoretiker des 20. Jahrhunderts*, Tübingen 2005, p. 362.

Interior). Although by 1920 the latter had ceased to be under Social Democratic control, even the conservative ministers had to give in to the pressure of the people and usually granted the appeal. The situation became particularly delicate in the years 1923–1924 and 1926–1929 respectively, when the prelate Ignaz Seipel, in addition to being the Federal Chancellor, also assumed the office of the Minister of the Interior. As a Catholic priest he was one of the fiercest critics of the dispensation practice.[14] Eventually, Kelsen reports, the problem was solved by

> the Christian Social Chancellor taking a short holiday, which enabled his German Nationalist deputy to attend, in a favourable manner, to the appeals which had meanwhile accumulated. [...] One should mention that concerning this matter the provincial governors were subordinate to the Chancellor, and that therefore the Chancellor would have been in a position to simply order the governors not to grant such dispensations. But given that the Chancellor was, as a member of the Christian Socials, bound to the agreements made by his party he could not do this, however abhorrent the granting of such marriage dispensations might have seemed to him. It is understandable that Chancellor Seipel deeply hated this practice.[15]

Until the National Socialists enacted a new Marriage Act in 1938 which provided the basis for a divorce regardless of religious denomination, and thereby made the dispensations unnecessary, some 50,000 dispensation marriages were concluded countrywide in this manner.[16]

Everyone involved knew that the practice of allowing dispensation marriages opened up a number of legal problems.[17] Even if in practice dispensations were granted only to those who were separated from bed and board from their first spouse, their prior marriage continued to be valid and therefore, many argued, they were committing the criminal offence of bigamy pursuant to section 206 of the Criminal Code. In practice, criminal prosecutions did not happen, not least because this would have meant that the governor of the respective province would have had to be indicted as an accomplice. Could a husband leave behind two widows? What if the marital partners of the first marriage reconciled (as was expressly granted by section 110 ABGB)? Would that amount to adultery in regard to the second marriage? The provincial government of Tyrol, in particular, had grave concerns regarding the legal consequences of a dispensation, based on a legal opinion of the University of Innsbruck Law Faculty that was authored by the civil law professor Friedrich Woeß.[18] Many other legal experts, among them Julius Ofner, also put down in writing their views on the problems raised by the dispensation marriages.[19] And although most authors tried to stay within the bounds of rational reasoning, they hardly

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[14] U. Harmat, *Ehe auf Widerruf?...*, pp. 251, 253.

[15] H. Kelsen, *Autobiographie...*, p. 71. This *modus operandi* of Seipel's is also documented in a press release of the Greater German People's Party from 28th January 1929, U. Harmat, *Ehe auf Widerruf?...*, p. 329, note 541; Ch. Neschara, *Kelsen als Verfassungsrichter...*, p. 363. Kelsen's claim (*ibidem*) that the Christian Social chancellors since 1920 had "always" delegated the appeals to their Pan-German deputies cannot be correct, even if only because the chancellor was the addressee of the appeals only if he happened to be the interior minister as well.

[16] U. Harmat, *Ehe auf Widerruf?...*, p. 534.

[17] Ch. Neschara, *Kelsen als Verfassungsrichter...*, p. 363, refers to a "kaleidoscope of legal arguments" that developed in this context.

[18] U. Harmat, *Ehe auf Widerruf?...*, p. 177.

[19] J. Ofner, *Die Gültigkeit der Dispensehe*, "Juristische Blätter" 1920, No. 49, p. 211.

ever succeeded in taking up an entirely neutral position, as this was an area where fundamental ideological problems relating to the nature of marriage collided.[20]

It was only a matter of time until the supreme courts of justice had to deal with this affair. First was the Administrative Court, which issued a decision on 19th March 1921 saying that a dispensation from the impediment of an existing marriage was inadmissible, particularly so as it could lead to bigamy, which constituted a criminal offence, as well as to civil law intricacies that could not possibly be resolved.[21] This did not solve the problem, especially so because the decisions of the Administrative Court (like those of the Supreme Court) were only binding in relation to the particular case in question.[22] Despite this, the Ministry of Justice (held by the Christian Social Party) requested a Supreme Court opinion on the dispensation marriages. The Supreme Court, like the Administrative Court before, decided on 11th May 1921 that a dispensation from the impediment of an existing marriage was inadmissible; although the marriages based on such dispensations were formally valid, they could be declared void by the courts. Unlike the previous Administrative Court decision, the opinion of the Supreme Court (which, it seems, was devised by *Senatspräsident* Hermann Prey[23]) also addressed the legal policy problem that a great number of dispensation marriages already existed and that children had been born to these couples for whom the legislator would have to provide.[24]

As the legislator remained passive while the civil law courts, based upon the Supreme Court opinion, began to invalidate large numbers of dispensation marriages,[25] chaos reigned. The dispensation marriages were marriages 'good till cancelled', not generally void but voidable; voidable however only if in one way or another they came to the attention of the court. It was thus entirely up to the former spouse to organise the annulment of his or her partner's new marriage simply by means of an ordinary letter to the court. "This fact," Kelsen remembered, "was used for shameless blackmail."[26] [...]

> Moreover, even a marital partner who had been granted a release from the impediment by the administrative authority and then entered a second marriage could, whenever he felt like it, rid himself of this marriage simply by sending a postcard to the competent court to the effect that he was living in a dispensation marriage. I myself had to deal with a case at the Constitutional Court where an architect, who had been separated from bed and board from his first wife, applied to the authority for a dispensation in order to marry a very affluent young girl from Holland. After he had married the girl based on the granted dispensation and dissipated her fortune roughly within a year, he wrote

[20] U. Harmat, *Ehe auf Widerruf?...*, p. 194.

[21] Administrative Court decision of 19th March 1921, case No. 1265/1921, *Sammlung der Erkenntnisse des Verwaltungsgerichtshofes*, No. 12783 A; U. Harmat, *Ehe auf Widerruf?...*, pp. 212–216; H. Kalb, *Das Eherecht…*, p. 32.

[22] Ch. Neschara, *Kelsen als Verfassungsrichter…*, p. 364.

[23] According to Karl Gottfried Hugelmann, U. Harmat, *Ehe auf Widerruf?...*, p. 409.

[24] Supreme Court opinion of 11th May 1921, "Entscheidungen des österreichischen Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen" 1923, Vol. 4, No. 55. The precise date can be found in 1928, Vol. 7, No. 51; U. Harmat, *Ehe auf Widerruf?...*, pp. 222–227.

[25] By 1926, 1,000 marriages had been declared void: Ch. Neschara, *Kelsen als Verfassungsrichter…*, p. 365.

[26] H. Kelsen, *Autobiographie…*, p. 72. Cf. the case mentioned in the "Neue Freie Presse" 1925, No. 21669 of 10.01.1925, morning edition, p. 5, where a man demanded 30 million crowns (= 3,000 shillings) from his former wife for his consent to her second marriage. Out of desperation, when she could not raise the money, she took her own life.

a postcard to the court to advise that he was living in a dispensation marriage. The court investigated the case and declared the marriage void. The court file included a submission from the second wife, pointing out the outrageous and, to her, entirely incomprehensible fact that an Austrian court could annul a marriage on the grounds that the dispensation granted by an Austrian authority had been unlawful. She had entered this marriage relying on the Austrian state and its authorities, and now the same Austrian state was telling her that it had misled her, and enabled her husband to dispose of her once he had consumed her fortune.[27]

3. The position of the Constitutional Court and the role of Hans Kelsen

Kelsen's deeply felt personal dissatisfaction with this and similar cases can be sensed in the passage quoted above. However, it might not have been the main reason behind his decision to get involved in this matter. More plausibly, it would have been the fact that the way the civil courts were dealing with the decisions of the administrative authorities ran counter to Kelsen's own theoretical conception of the equal legal status of court judgments and administrative decisions.[28] "The same state that, through its administration, expressly permitted the conclusion of a marriage subsequently annulled through its courts that same marriage. The authority of the state could hardly be subverted in a more serious way."[29]

The first time that the Constitutional Court was confronted with the dispensation marriage problem as such was in 1926. Alois S. of Vienna had entered into a dispensation marriage, which was then declared void by the Vienna Regional Court for Civil Matters

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[27] H. Kelsen, *Autobiographie...*, p. 72f. Apparently this refers to the Constitutional Court decision of 21st January 1930 K 66/29, *Sammlung der Erkenntnisse des Verfassungsgerichtshofes*, "Neue Folge", No. 1303: The Viennese architect Robert Oerley (born Vienna 24th August 1876, died Vienna 15th November 1945; president of the Vienna Secession 1912/13) had married Gabriele Mayer "according to the Protestant rite" in 1902; the couple were separated from bed and board in 1917. After Oerley had obtained a dispensation from the Vienna *Magistrat* he entered a civil marriage with the Dutch citizen Virginia Veltmann, neé Vermin, on 24th August 1922. Only afterwards, on 26th January 1923, Robert Oerley's first marriage was divorced pursuant to section 115 ABGB. In 1927, Oerley was appointed to a position in Turkey, where he (together with Clemens Holzmeister *et al.*) was involved in the build-up of the new capital, Ankara. From there he filed for a "divorce of his marriage" (which probably meant a separation pursuant to section 107 ABGB), which resulted in the Vienna Regional Court for Civil Matters examining and then annulling his dispensation marriage. The decision was upheld by the Higher Regional Court. Thereupon, in June 1929, Virginia Oerely applied to the Constitutional Court for a decision on a positive conflict of jurisdictions. Kelsen was appointed referendary for this case: Österreichisches Staatsarchiv (Austrian State Archives), AdR, Höchstgerichte 1. Rep., VfGH, Karton 81, K 66/29. The Constitutional Court, in its decision, took the view that this was indeed a case of a positive conflict of jurisdictions; accordingly, the two civil court decisions were annulled. In 1938, immediately after the "Anschluss" of Austria to the German Reich and the enactment of a new Marriage Act (see below), the marriage of Robert and Virginia Oerley was divorced. Cf. also Schachel, *Oerley.* My thanks to Carmen Kleinszig, who found the court file in the Austrian *Archiv der Republik*.

[28] Correctly: R. Walter, *Hans Kelsen als Verfassungsrichter* (= Schriftenreihe des Hans Kelsen--Instituts 27), Wien 2005, p. 67f.

[29] H. Kelsen, *Autobiographie...*, p. 72.

on behalf of his first wife. As prescribed by law,[30] the court nominated a lawyer, Josef Turezky, as 'defender of the bond'. His task in this capacity was to gather all arguments in favour of the marriage being upheld and to lodge an appeal with the Vienna Higher Regional Court, which he did. In addition to that, on 5th August 1926, Turezky also applied to the Constitutional Court for a decision on a positive conflict of jurisdictions pursuant to article 138 of the Federal Constitution Act (*Bundes-Verfassungsgesetz,* B-VG). Constitutional Court judge Friedrich Engel was appointed the referendary for this case. In the sitting of 13th October he argued in favour of rejecting the case "because the matter was clearly not in the jurisdiction of the Constitutional Court." Engel's view was that there was not a conflict of jurisdictions at all, because court and administrative authority had not decided upon an identical matter. Kelsen objected. Both had decided upon the validity of the dispensation, whereby the court had overstepped "the limits of its jurisdiction". He lost the vote however,[31] and so the application for a decision on a conflict of jurisdictions was rejected.[32]

It is possible, even likely, that Kelsen thereafter discussed this decision with his disciples and had the validity of his opinion confirmed by them. At any rate, one of them, Fritz Schreier, published an article in the "Arbeiter-Zeitung" of 16th May 1927, in which he criticised the Constitutional Court decision as incorrect. "The Constitutional Court presupposes as proven that which it would have to prove first, namely that it is up to the courts to decide upon the validity of the marriage. [...] It would certainly be advisable to try again and give the Constitutional Court another opportunity to state its position on this matter and perhaps to revise its opinion."[33] This reads almost like a hidden call for help to the public so that Kelsen would be given another opportunity to present his views to his fellow judges! And another opportunity did indeed arise when another 'defender of the bond', the Vienna lawyer Moritz Ludwig Weiß, also addressed the Constitutional Court. This time – was it coincidence or not? – President Vitorelli appointed Kelsen the referendary for the case,[34] which concerned the dispensation granted to Eduard N.[35] On 5th November 1927, the case was heard before the court. Kelsen delivered his report and reminded the judges of two recent Constitutional Court judgements which would have been regarded as less than spectacular at that time.[36] Both cases had concerned pathways which ran across private properties but had been used by the public for decades. Therefore, the respective councils had declared them public

[30] Cf. section 97 ABGB, as well as the court decree of 23th August 1819, *Justizgesetzsammlung*, No. 1595.

[31] ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 4/26, pag 10.

[32] Constitutional Court decision of 13th October 1926 K4/26, *Sammlung der Erkenntnisse*, No. 426; U. Harmat, *Ehe auf Widerruf?...*, p. 294; Ch. Neschara, *Kelsen als Verfassungsrichter…*, p. 366.

[33] F. Schreier, *Ein Weg zur Erhaltung der Dispensehen*, "Arbeiter-Zeitung" 1927, No. 134 of 16.05.1927, p. 2.

[34] U. Harmat, *Ehe auf Widerruf?...*, p. 297; R. Walter, *Hans Kelsen…*, p. 63.

[35] The facts of the case are remarkable in that the application for the invalidation of the dispensation marriage came from the second wife (of the dispensation marriage) and was supported by the husband as well as by his first wife. This means that the 'defender of the bond' was acting against the express will of all three parties!

[36] Constitutional Court decisions of 11th October 1926 K 3/26, *Sammlung der Erkenntnisse*, No. 647, and of 6th July 1927 K 4/27, *Sammlung der Erkenntnisse*, No. 836. Apparently the cases were not considered relevant, so that only the court's findings were published but not the facts of the cases or the reasons for the judgments.

rights of way and (in the first case) removed a 'private path' sign and (in the second) eliminated wire fences, barriers and trenches. The respective property owners had not only appealed against the council resolutions but also filed suits for trespass at the civil courts based on their signposts, fences etc. having been removed. In both cases, the Constitutional Court had decided that there was a conflict of jurisdictions, even though (as had already been argued in the first case) the civil court and the council had decided upon two entirely different legal matters – the granting of a public right of way on the one hand, and trespass to land on the other.[37] In the second case, Kelsen himself had been the referendary and had just referred to the previous decision, which had led to the case not being discussed at great length.[38] Now, in the sitting of 5th November, Kelsen argued in favour of confirming a conflict of jurisdictions also in the case of Eduard N., stressing that his view adhered to the practice of the Constitutional Court as it had been developed in the two cases mentioned above.[39]

Constitutional Court judge Rudolf Ramek, associated with the Christian Social Party, objected: Whereas the administrative authority had granted a *dispensation*, the court had decided upon the *validity of a marriage* and only addressed the problem of the dispensation as a preliminary question. A conflict of jurisdictions, however, required as a prerequisite that two state organs had decided upon an identical matter. He also pointed out that while section 190 of the Civil Procedure Code (*Zivilprozessordnung*, ZPO) *allowed* the court to suspend its current proceedings until the administrative authority had decided upon a preliminary question, it *did not oblige* it to do so. For this reason alone there could not be a conflict of jurisdictions. Kelsen replied that section 190 ZPO had been abrogated by section 68 of the General Administrative Procedures Act (*Allgemeines Verwaltungsverfahrensgesetz*, AVG), which stipulated that administrative decisions could only be lifted or amended *ex officio* if they met one of the specific criteria from its exhaustive list. Engel – the referendary for the case decided on 13th October – assisted Kelsen, pointing out that a court that had suspended its proceedings pursuant to section 190 ZPO was thereafter bound by the outcome of the administrative proceedings.[40] The decision was rather close: The five judges associated with the Christian Socials (Falser, Klee, Pawelka, Ramek and Wanschura) voted against Kelsen; he was supported by the Social Democrats Eisler, Engel, Austerlitz and Hartl, the Pan-German Sylvester, and the party-independent judges Layer and Menzel.[41] The civil court judgement was set aside.[42]

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[37] This objection had been raised by Constitutional Court judge Kienböck: minutes of the consultation and vote of 11.10.1926, ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 3/26, pag 21.

[38] Minutes of the consultation and vote of 06.07.1927, ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 4/27, pag 8.

[39] Minutes of the consultation and vote of 05.11.1927, ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 6/27, pag 23r.

[40] Minutes of the consultation and vote of 05.11.1927, ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 6/27, pag 23v–24r.

[41] Minutes of the consultation and vote of 05.11.1927, ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 6/27, pag 24r. For the party-political composition of the Constitutional Court in this period: Ch. Neschwara, *Verfassungsgerichtsbarkeit im Spannungsfeld von Regierung und Parlament: Österreichs Verfassungsgerichtshof 1918–1934*, "Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung" 2013, No. 130, pp. 449–452.

[42] VfGH 5.11.1927, K 6/27, VfSlg 878. Ch. Neschara, *Kelsen als Verfassungsrichter*..., p. 367.

As one would expect, this decision of the Constitutional Court was celebrated in the Social Democratic *Arbeiter-Zeitung*,[43] while the Christian Social *Reichspost* wrote about an "untenable mistake" of the court.[44] Two weeks later, on 25th November, the "Neue Freie Presse" published an extensive article on "whether the chaos surrounding the dispensations should be escalated even further." It reported that a civil court had, despite the recent Constitutional Court decision, again annulled a dispensation marriage because it had considered itself exclusively bound to the Supreme Court opinion. The anonymous author, whom the editors described as a "prominent jurist," argued that this view was wrong because the court of first instance was neither bound to Constitutional Court decisions nor to those of the Supreme Court, and it certainly did not have to follow mere opinions. The author went on to predict that the Constitutional Court would continue to decide in the same fashion whenever similar cases were brought before it. Vindicating that court, the author wrote that it had "put an end to the unprecedented disgrace of the state granting dispensations with one hand and taking them away with the other." He stressed that the court had never decided upon the question whether the granting of dispensations as such was legitimate.[45]

The professor of civil procedure law Georg Petschek later assumed (probably correctly) that Hans Kelsen himself was the author of the article.[46] It is not clear when and how the public learned that he was behind the decision – the Constitutional Court itself never disclosed which judge had been the referendary in a case, or how the judges had voted – but certainly he must have been one of the principal suspects. For instance, the then Vienna Commercial Court judge Karl Wahle wrote to Chancellor Seipel on 22nd November 1927, saying that this decision was the result of "the Social Democrats and the liberal groups associated with this party's cultural policies delegating their best men – such as Prof. Kelsen, the referendary in the dispensation case, or the Commercial Court president Engel – to the Constitutional Court," whereas "from the other side of the spectrum downright losers had been nominated to staff this politically influential court." If counter-measures were not taken immediately, the realisation of "Kelsen's ideal of a socialist police state which identifies state and law, and negates the divine and natural law that is the foundation of any legal order" would be imminent.[47]

As Kelsen's authorship became widely known, it subsequently led to fierce personal attacks, not just in scholarly discourse but also personally: "I was accused of encouraging bigamy and the like. Among other incidents I remember my two young daughters coming home from school and telling me, in great distress, that there was a poster on our door with terrible things about me written on it. As I had not yet left our flat on this day

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[43] "Arbeiter-Zeitung" 1927, No. 310 of 12.11.1927, p. 4.

[44] "Reichspost" 1928, No. 19 of 19.01.1928, pp. 1–3.

[45] Anonymus (= Hans KELSEN), *Soll der Dispensehewirrwarr noch gesteigert werden?*, "Neue Freie Presse" 1927, No. 22698 of 25.11.1927.

[46] G. Petschek, *Indirekter Kompetenzkonflikt und Bindungskonflikt*, "Zentralblatt für die Juristische Praxis" 1929, No. 47, p. 349.

[47] Karl Wahle, letter to Ignaz Seipel of 22.11.1927, cited in U. Harmat, *Ehe auf Widerruf?...*, p. 306f. It is remarkable that in his letter, Wahle also openly criticised Constitutional Court judge Engel, who was his immediate superior as the president of the Commercial Court.

I had not seen it myself. I removed it. It contained the most offensive insults of a sexual nature, 'harem keeper' being one of the mildest."[48]

The civil courts were unimpressed by the Constitutional Court decision. On 18th December, the Vienna Higher Regional Court, as the court of second instance, annulled another dispensation marriage. While it did concede that the validity of a dispensation could not be reviewed by the courts, it argued that even in cases where the dispensation was valid this did not necessarily mean that the dispensation marriage was also valid, for instance if it violated binding law such as the ban on polygamy.[49] On 27th February, the Constitutional Court was again considering a civil court decision that had annulled a dispensation marriage. Again, it followed Kelsen as the referendary, resulting in an identical vote to that in the previous case,[50] and described the position of the Higher Regional Court as "untenable," because the validity of the dispensation necessarily meant that the marriage on which it was based was also valid. Accordingly, the civil court decision was set aside. What renders the text of the judgment so remarkable are the unusual turns of phrase, untypical for Kelsen. For instance, it argues that nobody could "seriously deny" that "for any interpretation that is more than just mere formalism" it was evident that there was a conflict of jurisdictions.[51] Was Kelsen getting nervous? It seems that he decided to proceed and, on 24th March, published under his own name an article in the *Juristische Blätter* where he explained his point of view – essentially using the same argument that he had used earlier at the Constitutional Court.

The other side reacted: On 3rd April 1928 the plenary of the Supreme Court, at the request of its presidium, authored a supplement to its previous 1921 opinion, in which the validity of the latter was confirmed. Furthermore, it reminded the Constitutional Court of its own decision from 1926 – two of the country's highest courts now openly opposed each other. Kelsen's original aim, namely to strengthen the reputation of the state authorities, was now even more distant. But more than that, the Supreme Court opinion turned directly on Kelsen, whose article in the "Juristische Blätter" it criticised: There could only be a conflict of jurisdictions if two state authorities were in conflict over the same matter. But this was not the case if for one of them this matter was only a preliminary question. Further, the court now also declared that the dispensations from the impediment of ligamen were incurably void, particularly as they were in violation of criminal law. Citing Kelsen's own article on wrongful acts of state from 1914, it found that legal acts which are incurably void do not need to be annulled pursuant to section 68 AVG because, legally, they never existed in the first place.[52]

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[48] H. Kelsen, *Autobiographie*..., p. 75; R.A. Métall, *Hans Kelsen*..., p. 51; H. Kalb, *Das Eherecht*..., p. 33.

[49] "Arbeiter-Zeitung" 1928, No. 18 of 18.01.1928, p. 4. The Constitutional Court set aside the judgment on 12.05.1928; this very complex case continued to be a matter for the courts and the administrative authorities until 1938; U. Harmat, *Ehe auf Widerruf?*..., pp. 515–528.

[50] ÖStA, AdR, Höchstgerichte 1. Rep., VfGH, Karton 74, K 14/27, pag 26v.

[51] Decision of 27.02.1928 K 14/27, *Sammlung der Erkenntnisse*, No. 951. R. Walter, *Hans Kelsen*..., p. 67.

[52] Plenary decision of the Supreme Court of 03.04.1928, Praes 1044/27, "Entscheidungen des österreichischen Obersten Gerichtshofs in Zivil- und Justizverwaltungssachen" 1928, Vol. 70, No. 51, esp. pp. 122, 126. Also H. Kalb, *Das Eherecht*..., p. 33.

Coincidentally or not, the conference of German constitutional law professors took place in Vienna around this time, on 23th and 24th April 1928, debating the question of reviews of administrative acts by the general jurisdiction courts. One of the two speakers was Professor Max Layer of Graz, who also touched upon the problem of the dispensation marriages, essentially supporting Kelsen's position. Kelsen himself then joined the debate and accepted full responsibility for the judicature of the Constitutional Court.[53] The conference was a great success for Kelsen – he delivered one of his most outstanding papers, which dealt with the nature and development of constitutional jurisdiction – and perhaps this helped him to regain confidence regarding the dispensation marriages. When, a little later, the "Neue Freie Presse" asked him for an interview on the Supreme Court's supplementary opinion, he referred to the recent conference in Vienna and the fact that one of the speakers (he must have been thinking of Layer) had argued in favour of the courts being bound by administrative acts. Nobody could "seriously claim that the dispensations were incurably void" – it almost seemed as if Kelsen was mocking the Supreme Court.[54] But Kelsen went even further and ignored for the first (and only) time his self-imposed restraint to answer only questions on the conflict of jurisdictions but not on the dispensation marriages as such, stating that the current practice of granting dispensations was entirely consistent with the "spirit and intentions" of the civil code. The interview culminated in Kelsen pointing out that there were no signs that the Constitutional Court would change its judicature, and it would continue to set aside all civil court judgments that annulled dispensations until either the courts discontinued this practice or the legislator reformed the marriage law.

Indeed, the Constitutional Court persisted in its jurisdiction with the great number of new marriage law cases that came before it and just based any new decisions on the previous ones. In May 1928 there were nine, in June 15, in October 32 judgments which annulled dispensation marriages pursuant to article 138 B-VG. In 1929 there were 34 judgments in February, 43 in May, six in June and 29 in December.[55]

Meanwhile the criticism voiced in the Christian Social "Reichspost" was becoming fiercer. In November 1928 it wrote: "The Constitutional Court against the Rule of Law. A hitherto unsurpassed grotesque. – The Turks have abolished polygamy. – The Austrian Constitutional Court introduces it." It also mentioned that Kelsen, as the referendary, had dealt with the 39 (in actuality 32 would have been correct) dispensation marriages on which the Constitutional Court had had to decide in its October sitting on "less than nine

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[53] Th. Olechowski, *Hans Kelsen als Mitglied der Deutschen Staatsrechtslehrervereinigung* [in:] M. Jestaedt (ed.), *Hans Kelsen und die deutsche Staatsrechtslehre* (= Recht – Wissenschaft – Theorie 8), Tübingen 2013, p. 21.

[54] "Neue Freie Presse" 1928, No. 22860 of 27.04.1928, p. 4. Already in his article in the "Juristische Blätter" he had said that if the many thousand dispensations were regarded as null and void this would be "too absurd" to even seriously consider this problem – but apparently this was exactly the position taken by the Supreme Court.

[55] Cf. the summaries of Constitutional Court decisions (on identical issues) published under No. 1001, 1032, 1059, 1135, 1201, 1236 and 1272a. In some cases, for instance No. 1023, 1033, 1060 and 1272b, the Constitutional Court decided to reject or dismiss the claim e.g. for procedural reasons, particularly if the civil court judgment had already become non-appealable. No. 1033 is interesting also because it documents the procedural complications resulting from the destruction of thousands of court files in the Vienna Palace of Justice fire of 1927.

typewritten pages," i.e. treated them like petty cases. The "Reichspost" also had a question to "ask the honourable Constitutional Court, in particular its referendary Professor Dr. Kelsen: Is section 62 ABGB, which stipulates that a man may only be married to one woman, and a woman only to one man, at the same time, still valid or not? We demand that this question be answered with a clear yes or no and without recourse to long-winded legal subtleties."[56] In November 1928 the "Reichspost" recalled Kelsen's contribution to the genesis of the federal constitution, which meant that he had been involved in granting the Constitutional Court control rights which "as far as we know exceed what has been granted in any of the other constitutional states on earth."[57] This statement was meant disapprovingly! Then the "Reichspost" fiercely criticised two Constitutional Court decisions from its October sitting,[58] which was particularly serious as on the day that this article was published, the court had to decide on a very politically sensitive matter concerning road traffic regulations. Although this time it ruled in favour of the federal government,[59] its president Vitorelli wrote to Chancellor Seipel on the same day, saying that the paper, which was politically aligned with the federal government, was conducting a "systematic campaign" that aimed to "debase the Constitutional Court in the eyes of the public." Seipel reacted coolly, pointing to the freedom of the press and the fact that the "Reichspost" must have the same rights as any other newspaper.[60]

However, the legal position of the Constitutional Court was not only met with polemics but also with serious legal concerns. Among those was the criticism directed against the concept of an 'indirect conflict of jurisdictions' that was published in 1929 by Georg Petschek in his "Zentralblatt für die juristische Praxis." He agreed with the Supreme Court that if what was the main issue for one state authority was only a preliminary question for the other, this did not constitute a conflict of jurisdictions. Kelsen, he claimed, had not studied the procedural law thoroughly enough; it was true that in accordance with section 68 AVG non-appealable administrative decisions could only be amended by the authorities' own motion under very limited circumstances. However, if the decision in question was in its substance contrary to law, then the other organ involved would be entitled, and even obliged, to also consider the question of its lawfulness.[61] To Petschek, the whole concept of an indirect conflict of jurisdictions was "just a fruit of imprecise terminology," which "raises the simple response to a preliminary question to the decision-level, and thereby moves it from the area of the legal appraisal of factual matters – which is the stage where the question whether the court is bound by the administrative

[56] "Reichspost" 1928, No. 313 of 09.11.1928, p. 1.

[57] "Reichspost" 1928, No. 319 of 16.11.1928, p. 1f.

[58] The first of the two decisions reviewed an Upper Austrian provincial statute; according to the "Reichspost," the provincial government had even refused to send a delegate to the hearing as it did not recognize the applicant's right to appeal, given that the action was not based on an asserted violation of a constitutionally guaranteed right but only claimed that the constitution as such had been violated. On 13.10.1928 the Constitutional Court decided that the constitution had not been violated (G 1/28 *Sammlung der Erkenntnisse*, No. 1064). The second decision concerned a complaint against the statutes of the representation of the German-Austrian gendarmerie from 1919, which the Court decided were unlawful: Decision of 09/10/1928 V 4/28, *Sammlung der Erkenntnisse*, No. 1053.

[59] Decision of 16/11/1928 G 3/28, *Sammlung der Erkenntnisse*, No. 1114. The referendary in this case was Friedrich Engel.

[60] U. Harmat, *Ehe auf Widerruf?...*, pp. 404–406.

[61] G. Petschek, *Indirekter Kompetenzkonflikt…*, p. 362f.

decision is relevant – to considerations about a possible conflict of jurisdictions."[62] Petschek suggested to use the expression "conflict of commitments" rather than "indirect conflict of jurisdictions" and acknowledged that this problem needed to be solved by the legislator. He even drafted a constitutional amendment that would have allowed the Constitutional Court to decide on such conflicts of commitments. He admitted that Kelsen deserved the credit for having identified the problem, so that one could now move on to solving it by legislative means, and "after a fierce battle these lines may now end in peace."[63]

4. The judicature turns around

The conflict surrounding the dispensation marriages took place at a time when the political climate in Austria was becoming noticeably worse. Outside the parliamentary system, paramilitary organisations had formed, namely the Social Democratic Republikanischer Schutzbund and the conservative Heimwehren. They engaged in violent clashes, most notably on 30th January 1927, when an eight-year-old and a disabled ex-service man died in the Burgenland town of Schattendorf, having been shot by Heimwehr members. The offenders were brought before the court but acquitted on 14th July. This led to demonstrations on the following day, which further escalated and eventually culminated in a fire at the Vienna Palace of Justice and the police firing into the largely unarmed crowd. 89 protestors and five police officers died; more than 1,000 people were wounded.[64] The republic was on the verge of civil war but the Social Democratic leadership hesitated to arm its followers, mainly because it was afraid of the international implications. The conservative government under Ignaz Seipel interpreted this as a sign of weakness[65] and exploited the political situation to initiate a major constitutional reform.[66]

As part of this reform the Constitutional Court was completely reorganised. Whereas so far the National Council and the Federal Council (the second chamber of parliament, representing the nine provinces) had each elected half of its judges, judges were now nominated by the federal president. The two chambers of parliament together only retained the right to suggest shortlists of three candidates for half of the court's members;

[62] *Ibidem*, p. 371f.

[63] *Ibidem*, p. 375.

[64] Cf. the reports in the "Mitteilungsblatt der Sozialdemokratie Deutsch-Österreichs" (= a special issue of the "Arbeiter-Zeitung") 1927, No. 1 of 16.07.1927, p. 2; "Neue Freie Presse" 1927, No. 22570 of 18.07.1927, p. 1–2; "Wiener Zeitung" 1927, No. 162 of 19.07.1927, pp. 2–3. The events of 15th July have been described many times in academic literature, e.g. in G. Botz, *Ungerechtigkeit, die Demonstranten, Zufall und die Polizei: der 15. Juli 1927* [in:] *Bundesministerium für Justiz/Ludwig Boltzmann-Institut für Geschichte und Gesellschaft, "80 Jahre Justizpalastbrand. Recht und gesellschaftliche Konflikte"* (= Veröffentlichungen des Ludwig-Boltzmann-Instituts für Geschichte und Gesellschaft 33), Innsbruck–Wien–Bozen 2008, pp. 21–57.

[65] K. Berchtold, *Verfassungsgeschichte der Republik Österreich I: 1918–1933. Fünfzehn Jahre Verfassungskampf*, Wien–New York 1998, p. 457.

[66] G. Hasiba, *Die Zweite Bundes-Verfassungsnovelle von 1929. Ihr Werdegang und wesentliche verfassungspolitische Ereignisse seit 1918*, Wien–Köln–Graz 1976, pp. 66, 71; K. Berchtold, *Verfassungsgeschichte...*, p. 534.

for the other half, the same right was attributed to the federal government. What was publically celebrated as the 'depoliticisation of the Constitutional Court' was in fact merely a 'repoliticisation'. The previous *modus operandi* had in practice led to agreements between the parties, so that all three parties represented in parliament – Social Democrats, Christian Socials and Pan-Germans – could, each according to the number of their parliamentary members, delegate a corresponding number of representatives to the court. Now, the influence of the Social Democrats had dwindled to only two representatives whom they could nominate, whereas all the other judges could be attributed to either the Christian Social or Pan-German parties. Furthermore, it was decided that all judges should lose their posts by 15th February 1930, so that the new appointing procedure could be implemented quickly and to its full extent. The Social Democrats, pushed into a corner and anxious that the constitutional reform might be accomplished by a *coup d'état*, were prepared to give in on these points.[67] On 7th December 1929 the constitutional reform was adopted by all parties represented in the National Council.[68]

Hans Kelsen and three other judges had not been nominated by individual parties but, as widely accepted experts on the constitution, by all parties unanimously. These non-affiliated judges were also removed from their posts. Although the Social Democrats offered Kelsen the opportunity to run for office again on one of their two remaining tickets, Kelsen declined, as he did not want to hold the office as a representative of a political party rather than as an independent expert.[69] Of all the former judges, only Wanschura and Engel stayed in office; otherwise the court was completely reshuffled.

It met for its first sitting in April 1930; the first two cases that concerned dispensation marriages were not heard until 7th July 1930. Engel was the referendary; continuing along the previous judicature of the court he argued that there was a conflict of jurisdictions. Trying to 'save' the rationale of the previous judicature, he even spoke of a *direct* conflict of jurisdictions, arguing that the civil court and the administrative authority had decided on the same main issue. But the new judge Ludwig Adamovich opposed this view and presented a pre-written opinion where he argued that such an "indirect conflict of jurisdictions" was not within the competency of the Constitutional Court. As one would expect, the Social Democratic judges protested, but they remained a minority. The majority of judges followed Adamovich's opinion; the case was rejected due to incompetence of the court.[70] "While this did not mean that granting a dispensation had become impossible, it certainly meant that entering a dispensation marriage had become rather risky," Kelsen recapped later. "And that was all the Christian Social Party could achieve under the given circumstances."[71]

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67 H. Kelsen, *Autobiographie*..., p. 76; U. Harmat, *Ehe auf Widerruf?*..., p. 408.

68 Constitutional amendment of 07.12.1929 *Bundesgesetzblatt*, No. 392 regarding certain changes to the Federal Constitution Act of 01.10.1920 ('Zweite Bundes-Verfassungsnovelle'); in more detail, G. Hasiba, *Die Zweite Bundes-Verfassungsnovelle*..., pp. 91–134; K. Berchtold, *Verfassungsgeschichte*..., p. 568f.

69 H. Kelsen, *Autobiographie*..., p. 76.

70 VfGH 07.07.1930, K 1/30 and K 102/29, VfSlg 1341 and 1342; in more detail, U. Harmat, *Ehe auf Widerruf?*..., pp. 420–428. Slightly imprecise thus H. Kelsen, *Autobiographie*..., p. 77, where he claims that the Constitutional Court had decided that the civil courts had not overstepped their competence.

71 H. Kelsen, *Autobiographie*..., p. 77.

5. The period of the dictatorships

The reorganised Constitutional Court did not have much of a future; in March 1933 the Austrian federal government used an incident regarding the parliamentary rules of procedure in the National Council to declare the latter 'unworkable' and assume an authoritarian course. When the Constitutional Court was called upon to review some of the emergency decrees that had been issued by the federal government, it was also made inoperative.[72]

It was in the same period that the concordat with the Holy See, which had been in negotiation since 1931, was finally signed on 5th June 1933. Almost a year passed until it was promulgated on 1st May 1934 together with a new authoritarian constitution. This gave the concordat a special political significance, particularly so as the new constitution expressly spoke of a "Christian, German federation based on corporative principles" and declared that all law emanated from God.[73] The Social Democratic Party had meanwhile been outlawed (12th February 1934).

Remarkably, neither the concordat nor the federal act that should guarantee its implementation[74] included a solution for the dispensation marriages. Rather, the federal government decided to continue to grant dispensations from the impediment of ligamen, however with a reverse intention, namely primarily to release people from marriages that were invalid under canon law. Of course this did not change anything in regard to the civil courts' position towards the dispensation marriages.[75] The number of dispensations granted decreased considerably,[76] but the problem as such remained unsolved.

The rise to power of the National Socialists in March 1938 led to a short-lived renewal of the dispensation marriages, with the 'Commissioner for the Reunification of Austria with the German Reich' Josef Bürckel pointing out that the National Socialist government had "no reason to be more restrictive in regard to the granting of dispensations than the previous Catholic government had been."[77] The new rulers were inclined to quickly introduce here as well the principles of an obligatory civil marriage and of divorce irrespective of religious denomination, which had long been in force in Germany. The question remained whether this should be done with a law for Austria only, or whether the occasion should be used for a reform of marriage law according to the National Socialist ideology also in the 'Altreich,' i.e. the pre-'Anschluss' German territory. Hitler decided in favour of the latter. On 6th June 1938, the new Marriage Act was enacted, replacing the

[72] As the most detailed account, Th. Zavadil, *Die Ausschaltung des Verfassungsgerichtshofs 1933* (diploma thesis, University of Vienna), Wien 1997.

[73] *Bundesgesetzblatt* 1934, Part II, No. 1 (constitution) and No. 2 (concordat).

[74] Federal act of 04.05.1934, *Bundesgesetzblatt*, Part II, No. 8, concerning marriage law provisions for the implementation of the concordat between the Holy See and Austria of 05.06.1933. H. Kalb, *Das Eherecht*..., p. 34.

[75] U. Harmat, *Ehe auf Widerruf?*..., p. 493.

[76] In 1935, for example, 'only' 55 dispensations from the impediment of ligamen were granted. *Ibidem*, p. 499.

[77] Cited in *ibidem*, p. 530.

respective provisions in both the German and Austrian civil codes.[78] It also removed the power of the provincial governors to grant dispensations pursuant to section 83 ABGB. Dispensation marriages which had been concluded before were recognised *ex post facto* if the spouses still lived together; such marriages were treated as though they had been valid from the beginning (section 121 Marriage Act). If a dispensation marriage had been annulled due to an existing impediment of ligamen,[79] the maintenance obligations were the same as after a divorce (section 127 Marriage Act). Thereby, the previous problem of the dispensation marriages had been resolved virtually 'in passing' and the *raison d'être* of further dispensations removed.

6. The development after 1945

Unlike Germany, where the Allied Control Council replaced the National Socialist Marriage Act with a new one (which came into effect on 1st March 1946),[80] in Austria, the old Act was carried over into the legal order of the Second Republic.[81] The fate of the concordat of 1933,[82] whose marriage law provisions were hardly compatible with the Marriage Act 1938, was contested. The Social Democrats, who prior to 1933 had not been able to achieve even the slightest reform of marriage law, were now in a superior position and rejected any changes to the legal situation created in 1938, as it provided for civil marriage and the access to divorce irrespective of religious denomination.[83]

A consensus could at least be reached on two aspects: The first concerned couples who "only due to racial or political reasons" had been unable to marry before a registrar in the years between 1938 and 1945 and had thus clandestinely married in a religious ceremony; there was a consensus that these marriages should be treated as valid.[84] The second consensus concerned cases where the marriage candidates had wrongly believed that after the fall of the National Socialist regime its marriage law would become invalid as well and that the old Austrian provisions would be reactivated. If, under this impression, they had entered a religious marriage (or a 'civil marriage under exceptional

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[78] Its full German title was *Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Reichsgebiet*; the rootedness of the Act in Nazi ideology cannot be discussed at this point; instead H. Kalb, *Das Eherecht...*, p. 36f.

[79] The Marriage Act (in section 127) slightly imprecisely implies that the marriages had been annulled due to the dispensations being void; as has been explained here in some detail, this is not what the courts had said.

[80] Control Council Law No. 16 of 20.02.1946, *Amtsblatt des Alliierten Kontrollrates*, p. 77 (Marriage Act).

[81] Transition of Laws Act of 01.05.1945, *Staatsgesetzblatt*, No. 6, section 2; Act of 26.06.1945, *Staatsgesetzblatt*, No. 31 on measures concerning marriage, civil status and eugenics laws, section 1. Certain provisions were set aside, such as the reference to the ban on marriages between persons of 'different blood' laid down in the Nuremberg Laws.

[82] H. Kalb, *Das Eherecht...*, p. 38.

[83] U. Harmat, *"...eine gottesräuberische Usurpation"? Die Debatte um die obligatorische Zivilehe in Österreich nach 1945 bis zur Anerkennung des Konkordats 1957*, "Beiträge zur Rechtsgeschichte Österreichs" 2014, No. 4, p. 88.

[84] Federal act of 16.12.1953 *Bundesgesetzblatt*, No. 1454.

circumstances') between 1st April and 29th June 1945, then this marriage was to be considered valid as well.[85]

Apart from these special cases, however, all attempts by the Catholic Church and its ally, the Austrian People's Party, to achieve a reform of marriage law according to their views were unsuccessful. Given that the ceremony before the public registrar could not establish a religious bond, Catholics needed to marry twice, the second time before a priest. It was vital that this sequence was observed, as another provision that had been adopted from German law, section 67 Civil Status Act 1937, threatened priests who married a couple that had not first married before the registrar with a fine or even a prison sentence.[86] When, in 1950, two Catholic priests married a couple who fulfilled only the requirements for an ecclesiastic but not for a civil marriage, they were sentenced to two and three weeks respectively in prison. The case was brought before the Supreme Court, where it was argued that section 67 violated the freedom of conscience and religion, which the court rejected.[87]

But the last word in this case was once again reserved for the Constitutional Court: On 3rd May 1955 the provincial government of Vorarlberg (led by the People's Party), making use of its right to demand an 'abstract' review of a contested statute, filed an examination request regarding the constitutionality of section 67 Civil Status Act. Shortly thereafter, the provincial government of Tyrol (also led by the People's Party) filed an identical request. Both claimed that section 67 violated the principle of equality as well as the freedom of conscience and religion as laid down in the Treaty of Saint-Germain. The federal government, which was asked by the Constitutional Court to comment on the case, was divided: While the Ministry of Justice (held by the Socialists) pleaded in favour of upholding section 67, the Ministry of Education, which was controlled by the People's Party, argued in favour of its annulment. The constitutional law office at the Federal Chancellery, on the other hand, claimed that the contested provision had been invalid since 1st May 1945 anyway. Eventually, the federal government decided not to comment on the case at all.[88]

In its decision of 19th December 1955, the Constitutional Court confirmed that section 67 Civil Status Act had been adopted into the legal system of the Second Republic; it did not contain any aspects of National Socialist ideology but was a consequence of the principle of an obligatory civil marriage, which was evident not least because a similar provision had existed in Germany since the introduction of this principle in 1875. Regarding its substance, the court argued that as a result of the same principle, a church wedding could not have any effect whatsoever in the realm of the state but could only be relevant within the church. "The performance of religious ceremonies and, specifically, the decision when they should take place belong to the internal affairs of any legally

[85] Law of 26.06.1945, *Staatsgesetzblatt*, No. 31 section 6.

[86] Civil Status Act of 03.11.1937, *deutsches Reichsgesetzblatt*, I, p. 1146.

[87] U. Harmat, *"...eine gottesräuberische Usurpation"?...*, pp. 96–99. The Supreme Court decision cited there (3 Os 84/50/7 of 21.09.1950) could neither be found in the official collection of court decisions nor on the Legal Information System database of the Republic of Austria.

[88] *Ibidem*, p. 115.

recognized church or religious community."[89] Section 67 Civil Status Act was therefore set aside as unconstitutional.

The Marriage Act 1938, however, bearing the signatures of the 'Führer and Reichskanzler' Adolf Hitler and his Minister of Justice Franz Gürtner, has remained valid in Austria to this day.

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Streszczenie

Kontrowersje dotyczące prawa małżeńskiego w XX-wiecznej Austrii ze szczególnym uwzględnieniem orzecznictwa Trybunału Konstytucyjnego odnoszącego się do „małżeństw opartych na dyspensie"

W Austrii koncept cywilnego małżeństwa i rozwodu jako niezależnych od religijnej afiliacji małżonków nie został wprowadzony aż do 1938 roku. Uprzednio wzniecał on masę kontrowersji pomiędzy partiami Socjaldemokratyczną oraz Chrześcijańsko-Socjalistyczną, i to bez jakiejkolwiek nadziei na rozstrzygnięcie. W tej sytuacji socjaldemokratyczni zarządcy niektórych landów austriackich, w szczególności Landu Wiedeńskiego, stosowali paragraf Powszechnego kodeksu cywilnego w celu udzielenia zainteresowanym dyspensy od małżeńskiej przeszkody typu *ligamen* (§ 83 ABGB), co oznaczało, że pozwalali osobie pozostającej w związku małżeńskim zawrzeć ponownie małżeństwo. Wynikło z tej praktyki wiele problemów natury prawnej, a próba Austriackiego Trybunału Konstytucyjnego rozwiązania owej kwestii jako „konfliktu jurysdykcyjnego" doprowadziła do pogłębienia sporu. W 1938 roku reżim nazistowski również w Austrii wprowadził koncept małżeństwa cywilnego oraz rozwiązywalności małżeństwa przez rozwód. Ustawa o małżeństwie z 1938 roku zachowała swą moc prawną w Austrii aż do dziś.

Słowa klucze: Austriacki Trybunał Konstytucyjny, austriackie prawo małżeńskie, „małżeństwa oparte na dyspensie", Hans Kelsen, konflikt jurysdykcyjny.