

*More favored - less favored? Women and men in different marital property right systems: A comparative study of marital property rights in the Habsburg Empire during the 18<sup>th</sup> century*

by

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Our paper focuses on several central points concerning pre-nuptial negotiations, the results of which were finalized in marriage contracts.

There are two opposing systems of the law governing marital property regimes: the regime of matrimonial community of property or joint marital property, *Gütergemeinschaft*, and the regime of separation of marital property, *Gütertrennung*. We compare two territories of the Habsburg Empire – the County of Tirol with the regime of separation of marital property dominating, and the Archduchy of Austria South of the River Enns (Lower Austria), with matrimonial community of property dominating in rural areas. For each territory, we concentrate on a single landed estate: Fridau-Weißenburg in the case of Lower Austria, and Innichen in the case of Tirol. Innichen was a small market town with a mixed economy based on agriculture and the trades;<sup>1</sup> while the estate of Fridau-Weißenburg was more rural and agricultural and also preindustrial since the middle of the 18<sup>th</sup> century.

**Marriage and inheritance: rules of law and legal practices**

The two areas represented different legal systems governing property and wealth in marriages and were also different in terms of their legal systems governing inheritance.

*Women and property rights in the Archduchy of Austria South of the River Enns*

Most important for the position of (married) women in the society of the Archduchy of Austria South of the River Enns was the property law. Land was owned by the landlords and given to the dependent peasants. The relationship of the unfree peasants to their landlord was characterised by varying degrees of dependency. The farm itself, the *behauste Gut* consisted of the farmhouse and the land, which must not be divided. From the late Middle Ages peasants were free to sell, or bequeath their property, as long as they managed their farms well and paid their duties. As the peasants were personally dependent, they had to ask for

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<sup>1</sup> Margareth Lanzinger, *Das gesicherte Erbe, Heirat in lokalen und familialen Kontexten, Innichen 1700-1900*, Wien/Köln/Weimar, Böhlau, 2003

their landlord's permission to marry or when leaving his area of jurisdiction.<sup>2</sup> When peasants took over a farm, both husband and wife were registered in the land register as co-owners. When the husband died, the widow alone was registered as owner. In case of remarriage a new co-ownership would be established with the new husband.

Until the codification of matrimonial law in the late 1780s, the prevailing system in the Archduchy of Lower Austria was one of customary law, the *Landsbrauch*, which dated back to the Middle Ages. It consisted of various regulations, differing from town to town and from estate to estate. In regions dominated by land-owning peasants the systems of customary law gave preference to the *Gütergemeinschaft* or joint marital property. The concept of joint marital property entailed that all the property and means that accrued to the spouses during their marriage formed a common matrimonial pool of wealth, *ein gemeinschaftliches Gut*. The rural household as a unit of labor and consumption favored the merging of property holdings, or at least the merging of any accrued gains. Joint property also seems to have been the dominant form in the lower middle class and the artisan class.<sup>3</sup>

During the 16<sup>th</sup> and 17<sup>th</sup> centuries the rise of the modern state touched off a standardization of the law in the states and provinces. In the Archduchy of Austria South of the River Enns the various drafts of *Landesordnungen*, compilations of written or unwritten customs as well as regulations influenced by the Roman law, were only partly approved by the sovereigns.<sup>4</sup> The parts dealing with matrimonial property arrangements, strongly influenced by Roman law, favored the *Heiratsgabensystem* especially, which ran counter to customary law. The complete draft never came into force, and the legal practice of agreements of joint marital property, referring to the “old customs”, dominated as before. Matrimonial property arrangements and the law of inheritance are strongly intertwined and influence each other. In Austria South of the River Enns the surviving spouse – whether male or female – inherited half of the property, as a consequence of co-ownership.<sup>5</sup> If one of the children was to take over, the youngest was preferred, and there was no legal discrimination against daughters.

In the 1780s the matrimonial law for peasants was codified and strongly modified to a system with more rights for the husband, primogeniture and preference for male heirs. In 1790 this law was revoked and modified – and the co-ownership of husband and wife was re-

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<sup>2</sup> Helmuth Feigl, *Die niederösterreichische Grundherrschaft*, Forschungen zur Landeskunde von Niederösterreich, 16, St. Pölten, Verein für Landeskunde von Niederösterreich, 1998<sup>2</sup>, 49-50.

<sup>3</sup> Wilhelm Brauneder, *Die Entwicklung des Ehegüterrechts in Österreich. Ein Beitrag zur Dogmengeschichte und Rechtsstatsachenforschung des Spätmittelalters und der Neuzeit*, Salzburg/München, Fink, 1973.

<sup>4</sup> Ursula Floßmann, *Österreichische Privatrechtsgeschichte*, Wien/New York, Springer, 2001<sup>4</sup>, 88-96, 92-93.

<sup>5</sup> Kaiser Leopold I., 13. März 1679, ‘Tractatus de Iuribus Incorporalibus’, IV. Titul, Von der Grund=Obrigkeit, § 16, in *Codex Austriacus* I, Wien 1704, 581ff

established as was the right of the widow/widower to take over the farm. Primogeniture and preference of the male heir were not withdrawn, but completely neglected in practice.

In the Innichen, separation of wealth and property between the spouses was the norm, and for the “principle” or original sums, the standard was *Anerbenrecht* (impartible inheritance) with primogeniture; in other words: the undivided transfer of property to the oldest son as the heir. The legal basis for this was Tirol’s sixteenth-century *Landesordnung*.<sup>6</sup>

The manorial system in the Tirol was quite different from the one in Lower Austria: there was practically no personal dependency of the peasantry upon the landlord; the Tirolean peasantry was personally “free”. Manorial marriage consent, *Ehekonsense*, was unknown, and the laws did not require written marriage contracts. That is why there are many more marriage contracts in the archives of Lower Austria than in the Tirol.

Our central question concerned the consequences of the aforementioned differences in law upon the topic of prenuptial negotiations. What did men, women and their families feel a need to agree upon? And how did the agreements look in actual practice? What ideals (concerning the proper gender-related order of things) came into play?

In the following, we would like to take a few selected examples of typical passages to illustrate the most important points of contractual practice. Contracts represent an intermediary legal form, which is – or must be – oriented in a legal framework, but which also serves to reconcile norms and practice, norms and real-life situations. A number of factors can result in specific constellations which necessitate various forms of agreement or modifications: socio-economic situation, social rank, the question of whether the marriage in question is a first marriage or a remarriage, a large age difference between bride and groom, and many other things. We will provide examples of these later on. In a third and final section, we provide a short look at how far-reaching changes in the legal system could have an effect on contract-writing practice. Our analysis centers on the point where gender studies and legal history meet and concentrates on the 18<sup>th</sup> century.

### **Property arrangements within marriage contracts**

Marriage contracts specified the economic terms of the marriage. They focus on the disposition of the spouses’ property. The means of both were called upon to help “bear the burdens of married status”, to establish a family economy. Marriage contracts also defined the entitlement of a surviving spouse to an inheritance, the children’s claim to an inheritance, and the way in which the possible widow or widower was to be provided for.

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<sup>6</sup> New reformierte Landsordnung der fürstlichen Grafschaft Tirol, o.O. [1573], Buch III

*“Heiratsgut”, “Widerlage”, “Morgengabe” and related agreements in the system of joint marital property – Archduchy of Austria South of the River Enns*

Both partners had to contribute toward the creation and survival of the household and family. The property contribution of the bride to the marriage was usually referred to as *Heiratsgut*. In return, the groom was expected to contribute an equal amount to the household as a *Widerlage*. The *Heiratsgut* usually consisted of a sum of money, either given by the parents themselves or resulting from paternal or maternal inheritance. In addition to the money, the bride sometimes contributed movable property – usually household and farm furnishings.

In rural areas, the property that the groom brought to the marriage, the *Widerlage*, was his farm and its land. Craftsmen often brought their tools and skills.

*Heiratsgut* and *Widerlage* are terms that had to appear in all marriage contracts. Both partners brought their property to the marriage, even if the amount of wealth in question was only small. Partners who owned nothing at all contributed at least their “love and loyalty” – the obligation to help and support the other partner during the marriage: “in the absence of wealth, the bride brings her love and loyalty to the marriage; this is accepted by the groom and, from his savings of 300 Gulden, it is equaled to 100 Gulden in cash, half of which he shall contribute according to customary law [...]”<sup>7</sup> This status of joint marital property could also be expanded to include accrued gains: “[...] entail a general union of property, so that both current wealth [of the bride, of the groom] and all that is inherited and purchased in the future become and remain indivisible.”<sup>8</sup>

According to customary law, the husband was obliged to give his wife a present the morning after the wedding night, which is an interesting point, since a widow was also obliged to pass on this *Morgengabe* to her new husband.<sup>9</sup> The *Morgengabe* as a specific item disappeared over the course of the 18<sup>th</sup> century.

A large number of women retained their own property separate from the *Heiratsgut*. There was no automatic authority of the husband over this part of his wife’s property. The *Landesordnung* even states this explicitly: The wife should freely decide what to do with her separate share of the fortune – she could sell, bequeath, and divide it as she saw fit. Her husband was not allowed to interfere or make any decisions regarding this property – and if

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<sup>7</sup> Niederösterreichisches Landesarchiv (NÖLA), Herrschaft Fridau, Handschrift (HS) 5, fol. 492, Heuratsabred 1765.

<sup>8</sup> NÖLA, Kreisgericht (KG) St. Pölten 42/8, Heiratsprotokoll Herrschaft Fridau, fol. 196’, Heiratsabrede 1782.

<sup>9</sup> NÖLA Handschriftensammlung, ‘Landtafel oder Landesordnung des Erzherzogtums Österreich unter der Enns, Entwurf Püdler 1573’, 28. Titel: Von heuratguetern widerlegung morgengaben auch derselben eigenschaften widerfällen freihaiten und bedingnussen, Sammlung Chorinsky, Bd. 42, 331-367, 339.

he did so, all his actions were without legal consequence. “If the women have other private means above and beyond the *Heiratsgut*, these are in no case subject to their husbands’ decisions or interference without the women’s knowledge and consent; should they do so anyway, then these actions are invalid.”<sup>10</sup>

The consequence of *all* wealth-related agreements was the creation of a mutual pool of wealth that was not differentiated according to the respective amounts contributed by the man or the woman. Ownership-related changes of any sort could take place only with the assent of both partners-in-marriage. Women who had retained wealth of their own outside this mutual pool were able to act in this regard without any need for their husbands’ permission. This may well have meant a significantly more independent position within the marriage, but it could certainly also have led to the woman being pressured to give up some of it. This “private” wealth could also be freely disposed of in a last will and testament.

*“Heiratsgut”, “Einbringen”, “Fruchtgenuss” and “Morgengabe” in the system of separation of goods – the Tirol*

The basic form of the marriage contracts in Innichen was as follows: The bride promises the groom, after the marriage has taken place, to contribute a certain sum in cash as the bride’s wealth; the groom promises to invest and insure this wealth in his house, *fürpfändlich*, as a sort of mortgage. The same also usually applied to wealth accrued during the marriage.

An important difference (from the bride’s perspective) was whether the disbursement of her *Heiratsgut* was done independently of her expected paternal and maternal inheritances, or was – as was more often the case – identical with it or included in a future distribution as an already distributed portion (*à conto* or *Kollationierung*).

The basic, early modern variant provided for by law in the Tirolean example is that the husband is entitled to the usufruct: “[...] reserve the existing and future wealth during the marriage, according to the old Tirolean Landsrechten, for usufruct”.<sup>11</sup> Usufruct also came in a variety of variants: “The bride desires to dedicate her wealth consisting of 180 fl in the case that at her death, no children be present, to the lifelong usufruct of the future husband; should, however, children be present, he shall be entitled to usufruct only until such time when all children have turned 20.”<sup>12</sup>

In another example “the bride dedicates to the groom the usufruct of the contributed *Heiratsgut* during the marriage; should the bride pass away earlier, the groom is to retain usu-

<sup>10</sup> Original: NÖLA, HS 178b, Landesordnung Kaiser Ferdinands I, 1528, fol. 184’

<sup>11</sup> Tiroler Landesarchiv (TLA) Innsbruck, Verfachbuch Innichen (VBI) 1790, fol. 690

<sup>12</sup> TLA Innsbruck, VBI 1786, fol. 257

fruct from half of her wealth, as long as he does not remarry.”<sup>13</sup> This was a somewhat unusual sort of contract, since limitations of this kind made on the part of the wife with regard to the husband were rare. In this case, the bride also demanded a 3% interest on an expected inheritance of 200 Gulden – for anything exceeding 200 Gulden, the groom once again had the usufruct.

In certain cases, the bride gave to the groom a *Morgengabe* which, in contrast to *Heiratsgut* and *Einbringen*, was a gift – not simply a matter of usufruct: “[...] because the bride has given the groom as a *Morgengabe* and as a gift 199 Gulden from her wealth as his irrevocable property”.<sup>14</sup>

The contribution of a *Heiratsgut* and the giving of a *Morgengabe* were not tied to gender – *Heiratsgut* only from women, *Morgengabe* only from men – but were rather dependent on constellations of ownership. The case quoted is that of Andre Gatterer, the servant of the *Pfleger* (a local official functioning as a judge and a notary), who married into a widow’s household. Just as well – although less commonly – a groom like Joseph Reiner, who also married into a widow’s household, was able to “invest” his wealth in the house and dedicate to his bride lifelong usufruct.<sup>15</sup>

Normally, then, the wealth contributed by the woman remained in her possession and served after the husband’s death as a basis for her material existence. In light of *Gütertrennung* (the separation of property/wealth), this, as well, was in need of being regulated and ensured. In this sense, the *Heiratsgut* was able to assume a loan-like character for the family of the groom.

## **Governing entitlements and distribution for the period after marriage**

### *Joint marital property*

In Lower Austria, both the widow and the widower were entitled by law to the half of the joint property. The other half was to be divided among the children. The Inheritance Law clearly favored the surviving spouses, not the children. From an economic point of view, it was better to keep the financial burdens and strains on existing peasant households as low as possible.

An example will show this more clearly: After a farmer’s death, the farm with adjoining lands, co-owned by the deceased and his surviving wife, is estimated at 5000 fl. (after the obligations have been deducted). Beside the widow, five children survive. If the

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<sup>13</sup> TLA Innsbruck, VBI 1789, fol. 398’

<sup>14</sup> TLA Innsbruck, VBI 1790, fol. 680

<sup>15</sup> TLA Innsbruck, VBI 1791, fol. 41

widow retains the main share of the property and keeps the farm running, her share will be 2500 fl; 2500 fl will have to be divided equally among the five children – which comes to 500 fl per child. There is no difference between sons and daughters here! But if one of the children takes over – she or he has to pay 2500 fl to his mother and 2000 fl to his four siblings: a total burden of 4500 fl.

During the 18<sup>th</sup> century, the position of the surviving spouse was further strengthened with an entitlement to two thirds. If there were no children left, the closest relatives were usually entitled to a certain sum or a percentage of the property. But very often the couple had made a separate agreement in which it was stated explicitly that the relatives were to receive nothing at all or only a small sum. Obviously, this provided an opportunity to act according to the relations within the family (or families) in question. In case of remarriage, which took place quite often, the rights of the children of the first marriage had to be recognized in the new marriage contract.

### *Separation of goods*

In the case of Innichen, if the groom brought his house and his farm into the marriage (as in the majority of cases, although by no means always), this property did not, upon his death, go to the widow, but – normally – to the eldest son; if he did not take charge of this inheritance, the farm would go to his brother or sister. If no children were present, the closest relatives of the owners would accept ownership; a nephew or niece, for example – here, once again, men came before women, and the older before the younger. The house, then, could land in the hands of “strangers”. This necessitated that decisions and agreements be made, which – particularly in the last decades of the 18<sup>th</sup> century – were not formulated in inheritance contracts with heirs or heiresses, but in marriage contracts.

Normally, a widow was entitled to a so-called *Herberg* (a sort of lodging), which meant the right to continue living in her house and have her basic needs provided for. The specification of this *Herberg* is one of the first and – still in the 1760s – often the only point in marriage contracts. But there were alternatives to the widow’s moving immediately to the *Herberg*.

First, a few word about the *Herberg*: the standard was that the widow did not have to pay anything – *zinsfrei* (rent-free) and *franco* are the terms used – nor did she have to contribute any wood (the term for this is *holzfrei* [wood-free]). This was especially important, for example, in a village at nearly 1,200 meters’ elevation, where the winters were long and cold. Points of negotiation in pacts or contracts included the room to which the widow was entitled

– usually the room that lay above the kitchen. The best room was the one above the so-called *Stube*, the main room where the family spent most of its time. The *Stube* was often the only heated room in the house, and the room directly above it was a bit warmer than the others. In some cases, well-situated widows were able to secure this room for themselves. Further provisions included use of the tools and utensils necessary in the household and kitchen. If a marriage took place at an advanced age and/or if the groom was significantly older than the bride, children from the marriage would be highly unlikely, while the *Herberg* would be a relatively certain, and the widow could then make very detailed claims for the *Herberg* concerning the dimensions of the vegetable garden, that she could use, the amount of fresh milk, she was allowed daily, a certain place for a table, a chair and a spinning wheel in the room, where she would stay.<sup>16</sup>

The main sort of usufruct to be governed by contract was that which the widowed woman was to receive from the wealth of her deceased husband. Particularly the presence of children from the marriage in question could entail modifications in terms of the duration of usufruct. The range of individual contingencies is wide and encompasses both limitations and expansions of the widow's decision-making power. In a sample of 64 contracts concluded between 1780 and 1805, somewhat less than a third of those contracts with applicable specifications, concede a lifelong right of usufruct to the widow regardless of whether or not children are present. For example: "Both spouses will to each other, in the event that one should pass away, lifelong usufruct of the full wealth left behind, with the exception of clothing, table cloths and bedclothes, whether or not this marriage produces children."<sup>17</sup> The widow did not become owner of the property, but neither was she ever required to withdraw to the *Herberg*. The most common limitation, in case the marriage did result in children, was a time limitation specifying that the right of usufruct terminated when the children had reached a certain age. This point was marked by the ages of 16, 18, 20 or 24 years, which usually all children had to have reached – but sometimes only the *Besitzkind*, the designated heir (in other words, the eldest). For example: "Fourthly and lastly, both spouses would like to promise each other lifelong usufruct of their respective wealth in such a way that it should cease only if children be present, and should in this case last only until all children have reached the age of 18."<sup>18</sup>

Usufruct of the husband's wealth carried with it the – often explicit, and sometimes closely detailed – obligation to provide for the keep and education of the children, which

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<sup>16</sup> See for example the marriage contract between the widower Thomas Mayr, 71 years old, and the widow Elisabeth Gütlin, 48 years old: TLA Innsbruck, VBI 1785, fol. 1'-3'

<sup>17</sup> TLA Innsbruck, VBI 1791, fol. 43

<sup>18</sup> TLA Innsbruck, VBI 1795, fol. 354



would otherwise have been the obligation of the husband. The widow, then, was obligated by the marriage contract to, for example: “[...] obtain for the children the necessary nourishment and clothing, see to it that they learned to read, write and do arithmetic, and that the boys learned a trade, and the girls sewing, so that they would be capable of earning their bread.”<sup>19</sup> Thus, the validity of these various agreements made prenuptially extended beyond the period of marriage. Later contracts – such as those for transfers of property, or even specific widow-contracts – made specific reference to the existing marriage contracts.

### Legal transformations

In the Archduchy of Austria South of the River Enns attempts to counter ancient regional types of traditional arrangements via standardized bodies of law (such as *Landesordnungen* in the 17<sup>th</sup> century) or codified legislation (such as the Josephine marriage laws in the 18<sup>th</sup> century) had no effect on everyday legal practice. The marriage laws of Joseph II were aimed against the form of *Gütergemeinschaft* (joint marital property), and sought to establish the system of *Heiratsabgaben* (nuptial contributions) as the general norm. This system assumes that the bride brings money to the marriage for her husband, and that the husband invests this money in profitable property and manages it for his wife. The practicability of this system was contingent upon the possession of differentiated wealth, and was common among urban patricians and the nobility in particular. It was not, however, in any way compatible with peasant society. It negated the economic unity of the typical farm, as well as the reality of the “working team” of husband and wife, who with equal contributions – and in some respects, equal rights – conducted their mutual economic activities. Joint marital property as a form detailed by marriage contracts persisted, uninfluenced by legal innovations, into the 20<sup>th</sup> century.

Just one an example of how marriage contracts were useful in negating new legal developments in Tirol: the law in question is the *Intestat-Ordnung* of 1786, according to which parents became the heirs of their children who died as minors and without leaving children of their own – in contrast to the previous period, when the inheritance remained in the family line and did not go to both parents. This contract clause appears for the first time in 1800, and states that the future husband and wife agree not to claim any rights to inherit their minor children, so that in such a case “Kerschbaum property should return to the Kerschbaum heirs,

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<sup>19</sup> TLA Innsbruck, VBI 1784, fol. 708-708’

and Hofer property to the Hofer heirs”<sup>20</sup> – thus continuing the practice of bequeathing wealth according to family lines and gender.

## Conclusion

The goal of our paper was to clarify and/or to sketch the implications of various systems of marriage-related property law in connection with other legal parameters according to a few specific aspects. The systems of law governing marital property regimes and of inheritance differ in principle and develop their own dynamic and logic.

In the Archduchy South of the River Enns, the co-ownership and joint property are clearly in favor of wives or widows. The marriage settlements just emphasize the role of the surviving spouse as heir and do not have to specify special agreements for a widow’s future.

In the Tirol, the law and the practice gave preference to the descendants. The settlements in the marriage contracts necessarily had to guarantee the means, the bride brought into the marriage. They provided the widow for her needs after her husband’s death, especially by the arrangement of usufruct.

Remarriage was very common for widows in the Archduchy South of the River Enns. They obviously could easily find new partners, because they were economically attractive. From the legal point of view, women in the Archduchy South of the River Enns were in a better position for rights of possession than women in the Tirol. An indicator for the more dependent status of the women in the Tirol is also the fact, that at the settling of the marriage contract, the father or the brother acted as a sort of guardian – this *cura sexus* had vanished after the Middle Ages in Lower Austria. On the other hand, a certain positive result of the Tirolean system can be seen in the fact, that women could not be made liable with their assets for the debts of their husbands. In case women in Innichen wanted to pay off their husbands’ debts, a renunciation to this right had to be uttered in court. The legal conditions are not sufficient to draw conclusions about being “more favored” or “less favored”. There is a wide range of possibilities for acting, of “agency” which can modify and mitigate certain discriminations. It is also hard to judge if a more of economic and legal responsibilities were taken as a grant for agency or as a burden.<sup>21</sup>

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<sup>20</sup> TLA Innsbruck, VBI 1800, fol. 29.

<sup>21</sup> Philipp Sarasin, ‘Subjekte, Diskurs, Körper. Überlegungen zu einer diskursanalytischen Kulturgeschichte’, in Kulturgeschichte heute, Wolfgang Hardtwig, Hans-Ulrich Wehler (ed.), Göttingen, Vandenhoeck & Ruprecht, 1996, 131-164, 138