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Religion and the Drafting of the Saxonian Civil Code

Abstract

The materials of the Saxonian Civil Code of 1863/65 reveal an intensive debate about the importance of religion for private law. The Institutes for Legal History at Freiburg and Heidelberg University will fully publish these materials. The drafting of the provisions for matrimonial law shows the substantive influence of the Lutheran Evangelical Church. Large parts of the final version of the matrimonial law in the Saxonian Civil Code were based on the ecclesiastical law of the Evangelical Lutheran Church. The Civil Code also included special deviations from the Evangelical Lutheran law for Catholics and Jews. The Saxonian lawmaker chose a hybrid solution for matrimonial law: ecclesiastical law in the shell of civilian law. Such a solution was anachronistic since many particular laws in the German Confederacy had already introduced civil marriage to a certain degree. The most outdated Saxonian provision was the prohibition of matrimony between Christians and Jews. The Saxonian Act on Dissidents (1870) and the German Personal Status Act (1875) soon introduced civil marriage also in Saxony and eliminated almost all religious provisions in the Saxonian Civil Code.

Key words: codification, Evangelical Lutheran Church, Judaism, matrimonial law, Saxony.

I. Introduction: Religion in private law

Today, religion and private law are two very different topics in the modern German legal system. For instance, a religious marriage can take place before or without an accompanying civil marriage, but has no binding effect whatsoever on private law (section 1588 German Civil Code). This leads to the more general question about the relationship between religion and private law. Religion has two aspects: personal faith and the religious community to which a person belongs. Neither personal faith nor the religious community suit the particular concept of classical liberal private law that still governs the core of German private law. Private autonomy, the highest principle of private law, is fundamentally different from personal faith. So are the norms of religious communities different from contractual or statutory norms in private law. As we will see here, legal history reveals another concept of private law that includes religion within its sphere.

This ancient concept survived the early decades of the age of codification, but not the social and political changes and the rift between state and church in the late 19th century.

II. Religion in the Kingdom of Saxony

A good example of religion in private law is the role of religion during the drafting of the Civil Code in the Kingdom of Saxony in the middle of the 19th century. We will ask the following questions: How did different religious groups participate in the process of drafting the code? Which provisions in the final code regulated religious matters? Did the regulations in the Civil Code survive the social modernization of the late 19th century?

In the middle of the 19th century, the Kingdom of Saxony offered a unique religious landscape. Saxony had been the origin of reformation and the stronghold of the Evangelical Lutheran Church. The situation became complicated when Augustus the Strong (1670–1733), Elector of Saxony, wanted to acquire the crown as King of Poland and Grand Duke of Lithuania in 1697. He had to convert to Catholicism to be eligible for the throne of the Polish-Lithuanian Commonwealth. Augustus's conversion ran counter to the Saxonian policies and the aristocratic and popular faith. His wife Christiane Eberhardine of Brandenburg-Bayreuth (1671–1727), a staunch Protestant, did not switch her confession. August could not use his *ius reformandi* to force the Saxonian population to convert to Catholicism either. The Kingdom of Saxony remained a Lutheran bastion. Nevertheless, the political impact of Augustus's decision was immense. From a political perspective, a Catholic monarch could neither act as director of the Protestant body in the Imperial Diet nor preside over the Evangelical Lutheran Church, which was *de facto* the Saxonian state church. To use modern terms, a Catholic as head of state was incompatible with the presidency of the state church. If the right of *cuius regio, eius religio* could not be enforced, the *rex* had to split his power. Augustus delegated his directorship of the Protestant body to the Duke of Saxe-Weissenfels. He also entrusted a new Secret Council *in Evangelicis* with the administration of the Evangelical Lutheran Church.¹ This decision separated the two offices: the monarchy as embodiment of the absolutist state and the presidency of church. Augustus's successor, Frederick Augustus II, also King of Poland and Grand Duke of Lithuania (1696–1763), converted to Catholicism in 1712, when he was still a prince. The following electors (since Frederick Christian, 1722–1763) and later kings of Saxony were Catholics from birth.

In the 19th century, section 56 of the Constitution of the Kingdom of Saxony, enacted in 1831, guaranteed public religious practice only to approved Christian communities. Non-approved Christian communities or other religions had to rely on statutes below

¹ Details: J. Bürger, *Carl Friedrich Wilhelm von Gerber als sächsischer Kultusminister. Eine rechts- und verfassungsgeschichtliche Untersuchung zu seinem rechtlichen und politischen Wirken im Spannungsfeld von Staat und Kirche im ausgehenden 19. Jahrhundert* [Carl Friedrich Wilhelm von Gerber as Saxonian Minister of Culture. A Study in Legal and Constitutional History of his Legal and Political Work in the Areas of Tension between State and Church in the Late 19th Century], Frankfurt am Main 2007, pp. 75 f. See later sections 57, 41 of the Constitution of 1831.

the constitutional level to gain collective religious freedom. In opposition to this limited institutional protection of religious communities, section 32 of the Constitution granted personal religious freedom to every citizen irrespective of denomination or religion. Section 33 of the Constitution added that members of approved Christian communities had the same rights in the political sphere and in private law. Members of other Christian communities or other religions could obtain such rights only through special statutes.

In reality, nearly all Saxonians were members of the Evangelical Lutheran Church, which was the prototype of an approved Christian community. Only a small minority, 3%, of the Saxonian population had another denomination or religion. The Roman Catholic Church was the most important minority with 28,000 members in 1864.² It had also obtained the status of an approved Christian community. The Roman Catholic Church was organised in the Apostolic Vicariat of the Saxonian hereditary lands and in the Apostolic Prefecture of Meißen for Lusatia. After the Principal Conclusion of the Extraordinary Imperial Delegation (*Reichsdeputationshauptschluss*) in 1803, Saxony gained administrative control over the Catholic Church in its territory. The state also approved the Reformed Church and the German Catholics (*Deutschkatholiken*), which had very few members. Amongst other, non-approved Christian communities were Methodists and Baptists. Judaism had even fewer members – 3,346 in 1871.³ The Constitution excluded Judaism from the circle of the approved Christian communities, but several statutes of which the first was in 1849 granted the Jews the same rights as Christians.⁴ In other words, Judaism became a second category of approved religious community.

III. Saxonian Civil Code: Genesis and public sources

Before the German Civil Code of 1896 entered into force in 1900, the Civil Code for the Kingdom of Saxony was the only modern codification of private law in the territory of the present Federal Republic of Germany. Other states of the German Confederation – Prussia (1842), Darmstadt-Hesse (1842–1853) and Bavaria (last attempt 1861–1864) – failed to push their drafts on private law to the final stage.⁵ Saxony was an exception. King Johann (1801–1873) and the contemporary Ministers of Justice Johann August Heinrich von Behr (1793–1871) and Ferdinand von Zschinsky (1797–1858) supported the project much more strongly.⁶

² *Ibidem*, p. 84.

³ *Ibidem*, p. 91; see also: R. Penßel, *Jüdische Religionsgemeinschaften als Körperschaften des öffentlichen Rechts von 1800 bis 1919* [Jewish Religious Communities as Corporations of Public Law from 1800 to 1919], Böhlau, Cologne 2014, pp. 382–385.

⁴ Details: Landau/Majer, *Petition of the Israelite Religious Communities of Dresden and Leipzig, 30th April 1861, in the Saxonian general state archive in Dresden*, sig. 10692, no. 5108, fol. 47^r–51^r.

⁵ Overview: B. Dölemeyer, *Kodifikation Deutschland* [German Codification] [in:] H. Coing (ed.), *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte* [Handbook on Sources and Literature on Recent European History of Private Law], vol. III/2, Munich 1982, pp. 1472–1571.

⁶ For a complete history: Ch. Ahcin, *Zur Entstehung des bürgerlichen Gesetzbuchs für das Königreich Sachsen von 1863/65* [The Genesis of the Civil Code for the Kingdom of Saxony in 1863/65], Frankfurt am Main 1996; on King Johann: K. Blaschke, *Johann* [in:] *Neue Deutsche Biographie* [New German Biography],

The Saxonian lawyer Gustav Friedrich Held (1804–1857), temporarily Minister of Justice in early 1849, delivered a first draft in 1852.⁷ The draft consisted of 2,180 paragraphs and resembled in many aspects the General Civil Code of 1811/12 for Austria. Beside some so-called motives from the following year, little is known about the commission assisting Held and his method of drafting.⁸ Since the public and scholarly commentators heavily criticised the draft from 1853 on,⁹ the entire project came close to failing.

That the Saxonian government made another attempt at all was a huge political success. The government summoned a commission to revise the first draft at the end of 1855. Friedrich Albert von Langenn (1798–1868), President of the Upper Court of Appeal (*Oberappellationsgericht*),¹⁰ presided over the revision commission, which held 245 sessions from 24 January 1856 to 24 May 1860. Eduard Siebenhaar, judge at the Upper Appellate Court, was appointed as referent and acted *de facto* as the editor of the code from the special parts of obligations on,¹¹ after Held died in April 1857 during the very early sessions of the revision commission. Siebenhaar's performance was so outstanding that the Saxonian Ministry of Justice appointed him to the commission of the Dresden draft of the law of obligation later. The small Thuringian states sent Friedrich Ortloff (1797–1868) and Karl Friedrich Ferdinand Sintenis (1804–1868) as prominent delegates. Both jurists were presidents of Upper Courts of Appeal and former law professors.¹² An editorial commission supported the revision commission in 83 sessions from 31 May 1856 to 3 April 1860 in order to polish the system and wording of the Civil Code. The effort resulted in a second draft in the autumn of 1860.¹³ In the official commentary on the draft, the so-called motives offered only a short text, insufficient for understanding the new code.¹⁴ After a moderate parliamentary debate in 1861, which did

Vol. 10, 1974, pp. 528 f; on Behr and Zschinsky: H.T. Flathe, *Behr* [in:] *Allgemeine Deutsche Biographie* [General German Biography], vol. 2, Berlin 1875, p. 285; V. Neubert, *Dr. Ferdinand Zschinsky (1797–1858), Sächsischer Justizminister von 1849–58* [Dr. Ferdinand Zschinsky (1797–1858), Saxonian Minister of Justice from 1849 to 1858] [in:] *Sächsische Justizgeschichte* [Saxonian History of the Judiciary], Vol. 4: *Sächsische Justizminister 1831 bis 1950* [Saxonian Ministers of Justice from 1831 to 1950], Dresden 1994, pp. 23–40.

⁷ Biography: H.T. Flathe, *Held* [in:] *Allgemeine Deutsche Biographie* [General German Biography], vol. 11, Berlin 1885, p. 680.

⁸ *Entwurf eines bürgerlichen Gesetzbuchs für das Königreich Sachsen. Nebst allgemeinen Motiven* [Draft of a Civil Code for the Kingdom of Saxony plus General Motives], Dresden 1853; *Spezielle Motiven [sic] zu dem Entwurfe eines bürgerlichen Gesetzbuchs für das Königreich Sachsen* [Special Motives Associated with the Draft of a Civil Code for the Kingdom of Saxony], Dresden 1853.

⁹ For example: Carl Ludwig Arndt von Arnesberg, Karl Friedrich Ferdinand Sintenis, Joseph Unger, Carl Georg von Wächter and Julius Weiske.

¹⁰ Biography: H.T. Flathe, *Langenn* [in:] *Allgemeine Deutsche Biographie* [General German Biography], vol. 17, Berlin 1883, pp. 671 f.

¹¹ Biography: M. Pagenstecher, *Siebenhaar* [in:] *Allgemeine Deutsche Biographie* [General German Biography], vol. 54, Berlin 1908, pp. 336–338.

¹² Biographies: P. Landau, *Ortloff* [in:] *Neue Deutsche Biographie* [New German Biography], vol. 19, 1999, p. 602 f; A. Boeck, *Karl Friedrich Ferdinand Sintenis (1804–1868)* [in:] T. Großböbling, R. Willenius (eds.), *Landesherrschaft – Region – Identität: Der Mittelberaum im historischen Wandel: Festschrift für Prof. Dr. Mathias Tullner* [Essays in Honour of Mathias Tullner], Halle 2009, pp. 118–129.

¹³ *Entwurf eines bürgerlichen Gesetzbuchs für das Königreich Sachsen. Nebst allgemeinen Motiven* [Draft of a Civil Code for the Kingdom of Saxony plus General Motives], Dresden 1860.

¹⁴ *Ibidem*; *Spezielle Motiven [sic] und Publicationsverordnung zu dem Entwurfe eines bürgerlichen Gesetzbuchs für das Königreich Sachsen* [Special Motives and Ordinance on Publication for the Draft of a Civil Code for the Kingdom of Saxony], Dresden 1861.

not challenge the foundations of the project, the Civil Code was published on 2 January 1863. It came into force two years later, on 1 March 1865.

The new code governed relationships in private law in Saxony until the German Civil Code unified the legal landscape and superseded the local code as national law in 1900. The smaller Thuringian states never introduced the code of 1863, although they had sent influential representatives into the Saxonian revision commission – such as Ortloff, who shaped the text of the general part of the law obligations in the code. It is also interesting to know that Siebenhaar published a private commentary on the Saxonian Civil Code, which for the most part echoed the unpublished protocols and the public motives.¹⁵

IV. Saxonian Civil Code: Edition

Members of the Institute for Historical Legal Scholarship at Heidelberg University (Christian Hattenhauer) and the Institute for Legal History and Comparative Legal History at Freiburg University (Frank Schäfer) will publish the complete material on the Saxonian Code in 2018. The project started in spring 2008. The German Research Foundation (*Deutsche Forschungsgemeinschaft*) supports the project under the title “edition of the material on the Saxonian Civil Code of 1863/65” (*Edition der Materialien zum sächsischen BGB von 1863/65*). The edition will contain all published and unpublished materials and nearly all literature on the code from 1852 to 1865. It starts with the text’s first draft from 1852 and stops with Siebenhaar’s commentary on the new Civil Code. The sources before the first draft from 1800 to 1851 are not included, since the early sources do not reveal anything about the drafting of the first draft or the reason for writing it. Luckily, nearly all unpublished materials on the draft survive in the Central State Archive in Dresden, in the Saxonian State- and University Library in Dresden, in the library of the Imperial Court in Leipzig and other places like the Court of Appeal in Jena. The result is a huge data volume: The sources on the Saxonian Civil Code are approximately 12,000 computer pages long.

The edition will present these materials in different ways: first, as an online database with free access, which relies on the technology of the commercial Juris-database. The edition will assign the materials to units containing single paragraphs or small paragraph groups of the final code and present the materials in each unit in chronological order. Parallel to the Historical-Critical Commentary on the German Civil Code, the user can follow the history of each provision from the first draft of 1852 through all later stages in systematic and chronological order. Second, the database will contain the unsorted texts of the materials in full length. Third, the database will include digital pictures of the original texts. Fourth, we will publish the materials as books by print-on-demand to guarantee the sustainability of the publication effort.

¹⁵ E. Siebenhaar (ed.), *Commentar zu dem bürgerlichen Gesetzbuche für das Königreich Sachsen* [Commentary on the Civil Code for the Kingdom of Saxony], 3 vols., Leipzig 1864/65.

The protocols of the revision commission from the Saxonian State and University Library in Dresden resemble the core of the edition.¹⁶ These unpublished protocols are far longer than the published official motives or Siebenhaar's commentary. The digital pictures of these protocols are available via www.sachsendigital.de. The working groups in Freiburg and Heidelberg transcribed every single page and formatted the pages. Overall, the protocols of the revision commission consist of 9,500 pages and the protocols of the editorial commission of nearly 4,000 pages.¹⁷ Despite their massive size, the overall size of the protocols is far smaller than the later protocols on the German Civil Code. However, we include materials such as parliamentary protocols, correspondence and contemporary literature, so the overall size matches the edition of the materials on the German Civil Code.¹⁸

V. Saxonian Civil Code: Provisions on religion

1. Overview

The norms on religion in the Saxonian Civil Code start in section 51. The provision lays down the principle that there shall be no differentiation by religion in private law. In present terminology, this paragraph forbade religious discrimination in principle. Section 51 Saxonian Civil Code extended section 33 of the Saxonian Constitution to apply to citizens belonging to a non-approved Christian community or to a non-Christian religion, mainly Judaism. Since section 51 only stated a principle, it was open to exceptions, as we will see soon.

The next provision, section 879 of the Saxonian Civil Code, declared any promise to change religion or denomination null and void. The similar rule in the first draft of 1852 (section 714) had been limited to a change of religion.¹⁹ It is clear that the Saxonian Civil Code made a distinction between the words religion and denomination. It is important to know for the following provisions, that the Christian denominations were seen as a single religion. On the other hand, Judaism under this scheme was not just a denomination of Christianity, but a different religion.

¹⁶ Sig. Hist. Sax. K. 35c; Hist. Sax. K. 35. Other copies are in the State Library of Berlin, in the library of the Imperial Court at the Federal Administrative Court in Leipzig and in the library of the Law Faculty of Potsdam University.

¹⁷ Sig. Hist. Sax. K. 35b. Another copy is preserved in the library of the Imperial Court at the Federal Administrative Court in Leipzig.

¹⁸ W. Schubert, H.H. Jakobs (eds.), *Beratung des Bürgerlichen Gesetzbuchs* [Consultation of the Civil Code], Berlin 1978 ff.

¹⁹ See *Acta der Zwischendeputation der I. Kammer, Recht der Forderungen* [Files of the Intermediary Deputation of the 1st Chamber, Law of Obligations], §§588–1029, No. 8b, Vol. III, fol. 28^r in the Saxonian general state archive in Dresden, sig. 10692, no. 4103; *Acta der Zwischendeputation der II. Kammer, Recht der Forderungen* [Files of the Intermediary Deputation of the 2nd Chamber, Law of Obligations], Vol. V, fol. 30^r, in the Saxonian general state archive in Dresden, sig. 10692.

The bulk of religious provisions dealt with matrimonial law, since this area was the historical core topic of canon law.²⁰ Sections 1588 and 1620 stated and secured that the form of the wedding ceremony and the authority responsible for the wedding ceremony must follow religious rules. As consequence of this legislative decision, the wedding ceremony took place in front of a priest or a rabbi. The next provision, section 1591, created a specific rule for Catholics. It laid down a matrimonial impediment for Catholics. Canon law did not allow divorce and a new marriage after an illegal divorce. Section 1591 ensured that Catholics could not marry again after divorce. The rule extended to a divorced non-Catholic person who wanted to marry a Catholic. Section 1766 was again a specific provision for Catholics. Since canon law did not allow divorce, the Civil Code opted for mere so-called separation of board and bed. Sections 1619 and 1770 provided general clauses to include religious norms in the code. The first provision opened civil matrimonial law for additional religious marriage impediments, if an approved religious community did acknowledge them for their members. For the same reason, the second provision opened matrimonial law for additional religious causes for divorce. *Vice versa*, the provisions also opened civil matrimonial law for religious restrictions in both cases. Section 1617 abolished marriage between Christians and Non-Christians. We will discuss this provision, which discriminated against Jews, in full detail. In its final version section 1744 allowed divorce if one member of the couple changed religion. The revision commission had rejected such a reason, but was overruled for political reasons.²¹ It is important that mere conversion amongst Christian denominations did not suffice as a cause for divorce.²² Section 1769 solved the issue of mixed Christian marriages in case of divorce. The provision stated that the denomination of the defendant decides the rules on divorce.

All these provisions did not specify the court responsible for matrimonial disputes, for example in the case of divorce. A special statute from 1835 governed this issue.²³ Following the provisions of this statute, the Courts of Appeal were responsible in the first instance for Lutheran Evangelical couples and mixed Lutheran Evangelical-Catholic couples. Clerics acted as equal members of the court in the case of conciliation hearings, resolutions and other matters.²⁴ Upper Lusatia retained special regulations for

²⁰ General history: H. Hattenhauer, *Grundbegriffe des Bürgerlichen Rechts: Historisch-dogmatische Einführung* [Basic Concepts of Private Law: Historical-Dogmatic Introduction], 2nd ed., Munich 2000, pp. 154–184; for the ecclesiastical background of the provisions: F. Sturm, G. Sturm, *Der Kampf um Zivil- und Dissidentenehe im Königreich Sachsen* [The Battle for Civil and Dissident Marriage] [in:] S. Buchholz, H. Lück (eds.), *Worte des Rechts – Wörter zur Rechtsgeschichte: Festschrift für Dieter Werkmüller zum 70. Geburtstag* [Essays in Honour of Dieter Werkmüller], Berlin 2007, p. 384.

²¹ Revision commission, session 204, 6th October 1859, pp. 38 f; session 245, 24th May 1860, p. 5.

²² F. Poland, *Praktische Bemerkungen zum Entwurfe eines bürgerlichen Gesetzbuches für das Königreich Sachsen* [Practical Comments on a Draft of a Civil Code for the Kingdom of Saxony], Dresden 1853, p. 22; *Bemerkungen des Ref. d. II. Kammer* [Comments of the Referent of the 2nd Chamber] §§1388–2170, 1853, fol. 14v, in the Saxonian general state archive in Dresden, sig. 10692, no. 4096/1.

²³ Gesetz über privilegierte Gerichtsstände und einige damit zusammenhängende Gegenstände [Act on Privileged Jurisdiction and some Related Topics], 28th January 1835 [in:] *Gesetz- und Verordnungsblatt für das Königreich Sachsen* [Law Gazette for the Kingdom of Saxony] 1835, p. 75.

²⁴ Section 55 of the act on privileged jurisdiction and some related topics.

mixed couples.²⁵ The Upper Court of Appeal in Dresden provided the second instance.²⁶ The Catholic Consistories in Dresden and the Consistory of the Cathedral chapter Saint Petri of Bautzen were responsible for Catholic couples in the first instance and the Vice Vicariat Court of Dresden in the second instance.²⁷ The Jewish population had the privilege of special religious courts as well.²⁸

The final code did not include section 1510 of the first draft of 1852, which had referred to special statutes for religious education in mixed marriages.²⁹ Since section 1802 of the Saxonian Civil Code granted the father the right to determine the child's education, if he disagreed with his wife he had the final say on the child's religion.

2. In detail: Religious or civil marriage

The Saxonian Civil Code made a twofold decision. Firstly, it installed a hybrid concept for matrimonial law between civil and religious law, basically ecclesiastical law. The new Civil Code opted neither for religious nor for civil matrimonial law as a pure legislative concept. The core of matrimonial law consisted of Lutheran Evangelical rules, which the lawmaker adopted as codified private law. These ecclesiastical norms were only slightly modified, e.g. in the case of incorrigible alcoholism as a cause for divorce (section 1733, Saxonian Civil Code).³⁰ The adoption of these rules had two main applications: impediments to marriage and reasons for divorce. Religious, mainly ecclesiastical law as a legal source in its own right came into play for the form and the responsible office of the wedding ceremony. Religious rules also could modify the impediments to marriage and the reasons for divorce. In these instances, the lawmaker used the technique of explicitly referring to religious norms.

If one compares the Saxonian solution to other contemporary civil codes, it becomes clear that such religious differentiations had been outdated for decades. The French Civil Code of 1804 and most of its copies – e.g. the Geneva and Neuchâtel codes in Switzerland, the Austrian General Civil Code of 1811/12 in its original form and the Zurich Private Code of 1853–1856 – all implemented a unified concept for matrimonial law. So did the two most important examples of the older land laws, the Bavarian Land Law of 1756 (*Codex Maximilianeus Bavaricus Civilis*) and the Prussian General Land Law of 1794, as well as the laws of the Duchies of Schleswig and Holstein. The Austrian and Bavarian legislation adopted canonical rules, Schleswig and Holstein adopted protestant rules to achieve unity in matrimonial law; the other jurisdictions did not copy a specific ecclesiastical set of norms.³¹ Only the non-codified matrimonial law in other parts of the German

²⁵ Section 35 of *Verordnung, die Ausführung innerbemerakter Gesetze betreffend* [Ordinance Concerning the Mentioned Acts], 28th March 1835 [in:] *Gesetz- und Verordnungsblatt für das Königreich Sachsen* [Law Gazette for the Kingdom of Saxony] 1835, p. 212.

²⁶ Section 59 of the act on privileged jurisdiction and some related topics.

²⁷ Section 62 of the act on privileged jurisdiction and some related topics.

²⁸ Section 65 of the act on privileged jurisdiction and some related topics.

²⁹ See Revision commission, session 189, 1st September 1859, p. 38.

³⁰ For a lengthy debate on the topic, see Revision commission session 203, 4th October 1859, pp. 39–54.

³¹ For details, see Gottlieb Planck's contribution in: W. Schubert (ed.), *Die Vorlagen der Redaktoren für die erste Kommission zur Ausarbeitung des Entwurfs eines Bürgerlichen Gesetzbuches, Familienrecht* [The

Federation and some older statutes chose a hybrid solution or assigned matrimonial law entirely to ecclesiastical law: the areas of the *ius commune* in the Kingdoms of Bavaria and Prussia, the Kingdoms of Hannover and Wurttemberg, the Grand Duchies of Hesse and Oldenburg, the Duchy of Nassau, the Electorate of Hesse, also next to Saxony the Duchies of Saxe-Altenburg and Saxe-Gotha and the Principality of Schwarzburg-Sondershausen.³²

Secondly and *a fortiori*, the Saxonian matrimonial law opted against civil marriage where the wedding took place in front of a public registrar, and the rest of matrimonial law consists of secular norms. In this respect too, the Saxonian solution trailed behind contemporary legal politics. Since §150 of the failed Frankfurt Constitution of 1849, civil marriage had been on the agenda of the constitutional and democratic movement. The constitutions of the Kingdom of Prussia (1848/1850), the Grand Duchies of Mecklenburg (1849) and Oldenburg (1849), the Principality of Waldeck (1849) and many other political entities promised civil marriage in private law. As often, such political promises failed to materialize. Only a handful of jurisdictions introduced civil marriage in its general obligatory or mandatory form before German unification: The area governed by the French Civil Code and its Swiss derivatives, the Free Imperial City of Frankfurt am Main (1850), the Grand Duchy of Oldenburg (1855) and the Free Imperial City of Hamburg (1865). The Electorate of Hesse (1848–1853) and the Duchies of Anhalt-Dessau and Anhalt-Köthen (1849–1851) introduced it temporarily. The Kingdom of Prussia (1847/48), the Free Imperial Cities of Hamburg (1849) and Lübeck (1852), the Electorate of Hesse (1853), the Kingdom of Wurttemberg (1855), the Grand Duchy of Baden (1860/1869), the Duchies of Nassau (1863) and Sachsen-Weimar (1864) and last but not least the Empire of Austria (1868/70) opened the gates to civil marriage at least in a limited form for dissidents and Jews.³³

Beyond the surface of the officially published materials on the code, the unpublished protocols of the revision commission reveal a long and intensive debate on the general question of whether religious norms should be included in matrimonial law at all. In essence, in 1859 the revision commission debated three options: first, a purely civil marriage, second, a purely religious marriage and third, a hybrid solution as a middle path.

Robert Schneider (1807–1871), president of the Court of Appeal in Dresden and later Minister of Justice,³⁴ pleaded to exclude the provision on entering and leaving marriage from the Civil Code.³⁵ Despite the close relationship between the Evangelical Lutheran Church and the state, Schneider argued, the Evangelical Lutheran Church was autonomous and could rely on religious freedom to protect it in cases of infringement of state legislation. He did not accept the status of the Evangelical Lutheran Church as a *de facto* state church. Schneider suggested two ways to avoid any religious and political conflict with the Evangelical Lutheran Church: either no regulation of matrimonial law in the code or the institution of civil marriage. Since Schneider clearly condemned civil mar-

Templates of the Editors of the First Commission on the Drafting of a Civil Code for Family Law], part 1, Berlin 1983, p. 155.

³² *Ibidem*.

³³ *Ibidem*, pp. 157–161.

³⁴ Biography: E. Landsberg, *Geschichte der Deutschen Rechtswissenschaft* [History of German Legal Scholarship], Vol. III/2, notes, Munich 1910, p. 253.

³⁵ Revision commission, session 200, 27th September 1859, pp. 9–19. See also F. Poland, *Praktische Bemerkungen...*, p. 21: the exclusion of Catholic matrimonial law from the code.

riage, the exclusion of matrimonial law remained as the only possible solution. However, the majority in the commission voted against Schneider's proposal.³⁶ They argued that marriage had the character of a mixed legal institution, containing aspects of both religion and public morality. The majority did not contemplate civil marriage as a serious option.

3. In detail: Culture clash? The Catholic Church

The position of the Roman Catholic Church also deserves some detailed study. Compared with the Catholic Church, the influence of the Evangelical Lutherans was overwhelming. Carl Adolph Eduard von Zobel (born in 1801) was a member of the revision commission as a deputy of the Ministry of Culture and Education.³⁷ The Evangelical Lutheran Church dominated this Ministry, which dealt with religious matters. The church also directly influenced the drafting process through its Evangelical General Consistory and the State Ministers *in Evangelicis*, which presided over the Evangelical Lutheran Church in Saxony. These two institutions and the Ministry of Culture and Education had to be consulted at every step of the drafting.³⁸ Note that the representatives of the Evangelical Lutheran Church and single clerical voices agreed with the general concept of the new matrimonial law, but not in every detail.³⁹

The Catholic influence, on the other hand, was nearly invisible, since the Catholic Church represented less than 2% of the Saxonian population. There was no sign of a *Kulturkampf* between the kingdom of Saxony and the Catholic Church on matrimonial law, since the Vatican itself kept silent. The Saxonian codification was not significant enough to produce a religious dispute between the church and the state. The only visible Catholic critique of the code came from the vicar apostolic for Saxony. In 1853, Vicar Apostolic Joseph Dittrich (1794–1853) rejected the matrimonial law in the draft as an intervention against the inner constitutional sphere of the Catholic Church.⁴⁰ He argued that a Catholic priest should not be forced to apply rules on weddings which contradict canon law. Dittrich also pointed out that a change of religion was no reason for divorce under canon law, but opened the door to abuse. Consequently, his apostolic successor

³⁶ Revision commission, session 200, 27th September 1859, pp. 19–33. For Schneider: President Friedrich Albert von Langenn; neutral: Friedrich Robert von Criegern, Eduard Siebenhaar; against Schneider: Christoph Gustav Marschner, Gustav Friedrich Theodor von König and Friedrich Ortloff.

³⁷ A detailed biography is not available.

³⁸ See C.Ch. Kopp, *Bemerkungen zum Entwurfe eines bürgerlichen Gesetzbuchs für Sachsen in vier Heften* [Comments on a Draft on a Civil Code for Saxony in Four Volumes], 1853, fol. 12^v, in the Saxonian general state archive in Dresden, sig. Ständeversammlung 1833–1918, no. 4086–4087.

³⁹ See for example Ministry of Culture and Education, Memo, 7th June 1861, in the Saxonian general state archive in Dresden, sig. 11125, no. 30; F.M. Schubarth, *Das Eherecht des Entwurfs eines bürgerlichen Gesetzbuchs für das Königreich Sachsen in landeskirchlicher Beziehung* [The Matrimonial Law of the Draft of a Civil Code for the Kingdom of Saxony in Relation to the Regional Church], Leipzig 1861.

⁴⁰ J. Dittrich, *Bemerkungen und Anträge zu dem Entwurfe eines bürgerlichen Gesetzbuchs in Betreff des Eherechts* [Comments and Applications for the Draft of a Civil Code Concerning Matrimonial Law], 3rd February 1853, fol. 47^v–65^v, in the Saxonian general state archive in Dresden, sig. 10692, no. 4085.

Ludwig Forwerk (1816–1875) voted against the final draft of the Civil Code in the Upper House of the Saxonian Parliament.⁴¹

4. In detail: Emancipation of Jews?

The matrimonial rules were a clear setback for the emancipation of Jews in the Kingdom of Saxony. Nevertheless, the lobbying of the Jewish community in Leipzig and Dresden against discrimination during the year 1861 was partially successful.⁴² On the one hand, the final version of the Civil Code omitted any restrictions for Jews who noted in guardianship (*Vormundschaft*).⁴³ In that respect, the final code followed section 1585 of the first draft of 1852 and the Austrian example. In opposition to this, section 1918 of the draft of 1860 had stated that Non-Christians could not act as guardians of Christians.⁴⁴ Unlike the first draft of 1852, the final version of the code also no longer contained any specific regulation for Jewish marriages. Section 1488 of the first draft had regulated the separation of Jewish spouses, section 1489 the separation from bed and board plus the execution of divorce, sections 1490 and 1491 the consensual divorce letter and section 1492 the contested divorce.

On the other hand, the verdict against a Christian-Jewish marriage remained in section 1617 of the final code. The revision commission implemented this provision, which had already been in the first draft of 1852, without any reasonable juristic explanation.⁴⁵ The Jewish community could point out later that several acts had already granted them religious freedom and equal status in public and private law since 1849. On that legal basis they criticized the reasoning of the official motives of the second draft of 1860, which claimed that the constitution limited equal rights to the various Christian denominations. The Jewish community was right to conclude that the ban of mixed marriages was unconstitutional. They also pointed to Prussia where mixed marriages had been allowed since 1847 in the form of civil marriages. Even the Duchy of Saxe-Eisenach (1850) had opted for this solution.⁴⁶ Therefore, the Jewish community proposed, Saxony should also introduce civil marriage to allow mixed marriages.

The liberal segment of the Saxonian Parliament sympathised with the arguments of the Jewish community. Those arguments did not, however, convince the majority of both

⁴¹ 51st session of the 1st Chamber of the Parliament of the Kingdom Saxony, 1st May 1861, in the Saxonian general state archive in Dresden, sig. 10692, no. 5108, fol. 39^v; Protocol of the 1st Chamber of the Parliament of the Kingdom of Saxony, 1st May 1861 [in:] *Landtags-Acten* [Files of the Parliament] 1860/61, p. 340.

⁴² Landau/Majer, *Petition*..., fol. 46^v-73^v; summary in: *Siebenhaar* [in:] E. Siebenhaar (ed.), *Commentary*..., vol. 1, §51, pp. 84 f.

⁴³ Report of the 1st Deputation of the 2nd Chamber of the Parliament of the Kingdom of Saxony, 15th July 1861, fol. 163^v, in the Saxonian general state archive in Dresden, sig. 10692, no. 5108.

⁴⁴ See the majority of the revision commission, session 189, 15th September 1859, p. 19, against the minority (Christoph Gustav Marschner and Friedrich Ortloff).

⁴⁵ Revision commission, session 201, 29th September 1859, pp. 21–23; *Specielle Motiven [sic] zu dem Entwurfe eines bürgerlichen*..., p. 330: A marriage between a Christian and non-Christian was regularly lacking any domestic bliss.

⁴⁶ A. von Heerwart, *Bemerkungen zu dem neuen Entwurfe eines allgemeinen bürgerlichen Gesetzbuchs, Vierten Theils* [Comments on the New Draft of a General Civil Code, Fourth Part], fol. 27^v, in the Saxonian general state archive in Dresden, sig. Reg. 19000 Nr. 404/435; W. Schubert (ed.), *Die Vorlagen*..., p. 161.

Houses. The majority argued that the ban was necessary to secure religious freedom and was consistent with section 33 of the Constitution.⁴⁷ As long as marriage was at least in part a religious institution, they considered the ban to be consistent even with the religious freedom of the Jewish community. As we can see, the questions of civil marriage and Jewish emancipation were closely interconnected.

VI. Aftermath

1. Saxonian Act on Dissidents (1870)

The hybrid concept of the Saxonian Civil Code between civil and religious norms was outdated very soon. After just five years, the liberal movement in the Saxonian Parliament achieved a partial victory. The Act on Dissidents of 1870 introduced civil marriage for citizens without any denomination.⁴⁸ Section 1 of the act laid down the basic principle: “The civil register at the lower civil court (register on civil status) documents the births, deaths and marriages of persons who are not members of a denomination approved by the state.” Sections 16 and 17 extended civil marriage to couples with mixed Christian denomination provided their churches refused to wed them. Furthermore, section 19(1) of the Act repealed section 1617 of the Civil Code. Jewish citizens could now marry Christians by means of civil marriage (sections 16, 17 of the Act). Section 19(3) of the Act excluded the application of other religious provisions: sections 1588 (form of wedding ceremony), 1591 (special impediment to remarriage after divorce for Catholics), 1619 (variations on impediments to marriage), 1620 (nullity of marriage for breach of section 1588), 1769 (divorce of mixed marriages) and 1770 (variations on causes for divorce). Besides that, the impediments to marriage, the causes for nullification of marriage and causes for divorce were applicable to the new civil marriage (section 19[2] of the Act) because these provisions lacked any specific religious content.

2. German Personal Status Act (1875)

The so-called Kulturkampf, the power struggle between the new national constitutional state and the Roman Catholic Church, drew a clear division between public and private law on one hand and the norms of religious groups on the other. As a result, both the Kingdom of Prussia and the Swiss Confederation introduced obligatory civil mar-

⁴⁷ Report of the 1st Deputation of the 2nd Chamber of the Parliament of the Kingdom of Saxony, 15th July 1861, fol. 163^v, 167^{rv}, in the Saxonian general state archive in Dresden, sig. 10692, no. 5108.

⁴⁸ *Gesetz, die Einführung der Civilstandsregister für Personen, welche keiner im Königreich Sachsen anerkannten Religionsgemeinschaft angehören [...]* [Act on the Introduction of a Register on Civil Status for Persons, who Do not Belong to any Approved Religious Community], 20th June 1870 [in:] *Gesetz- und Verordnungsblatt für das Königreich Sachsen* [Law Gazette of the Kingdom of Saxony], 12th piece 1870, p. 215. In detail: F. Sturm, G. Sturm, *Der Kampf um Zivil- und Dissidentenehe...*, pp. 384–398.

riage in 1874.⁴⁹ The Imperial Parliament followed one year later by enacting the Personal Status Act in 1875.⁵⁰ Not religious norms, but liberal private law now governed the conditions and form of a wedding. Section 1 of the Personal Status Act stated: Public registrars have the exclusive power to certify births, marriages and deaths in a public register with effect to private law. Section 39 of the act added: All provisions which restrict the right of wedding beyond this act, are repealed. Sections 82 made clear that civil marriage does not abolish ecclesiastical marriages but denies the latter any effect on private law. Furthermore, section 67 secured the chronological primacy to civil marriage by fining a religious pre-wedding.

In reaction, the Saxonian Parliament modified the Saxonian Civil Code far beyond the scope of the Personal Status Act. The Saxonian Parliament not only repealed sections 1619 (variations on impediments to marriage), but also erased most religious elements in the rest of matrimonial law: sections 1766 (separation of board and bed for Catholics), 1769 (divorce of mixed-marriage couple) and 1770 (variations of causes for divorce) of the Saxonian Civil Code.⁵¹ Section 1744 (change of religion as a cause for divorce) remained. Sections 1588 (form of wedding ceremony), 1591 (special impediment to remarriage after divorce for Catholics) and 1620 (nullity of marriage for breach of section 1588) of the Saxonian Civil Code had no function in any case and did not need explicit repeal. The Imperial Code on Civil Procedural Law came into effect four years later. It assigned matrimonial trials to the civil courts, thus securing civil marriage on the procedural level.

3. German Civil Code (1896)

The Civil Code of the German Empire of 1896 completely abandoned the hybrid concept of mixing private law and ecclesiastical law in matrimonial affairs. Although the section on matrimonial law still followed the Christian conception of marriage in many ways, the provisions themselves lacked any reference to religion or specific religious communities. The legislature completely separated ecclesiastical law and civil law. Section 1588 of the Civil Code repeated section 82 of the Personal Status Act, thus implementing the separation of the two realms as a basic principle of the German legal system. The provision reads as follows: Church duties with regard to marriage are not affected by the provisions of this division. Section 1588 is also called the *Kaiserparagraph* (emperor paragraph), with possible reference to Matthew 22, 21: “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”⁵²

⁴⁹ Prussian Statute, 9th March 1874; Swiss Federal Statute, 24th December 1874; for details, see W. Schubert (ed.), *Die Vorlagen...*, pp. 155, 157.

⁵⁰ *Reichsgesetzblatt* [German Imperial Law Gazette] 1875, No. 4, p. 23.

⁵¹ §9 des Gesetzes, einige Abänderungen des Bürgerlichen Gesetzbuchs und damit in Zusammenhang stehende Bestimmungen enthaltend [section 9 of the Act, Modifying the Civil Code and Containing Some Related Matters], 5th November 1875 [in:] *Gesetz- und Verordnungsblatt für das Königreich Sachsen* [Law Gazette of the Kingdom of Saxony], 12th piece 1875, pp. 349 f.

⁵² In detail: H.-J. Becker, *Der so genannte Kaiser-Paragraph (§1588 BGB)* [The So-called Emperor Paragraph (section 1588 Civil Code)] [in:] S. Hofer, D. Schwab (eds.), *Perspektiven des Familienrechts: Festschrift für Dieter Schwab zum 70. Geburtstag am 15. August 2005* [Essays in Honour of Dieter Schwab], Bielefeld 2005, pp. 269–285.

The procedural provisions of 1875 remained in the Personal Status Act. Section 67 of this Act secured the chronological primacy of the civil wedding. Thereafter, a religious wedding could not take place before or without a civil wedding. Section 67 was not revised until 2009. At the substantive level, however, a religious wedding is still irrelevant for private law.

VII. Conclusion

If we look back to the drafting of the Saxonian Civil Code of 1863/1865, we can answer the questions raised in the beginning as follows.

First, the various religious groups participated in the process of drafting the legislation in very different ways. Since the Evangelical Lutheran Church was the *de facto* state church of the Kingdom of Saxony, it had by far the greatest influence on the code. Not only the ministers *in Evangelicis*, but also the Ministry for Cultural Affairs and Education represented the state church in a comprehensive manner. The Catholics, by contrast, had only the bishop representing the Apostolic Vicariat of Saxony as a single voice outside the official hierarchy when it came to the drafting of the Civil Code.

Second, nearly all provisions in the final civil code concerning religious matters were about matrimonial law. The Saxonian Civil Code no longer distinguished between denominations and religions when it came to general status and personal rights. Following equality as a key principle of liberal private law, every Saxonian citizen had equal status and equal rights. Religion however, had a last sanctuary in matrimonial law.

Third, the legislator enacted the Saxonian Civil Code to become a juridical monument for many generations. Actually, almost none of the religious provisions in the code survived their first ten years. The reason was simple: The concept of hybrid law in the Saxonian Civil Code was outdated from the very beginning. The Code was visionary in many aspects but in the case of matrimonial law it hung on to very old concepts, which were already outdated around 1800. The inclusion of religious elements no longer suited the national liberal movement and its conception of liberal private law. It was liberalism and not conservatism which dominated the first decades of the New German Empire shortly after the enactment of the Saxonian Civil Code.

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Streszczenie

Religia a redakcja saskiego Kodeksu cywilnego

Materiały redakcyjne do saskiego Kodeksu cywilnego z lat 1863–65 ujawniają toczącą się wówczas gorącą debatę dotyczącą znaczenia religii w obszarze prawa cywilnego. Instytuty Historii Prawa Uniwersytetów w Freiburgu i Heidelbergu będą publikować przedmiotowe materiały. Redakcja przepisów odnoszących się do prawa małżeńskiego ukazuje istotny wpływ Kościoła luterańskiego. Spora część ostatecznej wersji prawa małżeńskiego w saskim Kodeksie cywilnym została oparta na prawie kościelnym Kościoła luterańskiego. Kodeks cywilny zawierał także szczególne odstępstwa od prawa luterańskiego w odniesieniu do katolików i żydów. Ustawodawca saski wybrał dla prawa małżeńskiego rozwiązanie hybrydowe: prawo kościelne w powłoce prawa cywilnego. Rozwiązanie to było anachroniczne w sytuacji, gdy już wcześniej liczne prawa partykularne niemieckiej Konfederacji wprowadziły w pewnym stopniu małżeństwo cywilne. Najbardziej przestarzałym saskim przepisem był zakaz małżeństw między chrześcijanami a żydami. Saska Ustawa dotycząca dysydentów (1870) i niemiecka Ustawa o statusie osobowym (1875) wkrótce wprowadziły małżeństwa cywilne także w Saksonii i wyeliminowały niemal wszystkie przepisy religijne z saskiego Kodeksu cywilnego.

Słowa kluczowe: kodyfikacja, Kościół luterański, judaizm, prawo małżeńskie, Saksonia.