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Post-Austrian Divorce Law in Małopolska from 1918 to 1945. Selected Issues*

Abstract

Austrian divorce law was in force in the territory of the former region of Galicia until the end of 1945. The possibility of seeking a civil divorce was determined by the internal law of the church that the betrothed couple belonged to on the wedding day. Thus, divorce was outlawed both for people of the Roman Catholic confession [§ 111(1) ABGB] and for married couples where even one of the spouses confessed the Roman Catholic religion at the time of their wedding to a non-Catholic Christian [§ 111(2) ABGB]. Not even a religious conversion on the part of the Catholic after the date of the wedding could create the possibility for the couple to obtain a divorce. In practice, Catholic residents of Małopolska resorted to "divorce migration" to more lenient legal jurisdictions. In any case, a divorce dispute was adjudicated before common courts according to state procedural rules. Divorce proceedings could be initiated in two ways, i.e. by unilateral request of one of the spouses, or by joint request of both spouses. Divorce in Jewish marriage was subject to certain legal differences, and could also be initiated in two ways, i.e. by the voluntary, uncontested request of both spouses [§§ 133–134 ABGB] or by way of a divorce application filed by the husband [§ 135(1) ABGB]. In both cases, the procedures were aimed at terminating the marriage by the husband's presenting the wife with a so-called bill of divorce. Different civil proceedings regulated divorce disputes in Krakow in the period described (1918-1945), i.e. the Austrian proceedings until the end of 1932 and the Polish proceedings of 1930 thereafter.

Key words: marriage, marriage law, Austrian marriage law, divorce, grounds for divorce, divorce proceedings, divorce law, Galicia, General Government, General Governorate.

Słowa kluczowe: małżeństwo, prawo małżeńskie, austriackie prawo małżeńskie, rozwód, postępowanie rozwodowe, Galicja, Generalne Gubernatorstwo

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1. Introduction

In independent Poland after 1918 citizens' divorce matters were still subject to the regulations of after the partition legislation. This means that within the territory of the country, geographically speaking, there were as many as 5 (five) different systems of divorce law in force (and thereby of personal marriage law, which at the time was called non-property marriage law). In practical terms, this situation gave rise to many jurisprudential problems, which were circumvented by the legal loophole of the so-called "divorce migration" to more lenient legal jurisdictions. The state authorities at the time recognized the importance of the problem and made various attempts to mitigate this curious legal situation, and the resultant social pathologies and malpractices. One of the alternatives was an attempt at developing a new native and uniform personal law of marriage (and thus divorce) for all of Poland. This task was entrusted to the governmental Codification Commission of the Republic of Poland, which was established in 1919. The draft of the personal marriage law (including divorce law) developed in 1929 by Warsaw-based professor Karol Lutostański, was not published or enacted, despite its innovative legal solutions, due to opposition from conservative circles (including the authorities of the Catholic Church). Another regulation was the enactment on 2nd August 1926 of the Act on Inter-District Private Law.[1] The body of rulings, primarily from the Supreme Court, also played a role in rectifying the chaotic legal situation.

Nevertheless, the legal patchwork with regard to divorce (and also marriage) law survived until the end of the Second Polish Republic, i.e. until the outbreak of the Second World War on 1st September 1939. Nor was the specific situation concerning divorce law in the Polish territories during the Second World War (1939–1945) rectified by the invaders, i.e. Nazi Germany and the Soviet communists.

In other words, the (post-)Austrian divorce law (regulated in the General Austrian Civil Code of Law (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) *Bürgerliches* of 1811 was in force in former Galicia for 134 years. This comprises 106 years of the partitions, plus the whole 21-year period of the Second Republic (November 1918 – August 1939), along with 6 years of the German and Soviet occupation during the Second World War (September 1939 – January 1945) in Polish courts under the occupation, as well as nearly a year in post-war Poland (January 1945 – 31st December 1945).[2]

[1] Act on Law Applicable to Private Internal Relationships (Inter-District Private Law) (Journal of Laws No. 101, item 580); on the same day the Act on Law Applicable to Private International Relationships (Journal of Laws No. 101, item 581) was passed; both Acts entered into force on 13th November 1926.

[2] Divorce regulations of the AGBG were applied during the period of the Second Republic and in Polish courts under the occupation during World War II in the districts of the Courts of Appeal in Krakow (except the district of the District Court in Kielce) and Lviv, as well as in the District Court in Cieszyn. In other words, this Code was applicable in the territory of former Galicia, in the provinces of Krakow, Lviv, Tarnopol and Stanisławów (a.k.a. Ivano-Frankivsk) as well as in a part of the province of Silesia (the region of Cieszyn) until 31st December 1945. From 1922, the ABGB was also applicable in the regions of Spiš (Polish: Spisz) and Orava (Polish: Orawa – part of the Krakow province) as an alternative to the 1894 Hungarian marriage (including divorce) legislation.

Finally, the Polish state authorities in post-war communist Poland quite quickly developed and enacted, on 1st January 1946[3] a new personal marriage law which also included divorce law. It was a native Polish law, uniform on the scale of the whole country, original in its content, and devoid of confessional (canonical, Catholic) legal barriers for the divorcing spouses.

2. Entering into a marriage

In the period of the Second Polish Republic under the rule of the Austrian civil law in the 20th century, entering into a marriage was in principle conducted in a religious form before a competent ecclesiastical authority, and among Jews according to the Jewish religious rites, i.e. in the "ritual" form before a rabbi or another representative of this religion. By way of exception, some people entered into marriage in a secular form before a competent political authority.[4] Both forms of entering into marriage produced civil effects in the secular (post-Austrian) law, the first one, however, only under the condition that all requirements provided for in the secular regulations were observed. Admittedly, it did happen that such a religious marriage could fail to produce any civil effects, e.g. when Jews entered into marriage before an incompetent rabbi or a person improperly purporting to be a rabbi.

In any case, a marriage entered into by Catholics (or where at least one of the parties was Catholic) was called "indissoluble communion".[5] Individuals belonging to a religion not recognised by the state, those not adhering to any faith, or those who were denied marriage by their own clergyman, could enter into marriage in the secular (civil) form.[6] In the former two cases, it was obligatory for such individuals to enter into marriage in the secular form while in the latter case it was facultative.

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[3] Prior to 1946 eight different legal actions touched on the issue of marriage regulation, but none of them introduced any essential amendments with regard to standardising the post-Austrian personal marriage law in former Galicia. These were 1) the Constitution of the Republic of Poland of 17th March 1921 (art. 112 and art. 114); 2) the Concordat of 10th February 1925, which did not take up matters relating to entering into a marriage at all, 3) the Act of 13th March 1931 (Journal of Laws, No. 31, item 214) on Legal Expiry of Exceptional Provisions related to the Origin, Nationality, Language or Religion of the Citizens of the Republic of Poland, 4) the Polish consolidated provisions of the Code of Civil Procedure, which entered into force on 1st January 1933, 5) the Constitution of the Republic of Poland of 23rd April 1935, 6) the anti-Jewish provisions of the law on marriage and divorce in Germany after 1935, and in Austria after 1938, 7) the jurisdiction introduced by the German invader in the General Governorate after 1939, 8) the authorities of war-time and post-war Poland in 1944–1945 until the decree of the Council of Ministers (Government) of 25th September 1945 – Law on Marriage (Journal of Laws No. 48, item 270). See P. Biskupski, *O nowe prawo małżeńskie w Polsce*, Włocławek 1932, p. 10.

[4] F. Zoll, *Prawo prywatne austriackie*, vol. V: *Wykład prawa familijnego*, Lviv 1902, p. 97 et seq; M. Pietrzak [in:] J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia ustroju i prawa polskiego*, Warszawa 2009, p. 588.

[5] The essence of this "communion" was that its duration could not be limited in advance, and it was not of an absolute nature as it could be broken by death, divorce, or separation from bed and board due to grounds enumerated in § 109 ABGB. See K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne XIX wieku*, Warszawa 1973, pp. 53 and 70; P. Kasprzyk, *Separacja prawna małżonków*, Lublin 2003, p. 85, footnote 21.

[6] K. Sójka-Zielińska, *Historia prawa*, Warszawa 2009, p. 242.

A marriage was deemed validly contracted provided that the parties thereto had legal capacity and provided that they declared their uncontested will concerning this purpose before a competent authority duly authorised under civil law[7]. The Austrian doctrine in personal marriage law distinguished three fundamental elements, i.e. legal and public, emotional, and religious.

1. The legal and public element was also perceived through three points: 1) the prism of balancing the interest of an individual and that of the public in establishing a marriage,[8] 2) its maintenance, and 3) its eventual dissolution, when by divorce rather than natural causes. The provision of § 44 ABGB defined marriage as a contract (*Ehevertrag*) between two persons of different sexes, declaring their intent to live together in indissoluble communion, to procreate and rear children, and to provide each other with mutual assistance.[9] The institution of marriage was treated as the basis for social peace and order in the state. In the case of divorce, the act of initiating the process was left to the will of the spouses, but it was exclusively a specific public authority (common court) that could make rulings on divorce by way of applying pertinent state procedures.

2. A concession on the part of the state towards taking account of the individual interest consisted in evaluating the emotional elements binding the spouses at three stages,[10] i.e. the contracting of the marriage, the maintenance of the marriage, and its reappraisal at the stage of divorce or separation. The marriage law required that positive grounds should be cited for a divorce to be pronounced, and among the most important was one very general one called "insurmountable repugnance" to the marital act. In its absence, or if the repugnance was transient or not severe enough, the divorce petition was rejected.

3. The religious element of marriage, in turn, was taken into account along with the secular elements of the contract at the stage of deciding on the form and admissibility of

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[7] F. Zoll, *Prawo prywatne austriackie…*, p. 29 et seq; idem, *Prawo prywatne w zarysie przedstawione na podstawie ustaw austryackich*, Kraków 1910, p. 24–27 lists absolute and relative obstacles known in the ABGB that prevented or hindered certain individuals from entering into a valid matrimonial union. This category included persons who did not have legal capacity for this purpose, being either minors or deprived of legal capacity through a court ruling (e.g. prodigals, mentally ill), and also persons with permanent impotence (*impotentia generandi*), relatives in a direct line (also adopted), relatives in the collateral line to the siblings' children – including the parents' siblings, married persons, the clergy (diocesan and monastic), a Christian with a non-Christian, people who committed adultery with each other, spouse killers, and abducted persons with their abductors. Furthermore, the statement of intent to enter into marriage had to be free from legal faults, *inter alia* from coercion and any material error (with respect to the spouse and the spouse's essential qualities); also, such declaration had to be submitted in a proper form provided for in the act, i.e. after three-fold announcement of the banns and with a formal and ceremonial wedding.

[8] According to J. Gwiazdomorski, *Osobowe prawo małżeńskie obowiązujące w b. dzielnicy austriackiej*, Poznań 1932, p. 3, the effectiveness of the statements of intent towards entering into marriage before a church authority and a state authority was equivalent from the point of view of the legal and public order. Also, on both authorities rested the obligation of the three-fold announcement of the banns for the purpose of revealing any possible obstacles to the marriage. In the event of a defect at the stage of contracting the marriage, the public authority (prosecutor) could, *ex officio*, request a secular court to investigate the existence or non-existence of a marriage, or to nullify it. Finally, the public authorities were obliged to keep a wedding register and draw up relevant transcripts.

[9] K. Sójka-Zielińska, *Historia prawa…*, pp. 242–243. A marriage could be contracted in principle between individuals of the age of majority, i.e. after reaching the age of 21 (§ 21 ABGB), pursuant to art. 1 of the Act of 21st October 1919 on the Age of Majority in the Former Austrian partition (Journal of Laws, No. 87, item 472).

[10] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 4.

contracting a marriage, as well as the jurisdiction and admissibility of dissolving a marriage by means of divorce. The main focus was placed on the spouses' confession at the time of the wedding, and not on the kind of ecclesiastical authority before which the marriage was contracted. It did not matter which of the clergymen was the first to bless the already contracted church marriage as it was e.g. in the post-Russian marriage law of 1836, which was in force in the former Kingdom of Poland. The legislature intended to avoid any conflicts of interest with any church authorities and their laws, which, like e.g. the Catholic one, did not provide for divorces for their believers.[11]

The Austrian legislature introduced some intermediate compromise solutions (except during the years 1857–1868), as it was on the religious pattern that the stage of contracting (and the admissibility of dissolving) a marriage (in the confessional form)[12] and the inadmissibility of divorces for Catholics (or when at least one of the spouses was a Catholic) was based. The state regulations specified the conditions that had to be satisfied by the spouses for their church wedding to produce civil effects.[13] Failure to satisfy those conditions resulted in the absence of a valid marriage in the secular order, although it might yet exist in the ecclesiastical (confessional) sphere. Jurisdiction in marital matters was reserved exclusively for state (secular) courts[14], which had to apply secular procedural regulations, and which, as a rule, announced their rulings to the church authorities to be recorded in appropriate church registers (of marriages).

However, it was permissible, by way of exception, to contract a civil marriage before a political authority in three enumerated cases: 1) where a clergyman refused to announce the banns and could not bless the marriage due to a canonical obstacle that was not recognised in the state marriage law – such a marriage was called a civil marriage of necessity (*Nothzivilehe*) and was regulated by the Act of 25th May 1868 *On Conditional Admissibility of Contracting a Marriage before a Secular Authority*;[15] 2) where the marriage was con-

[11] J.A. Hibl, *Reforma prawa małżeńskiego w Austryi*, Lviv 1907, pp. 14–21; F. Zoll, *Prawo prywatne w zarysie…*, p. 28 and J. Gwiazdomorski, (*Osobowe prawo małżeńskie…*, pp. 4 and 5) infer that a marriage between Catholics contracted in Austria was not sacramental (§ 44 ABGB), but was essentially a secular contract, admittedly entered into before a clergyman, within the scope entrusted by the state (§ 75 ABGB). Hence, it was called an "imperial and royal patented Austrian marriage".

[12] The literature of the subject consistently points out that the Austrian legislature emphasised the civil effects of marriages, even those contracted before a religious authority, but it incorporated into its legal order (i.e. "nationalised") some religious regulations; e.g. it banned marriages between Christians and non-Christians, and recognised the so-called *impedimentum catholicismi* obstacles as being effective, but did not recognise the effects of one of the privileges of faith, the so-called Pauline privilege (*privilegium Paulinum*). K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne XIX wieku…*, p. 53; W. Rodowicz, *Prawo małżeńskie. Rozwód, separacja, unieważnienie według ustaw cywilnych obowiązujących w Polsce*, Vilnius 1933, pp. 8–9.

[13] In the Austrian law, in contrast to the legal solutions found in the post-Russian territories of Poland, there were no state regulations specifying which one of the marriage candidates' clergymen should officiate at the wedding. This was regulated only by church laws. W. Rodowicz, *Prawo małżeńskie. Rozwód…*, p. 9; A. Dziadzio, *Powszechna historia prawa*, Warszawa 2008, pp. 314–316.

[14] In certain situations Catholics could contract a marriage of necessity, with the exception of the period 1857–1868 when only the ecclesiastical form was allowed for them, see J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, pp. 4–5.

[15] Based on the Act cited, on 1st July 1868, the Ministers of Justice, Confessions and Internal Affairs issued a regulation containing relevant implementation rules (Journal of State Laws No. 80); see A. Dziadzio, *Osobowe prawo małżeńskie w Austrii na tle stosunków państwo – Kościół katolicki (XVIII–XIX wiek)*, "Krakowskie Studia z Historii Państwa i Prawa" 2004, p. 143.

tracted between individuals confessing a religion that was not recognised by the state, and 3) where the parties to the marriage had previously declared that they were unbelievers. In the latter two cases, such an option was provided for first in the above mentioned Act No. 51 of 9th April 1870.

The political authority that was competent to announce the banns and receive statements of intent from the marriage candidates, which were necessary for contracting a so-called civil marriage of necessity, was the administration (*starostwo*) of the political district (*powiat*). In towns having their own charters, authority fell to the municipal council (*magistrat*).[16] By way of exception, upon a duly justified request from the marriage candidates, the territorially competent authority could empower another authority (e.g. a Jewish religious community) to receive their statements on contracting a marriage. In any case, spouses who were joined in marriage before an official of the political authorities were allowed to request that their [civil] wedlock be blessed by their own clergyman. Spouses were entitled to obtain an official marriage certificate,[17] which did not preclude the option of obtaining a relevant church certificate; obviously, that did not concern non-believers' marriages. Civil marriages of necessity (*Nothzivilehe*) were very rare[18], while non-believers' (civil) marriages or those between persons of a religion unrecognised by the state gained limited popularity in the 20th century.

Religious elements in marriage were particularly noticeable in various obstacles to marriage and formalities that were necessary in order to contract a Jewish marriage (§§ 126–132 ABGB).[19] Orthodox Jews contracted marriages in the so-called "ritual" confessional form (with a civil effect) before an empowered religious authority (a rabbi or

[16] The territorial competence of the political authority was determined as the seat of the church authority that refused to carry out the procedure leading to marriage. The procedure adopted by the political authority was patterned after the ecclesiastical form. The announcement of the banns took place by displaying a notification on the official notice board and additionally, by a notification at the municipal offices at the fiancé's and the fiancée's domiciles.

The fiancé's and fiancée's statement on entering into marriage was to be made before the head of the competent political authority or their deputy in the presence of two adult witnesses and a sworn recording clerk. The procedure of contracting marriage was completed by drawing up a relevant certificate which was signed by the spouses, witnesses, and the officials present at the ceremony.

[17] The political authorities that carried out civil marriages also kept books of banns and registers of civil marriages. Such authorities were obliged *ex officio* to send a relevant certificate of marriage to a clergyman competent for either or both of the spouses. This obligation was applicable in all cases except with respect to marriages of non-believers.

[18] Such conclusions can be found in the study by A. Dziadzio, *Orzecznictwo Trybunału Administracyjnego w sprawach wyznaniowych (1876–1918)*, CPH 1995, vol. XLVII, issue 1–2, p. 141. Where the bride and groom confessed different religions (but with the exception of an attempted marriage between a Christian and a non-Christian), they could obtain dispensation from the state authority (municipality, precinct (*cyrkuł*) or governorate) to contract a religious marriage; however, this was not practised apart from some cases of marriages between Catholics and Uniates or Protestants. These findings were reached by K. Zamorski, *Transformacja demograficzna w Galicji na tle przemian ludnościowych innych obszarów Europy Środkowo-wschodniej w drugiej połowie XIX i na początku XX w.*, Kraków 1991, p. 78, periodical „Rozprawy Habilitacyjne – Uniwersytet Jagielloński", No. 228.

[19] This means that with regard to Jews contracting a marriage, general regulations in §§ 44–122 ABGB applied, as well as other special regulations, also known as "exceptions for Jews" (*Ausnahmen für die Judenschaft*) in §§ 124–136 ABGB, see E. Till, *Prawo prywatne austriackie*, vol. 5: *Wykład prawa familijnego*, Lviv 1902, pp. 160–161.

a teacher of the Mosaic religion in the presence of two witnesses – § 127 ABGB)[20], or in "secret" (for the State law), without complying with the civil legal formalities (i.e. even without a rabbi participating, although in public).[21] On the other hand, progressive (reformed) Jews, having previously left their religious community, contracted marriages as non-believers, in the secular form before the appropriate political authority.[22]

Pursuant to § 129 ABGB, a Jewish marriage contracted in contravention of the provisions of the act, i.e. the ABGB, was null and void, i.e. non-existent under the civil law.[23] Even though the practice of contracting religious "ritual" marriages without complying with the civil legal formalities was still common in the late 19th and early 20th centuries, there can be observed a tendency among the Jewish population, influenced by the state legislation, to have previously contracted marriages retroactively validated. There were two ways of giving effect to "ritual" marriages depending on the kind of defects, i.e. by an additional entry in the register of marriages or by contracting the marriage again in compliance with the requirements of the civil law. Unfortunately, it is difficult to establish what the scale of the phenomenon was among Krakow's Jews in the period between the World Wars, but it is estimated that it did not exceed 3.4% (1,919 people of 56,500) in 1931.[24]

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[20] Attempts to shed some light on this issue were undertaken, with varying degree of detail and relevance, by M. Śliż, *Rytualne małżeństwa Żydów w Galicji*, Studia Judaica 2001, pp. 97–110. The phenomenon of the so-called "ritual" marriages neglecting the civil form was known in the Polish territories in all the three partitions, but it posed the greatest problem in the Russian and Prussian partitions. Nor was the phenomenon absent in the period of the Second Polish Republic. In the latter territory, the causes of this phenomenon should be looked for in the anti-Jewish Teresian and Josephine legislation from the latter part of the 18th century (e.g. the so-called patent on wedding tariffs of 1785, and on exam in religion of 1811, etc.). The Jewish population, in order to avoid these inconveniences, contracted marriages before any clergyman (rather Jewish) according to their own religious regulations, without attaching any importance to any legal effect of the marriage contracted in such a manner according to the state (Austrian) law. In some localities in the 19th and early 20th century, this phenomenon comprised as much as 60% of newly contracted Jewish marriages. The state legislature in the latter part of the 19th century began to restrict this phenomenon in different ways. See S. Grodziski, *Stanowisko prawne Żydów w Galicji. Reformy Marii Teresy i Józefa II (1772–1790)* [in:] *Lud żydowski w narodzie polskim. Materiały sesji naukowej w Warszawie 15–16 wrzesień 1992*, ed. J. Michalski, Warszawa 1994, pp. 64–80; Z. Szulc, *Przepisy prawne dotyczące prowadzenia ksiąg metrykalnych w Galicji*, Prace Historyczno-Archiwalne, Rzeszów 1995, vol. III, pp. 27–42.

[21] In German, the Jewish ritual marriages were termed, *inter alia*, as *wilde* or *geheime Ehe*. See M. Allerhand, *Probleme des jüdisch-polnischen Eherechts*, Zeitschrift für Ostrecht, vol. IV, 1930, issue 5, p. 449 et seq; also, H. Weiss, *Die Judengesetzgebung de Österr/Regierung in Bezug auf den Reallitenbesitz Ehe und Taufe vom Jahre 1848–1867*, Vienna 1927 (typescript, doctoral thesis, ÖBN, ref. 218335 D, p. 132) – cited after M. Śliż, *Galicyjscy Żydzi na drodze…*, p. 124, footnote 153.

[22] There was an option of contracting a marriage between a Jew and a non-believer before an authority of the kahal, i.e. a Jewish community (e.g. a rabbi), but it was seldom taken advantage of due to the unfavourable attitude of the Jewish clergy towards such marriages. The future spouses were commonly forced to contract civil marriage at a registry office. M. Śliż (*Galicyjscy Żydzi na drodze do równouprawnienia 1848–1914. Aspekt prawny procesu emancypacji Żydów w Galicji*, „Studia Judaica Cracoviensia. Series Dissertationum" 2006, vol. 3, p. 125, footnote 161) makes reference to the Regulation of the Governorate of 30th November 1875, No. 19554 and Prawnik 1876, p. 150.

[23] M. Allerhand, *Probleme des jüdisch-polnischen…*, p. 451.

[24] Based on *Drugi powszechny spis ludności z dn. 9 XII 1931 r. Miasto Kraków* (Warszawa 1937, pp. 16–19, Table 15) [*Second General Population Census*], it can be stated that out of the total number of Krakow's inhabitants, i.e. 173,700 (1931), there were 2,320 (1.3%) people living in so-called "informal marriages", of whom 1,161 (1.5%) were men and 1,159 (1.2%) were women. At the time the term "informal marriage" was

Thus, it was only those Jewish "ritual" marriages that were effective in the civil law that were also subject to the ABGB divorce law, i.e. such marriages that were contracted in compliance with §§ 124–128 ABGB[25]. Jews could file a divorce petition based on one of two legal principles from the ABGB, i.e. pursuant to the "secularised" religious regulations listed in §§ 133–136 ABGB, through a so-called bill of divorce (*Scheidebrief*) or pursuant to § 115 ABGB, depending on whether they contracted the marriage in the "ritual" form with the inclusion of the civil provisions, or in the secular form only (e.g. under the BGB (German Civil Code) or under the ABGB as non-believers). Jewish spouses were also entitled to seek legal separation or annulment of the marriage, as well as to request that the existence or non-existence of the marriage be determined.[26]

Through the fact of contracting a marriage, regardless of its form, the spouses acquired certain rights and obligations, which included "conjugal rights [*debitum coniugale*] and faithfulness as well as respectful handling of each other" (§§ 89 and 90 ABGB). This was also the basis for the obligation on the part of the wife to run the household jointly with her husband, while the husband's particular obligation was to receive the wife into his home and provide her with decent maintenance, according to his property and means, and to defend her in all circumstances.[27] As part of the "husband's authority" the husband was entitled to special rights with respect to his wife and in the family generally (§ 91 ABGB).[28]

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understood to include broadly understood concubinage and Jewish "ritual" marriages. The corresponding number for Catholics was 378 people, i.e. 0.24% of the total number of 159,400 Catholics; among Jews there were 1,919 (1.1%) such people, of whom 956 were men, and 963 were women; and among other religions, a total of 23 people of whom 17 were men and 6 were women.

[25] The authorities of the Israeli Religious Community in Krakow recognised the problem of the lack of civil legal effects of the so-called Jewish "ritual" marriages and attempted to influence the Jewish population that they should rectify this state of affairs. An example might be the Resolution of the Council of the Religious Community and the resultant letter to the President of the Jewish Community dated 9th December 1924, No. 800/24 concerning the registrar's obligation to instruct people only living in the so-called "ritual" marriages about the necessity of legalising them (without any fees) in light of the civil law, and to legitimise children born in such unions. Cited after M. Śliż, *Rytualne małżeństwa Żydów…*, p. 101, footnote 22.

[26] See J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 42 who makes reference to the ruling of the Vienna Supreme Tribunal of 23rd April 1895, item 2871.

[27] K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne XIX wieku*, pp. 53–54; K. Sójka-Zielińska, *Wielkie kodyfikacje cywilne. Historia i współczesność*, Warszawa 2009, p. 112; P. Kasprzyk, *Separacja prawna…*, p. 86.

[28] F. Zoll, *Prawo prywatne austriackie…*, p. 132 et seq, derives two kinds of effects from the essence of contracting a marriage, i.e. internal and external. Among the rights and obligations of an internal nature he includes "cohesion of living" and the obligation of having a carnal relationship, along with the corresponding right of the other spouse to exclusively admit them to perform these obligations. There was an obligation to jointly manage a household which involved the husband's right to demand from the wife that she should cohabit with him, and the wife's right that the husband should admit her to their joint home. Nevertheless, the husband had the final say on a majority of property and non-property issues, which included the choice of the place of cohabitation and the running of the household, as well as the manner of earning a living and deciding on their own property. Due to the fact that the Austrian law governing property in marriage provided for a statutory regime of separation of property, the husband had only significantly limited powers to manage his wife's assets. Furthermore, the internal affairs included the husband's financial obligation to shoulder the main burden of the married life. The external effects included the wife's right (and obligation) to adopt her husband's surname as well as his citizenship, and the husband's right to represent his wife, etc.

3. Dissolubility of marriage

The literature on the subject explains that a marriage contracted under the ABGB was a lifelong union which was dissolved upon the death or presumptive death of one of the spouses.[29]

In exceptional cases, wedlock could be dissolved through divorce while both spouses were living, based on (positive) reasons expressly provided for in the law, before a competent judicial authority, and following a particular procedure.

There was no principle of all citizens' equal access to the option of requesting divorce for their marriages.[30] This means that the state unilaterally, in a specific manner, restricted the availability of divorce to a chosen small group of citizens. In doing so, the state was guided by the "secularised" principles of the religious law, and if such religious principles did not permit divorce, then the state respected them. Most notably, it was not possible to dissolve a marriage through divorce where the spouses were of the Roman Catholic confession [§ 111(1) ABGB] or where at least one of the parties confessed the Roman Catholic religion at the time of contracting marriage with a non-Catholic Christian [§ 111(2) ABGB]. Such spouses had only the option of separation from bed and board (obtainable upon joint request – § 103 ABGB – or unilateral petition – § 107 ABGB).[31] Alternatively, a marriage could be annulled for important reasons specified in the civil code (§§ 94 and 95 ABGB).[32] The religious conversion of the Catholic spouse to another Christian confession or religion, or to becoming a non-believer during the marriage did not create the possibility for them of obtaining a divorce.[33] Catholic residents of the province of Małopolska employed several methods to circumvent the provisions that prohibited divorce, e.g. they "preventively" contracted a marriage in a non-Catholic

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[29] Divorce was discussed by, among others, J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, pp. 60–67. However, his study is definitely insufficient.

[30] *Ibidem*, pp. 58 and 60. Also, F. Zoll, *Prawo cywilne opracowane głównie na podstawie przepisów obowiązujących w Małopolsce*, with the participation of J. Gwiazdomorski, L. Oberlander, T. Sołtysik, vol. IV: *Prawo familijne i spadkowe*, Poznań 1933, p. 61.

[31] Legal separation was admissible for both Catholics and non-Catholics (e.g. Evangelicals and Jews) and also for non-believers. P. Kasprzyk (*Separacja prawna…*, p. 86) refers to A. Hibl (*Reforma prawa małżeńskiego…*, p. 16–21) and the calculations made by Dr. Tachan for 1906, according to which there were 38,000 separated Catholics in Vienna alone and 200,000 in all of Austria. J. Gwiazdomorski (*Osobowe prawo małżeńskie…*, p. 51), in turn, states that 195 divorces upon joint request were granted among believers in the Mosaic religion in all of Austria in 1909, but no separations. With regard to other non-Catholic marriages, 185 divorces and 60 separations were granted. Along with the attempts undertaken in 1904–1907 at reforming the marriage law, there was an increase in petitions to the state authorities demanding an amendment to the marriage law that would abolish § 111 ABGB and include Catholics in the regulation of § 115 ABGB.

[32] The catalogue of grounds for nullifying a marriage was exhaustive: pursuant to § 94 it comprised grounds of a public nature, i.e. abduction (§ 56), bigamy (§ 62), impediment of holy orders or perpetual vows (§ 63), disparateness between Christian and non-Christian religions (§ 64), prohibited degrees of relationship (§ 65), affinity (§ 66), adultery (§ 67), spouse-killing (§ 68), lack of a solemn form of the wedding, including the banns (§ 75), and marriage with individuals who committed adultery with a divorcée (§ 119). Another group comprised grounds of a private nature (§ 95), i.e. error as to the person, fear (§ 95 *in principio*), minority and lack of the legal guardian's consent to marriage (§ 49), lack of court's consent (§ 50), lack of consent from military authorities (§ 54), and others.

[33] J. A. Hibl, *Reforma prawa małżeńskiego…*, p. 34.

confessional form after both (or one of them) first migrated to a selected other confession (religion), or in the civil form, after first having migrated to being a non-believer. They could also abstain from changing their existing confession forbidding them to divorce but move to other territories of the Polish Republic, or even abroad, in order to contract a marriage in the civil form, e.g. a so-called Transylvanian marriage[34] under Hungarian law (which was effective from 1894 in the territory of Hungary and in the Polish part of the regions of Spiš and Orava), or under the German law (*Bürgerliches Gesetzbuch für das Deutsche Reich*, BGB, of 1896) having previously obtained the citizenship of those countries or being domiciled in another district of Poland.[35] There were also cases of migration of Catholic citizens of Małopolska to other territories of Poland where the confessional form of marriage was effective, e.g. to the territories of the former Russian partition, after first having changed their confession, e.g. to Orthodoxy or Protestantism.

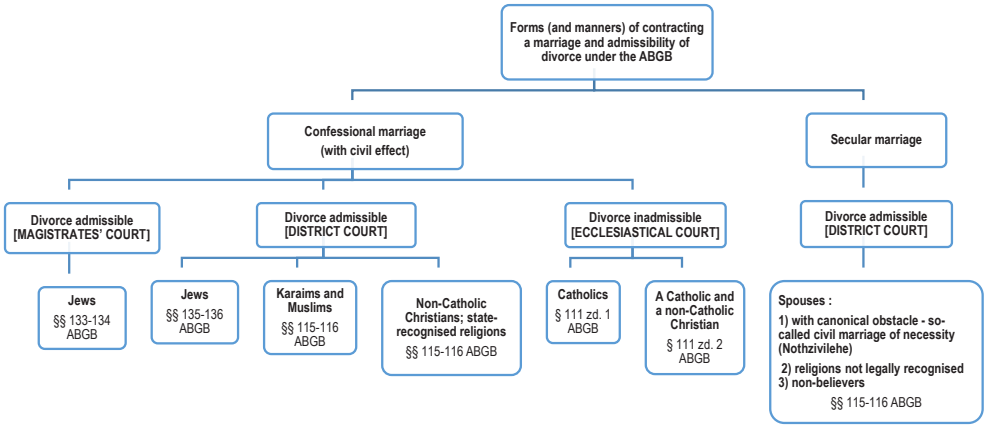
As already mentioned above, the provisions of the Austrian Civil Code regulated the admissibility of divorce for non-Catholic Christians and non-believers in a different manner (§ 115 and § 116 ABGB), and in a yet another different manner in the case of religious ("ritual") Jewish marriages (§§ 133–135 ABGB).[36] The details are presented in the graph below.

[34] The institution of the so-called Transylvanian marriages, as stated by K. Sójka-Zielińska (*Wielkie kodyfikacje cywilne. Historia*…, p. 127) and J. Koredczuk, *Małżeństwa węgierskie* [in:] *Państwo, prawo, społeczeństwo w dziejach Europy Środkowej. Księga Jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesiątlecie urodzin*, eds. A. Lityński, M. Mikołajczyk, T. Adamczyk, A. Drogoń, W. Organiściak, Katowice–Kraków 2009, pp. 331–338, provided that a Catholic being an Austrian citizen who had ever contracted a Catholic marriage was able to circumvent the prohibition on divorce that was applicable to them pursuant to § 111 ABGB and marry another person. The procedure of this "scheme" consisted in taking the citizenship of a country that permitted divorces for Catholics (e.g. Hungarian) and obtaining divorce before a court in such a country. The further procedure consisted in leaving the Catholic Church and contracting a new marriage which was valid everywhere, including the Austrian territories. The procedure of changing citizenship was possible due to the liberal regulations and the secular form of the Hungarian marriage law, particularly after its revision of 1894.

[35] T. Janiszewski, *Projekt nowego prawa małżeńskiego ze stanowiska higieny społecznej*, „Lekarz Polski" 1933, vol. IX, no. 3, p. 57.

[36] K. Sójka-Zielińska (*Wielkie kodyfikacje cywilne XIX wieku*…, p. 86) states that these regulations caused serious difficulties of interpretation from the beginning, and sometimes even led to contradictions.

Graph 1. Forms (and manners) of contracting a marriage under the ABGB and admissibility of divorce (legal situation in Poland in 1918–1945)[37]



The above graph demonstrates that the admissibility of requesting divorce under the ABGB was as follows:

1) impossibility of obtaining a divorce because of the obstacle called *impedimentum catholicismi* (Catholic impediment, existed from 1814):[38]
   a) where both spouses were of the Roman Catholic religion, either by joint request or by petition filed by one of them [art. 111(1) ABGB];[39]
   b) where the spouses are a Catholic and a non-Catholic Christian, either by joint request or by petition filed by one of them (art. 111(2) ABGB);[40]

2) possibility of dissolving marriage by divorce under § 115[41] or § 116[42] ABGB:

[37] Source: own work.

[38] J. Gwiazdomorski (*Osobowe prawo małżeńskie…*, p. 61) argues that with regard to the issue of requesting divorce, "it can clearly be seen that the Catholic religion is in quite a privileged position before the other religions".

[39] Pursuant to § 111 ABGB: "A valid marriage between Catholics may only be dissolved by the death of one of the spouses. Likewise, a marriage must not be dissolved if already at the time of contracting it at least one party confessed the Catholic religion". S. Wróblewski, *Powszechny Austriacki Kodeks cywilny z uzupełniającemi ustawami i rozporządzeniami objaśniony orzeczeniami Sądu Najwyższego*, part I: §§ 1–*937*, Kraków 1914, pp. 96–97; E. Till, *Prawo prywatne austriackie…*, p. 154 et seq.

[40] The Supreme Court, on the basis of § 111 ABGB, took the view that marriages contracted abroad between a Jew and a Catholic were indissoluble by divorce if they were declared valid in the jurisdiction of the ABGB. Hence, a Catholic could not contract a church marriage with a divorced non-Catholic Christian; see W. Rodowicz, *Prawo małżeńskie. Rozwód…*, p. 21; E. Till, *Prawo prywatne austriackie…*, p. 154 et seq.

[41] Pursuant to § 115 ABGB: "Spouses who do not confess the Catholic-Christian religions are permitted by the act, in accordance with the rules of their religion, to request divorce for important reasons. Such reasons are: adultery committed by a spouse, or such a crime for which they would be punished with at least five years of imprisonment, malicious abandonment of the other spouse and non-appearance during one year despite public summons issued by the court in such a case where their whereabouts was unknown".

[42] Pursuant to § 116 ABGB: "A non-Catholic spouse may, for reasons provided for in the preceding § [115], request divorce even if the other spouse converted to the Catholic religion".

a) where the spouses were non-Catholic Christians[43] (including Old Catholics, Greek Catholics, and Uniates);
b) where the spouses were non-believers or belonged to a confession not legally recognised[44] (in both cases either by joint request or by petition filed by one of them);
c) in the case of a Jewish religious marriage, either by their joint and voluntary request – bill of divorce (§§ 133–134 ABGB) or by husband's petition – bill of divorce (§§ 135–136 ABGB).[45]

4. The impact of a change of religion on the right to seek divorce

In the Austrian law there was a general principle that a change of religion by one of the spouses, made after contracting the marriage, did not result in a change of applicable regulations according to which the right to seek divorce should be considered [cf § 111(2), § 116 and § 136 ABGB].[46] This means that e.g. in a Jewish marriage, after a change of

[43] J. Ordyński, *O separacji, rozwodach (rozwiązaniu małżeństw przez rozwody i śmierć) i nieważności małżeństw*, Warszawa–Kraków 1925, p. 43. The author refers to the Imperial Decree of 27th August 1814 (Collection of Judicial Acts, No. 1099) and expresses the opinion that a non-Catholic person could, by way of exception, obtain divorce from a spouse, who after the wedding converted to Catholicism pursuant to § 116 ABGB, and then contracted a new union with a non-Catholic person, as long as the first spouse is alive, and after their death, in certain situations also with a Catholic. On the other hand, a Catholic divorced in such a manner could not enter into any marrital unions as long as the non-Catholic spouse was alive because he was prohibited from doing so by the Imperial Decree of 11th July 1835 (Collection of Judicial Acts, No. 61). Nor could a Catholic enter into a marriage with a divorced non-Catholic. A. Vetulani, *Kościelne prawo małżeńskie z uwzględnieniem prawa trójdzielnicowego*, Kraków 1937, p. 57; E. Margulies, *Rozwód i unieważnienie małżeństwa według obowiązujących obecnie ustaw w Polsce*, Lviv 1929, p. 35–36.

[44] Similar principles were applied to spouses requesting divorce where one of them was a Jew (or Muslim), and the other did not belong to a religion legally recognised by the state (§§ 123, 133 *in principium* ABGB), as well as in the situation where one of the spouses was a Jew and the other was a Muslim. Cf J. Ordyński, *O separacji, rozwodach…*, p. 51.

[45] If Jewish spouses converted to a Christian religion, then the admissibility of their divorce had to be considered pursuant to the provisions of the new religion, in accordance with the Ministerial Regulation of 8th August 1853 on Rules Applicable to Divorce and Separation of Spouses of the Israeli Faith who Converted to the Christian Faith (Journal of State Laws No. 160).

[46] According to J. Ordyński (*O separacji, rozwodach…*, pp. 42–43), of crucial importance was the moment of contracting the marriage and requesting the divorce. Under the Imperial Decree of 28th June 1806 (Collection of Judicial Acts, No. 771), a Catholic who changed religion did not acquire the right to seek divorce, even if the new religion permitted this method of dissolving marriage. An interpretation of § 116 ABGB suggests that from the moment of the conversion, the non-Catholic Christian who changed religion to Roman Catholicism could not obtain divorce, either. The right to divorce was retained by those non-Catholics who converted to the Catholic religion after the wedding and subsequently to another non-Catholic religion, but before the date of filing a divorce request. Under § 116 ABGB, the right to divorce was retained by a non-Catholic whose spouse converted to Catholicism; they could enter into a new union while the first spouse was alive, but only with a non-Catholic person (also Imperial Decree of 27th August 1814, Collection of Judicial Acts, No. 1099). Also the Supreme Court in its rulings consistently expressed the view that since both parties were Catholics at the time of contracting the marriage, their subsequent change of religion did not have an

religion by one of the spouses, even to Catholicism, such a marriage was not subject to being dissolved *ipso iure*; instead, divorce proceedings appropriate for Jewish spouses had to be conducted. After the divorce, even the Catholic party could enter into a new marriage, even to a Catholic in the canonical form irrespective of whether their previous spouse was still alive or had died.[47]

Where both spouses changed religion after contracting their marriage, any possible petition for divorce was to be considered pursuant to the regulations that were applicable for the religion to which both of them belonged at the time of filing the divorce petition.[48] There was an exception to this rule, concerning spouses who both converted to the Roman Catholic religion after their wedding and remained therein until the time of filing the divorce petition. This means that spouses who were non-believers on the date of the wedding or belonged to a religion that permitted dissolution of a marriage by divorce, forfeited that right upon their Catholic christening, i.e. they incurred the obstacle called *impedimentum catholicismi.*[49] A return to the previous religion did not cause the right to divorce to be revived.

5. Grounds for divorce

The Austrian law was based on the principle that a marriage can be dissolved by way of divorce exclusively due to an important reason specified in the civil law.[50] However, the catalogue of grounds for divorce varied depending on the form of contracting the marriage. The widest (§ 115 ABGB) was intended for spouses who had a civil wedding (e.g. non-believers) or a religious one, but only within the range of non-Catholic Christian religions. Identically wide was the one for non-Catholics, where the other spouse converted to Catholicism after the wedding (§ 116 ABGB). For "ritual" Mosaic spouses the catalogue of grounds was very narrow (§ 135 ABGB), and for marriages contracted

effect on the right to request divorce, because Catholic marriage is indissoluble while both spouses are alive (cf Supreme Court ruling of 26th February 1929, III. Rw. 2932/28, published in Przegląd Sądowy 1928, vol. IV, p. 126 – concerns the case of the District Court in Krakow, Cg. Ib 426/28).

[47] E. Margulies, *Rozwód i unieważnienie…*, p. 59–60.

[48] According to the Rescript of the Ministry of Justice of 8th August 1853 on Rules Applicable to Divorce and Separation of Spouses of the Israeli Faith who Converted to the Christian Faith (Journal of State Laws No. 160). M. Śliż, *Galicyjscy Żydzi na drodze…*, p. 139.

[49] According to the Imperial Decree of 4th February 1837 (Collection of Judicial Acts, No. 136), the impediment of Catholicism was not applicable to a Jewish spouse who divorced from the former one by bill of divorce in compliance with provisions of the secular law and converted to the Catholic religion themselves. In such a situation, the divorced convert could contract another marriage in the Catholic Church with a Catholic, even while the former Jewish spouse was still alive. M. Allerhand, *O rozwodzie małżeństwa żydowskiego* [in:] *Księga pamiątkowa wydana w setną rocznicę ogłoszenia Kodeksu cywilnego z dnia 1. czerwca 1811 roku*, Lviv 1911, pp. 551–553; M. Śliż, *Galicyjscy Żydzi na drodze…*, p. 126.

[50] Divorce legislation introduced different catalogues of positive and negative grounds for divorce so that the interest of the individual should not prevail over the interest of the state and society in pursuit of dissolution of the existence of marriage. A catalogue of such grounds was meant to effectively hinder divorcing in a reckless manner. See J. Poznański, *Wina stron a rozwiązanie małżeństwa*, „Głos Sądownictwa" 1935, vol. VII, no. 5, p. 350.

in the Catholic form, none of the statutory listed grounds justified a request for divorce (§ 111 ABGB).

The prevailing view is that the catalogue of important grounds for divorce was exhaustive and restricted to six, which were enumerated in § 115 ABGB.[51] They comprised 1) "invincible repugnance" (to the marital act), 2) a spouse being sentenced to a minimum of 5 years of imprisonment, 3) inflicting of severe and repeated corporal injury on a spouse ("bodily injury"),[52] 4) a spouse's adultery,[53] 5) malicious abandonment of the other spouse[54] and 6) threats against the life or health of the other spouse (so-called "life- and health-threatening harassment").[55] The grounds for divorce and for legal separation were only partially consistent.

The manner of defining those reasons was not consistent as the first five were defined rather narrowly while the last of them had a very wide definition. Furthermore, the effect of proving any of the first five reasons before a divorce court was that the fault was automatically attributed to one spouse, unless it was established that fault lay with both parties where both spouses committed wrongs.[56] The notion of the so-called "invincible repugnance" was rather broad and very inclusive in practical application. It comprised a variety of factual circumstances, which provided the ruling court with more freedom of

[51] Also S. Wróblewski, *Powszechny Austriacki Kodeks…*, pp. 93–95 and p. 102. This means that divorce was impermissible for other reasons (e.g. spouse's mental illness) which could be considered as important in foreign legislation systems. However, the Supreme Court, in the ruling of 28th August 1928, III. Rw. 2162/27, published in Przegląd Sądowy 1928, vol. IV (concerning case SOKC Cg Ia. 3/25), expressed the view that the grounds for divorce in § 115 ABGB "are only listed in this regulation as examples". The District Court in Krakow, in turn, took the view that the catalogue of grounds for divorce was exhaustive – cf e.g. the grounds of the dismissing judgment to the case I C 292/40 (sheets 59–60).

[52] Grievous bodily injury to a spouse, like threats against their life or health, were penalised under the Austrian penal law, as well as the Polish law of 1932.

[53] The term adultery was understood to mean engaging in carnal intercourse by a spouse with another person who was not their spouse. For this ground for divorce to be accepted, the Austrian divorce law did not require that the adulterous spouse, or the person they committed that act with, should earlier have been convicted of this crime (§ 502 of the Austrian penal law of 1852). E. Till, *Prawo prywatne austriackie…*, p. 65.

[54] The case law took the view that malicious abandonment of the other spouse was the case not only when the other spouse arbitrarily, deliberately, and maliciously left the joint home physically, but also when they did not leave the home, but only broke the conjugal community in the above manner. These circumstances were also present when one spouse forced the other spouse to abandon the home due to their conduct. In certain situations, malicious abandonment was understood as unjustified refusal to engage in sexual relations. S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 103.

[55] A single quarrel, even a violent one, between the spouses did not justify requesting divorce or separation. On the other hand, beating the wife, coupled with a refusal to provide her with maintenance, could be a manifestation of health-threatening harassment and a ground for separation (or divorce) being the husband's fault. See Supreme Court ruling of 7th September 1937, C II 1027/37, published in "Przegląd Prawa i Administracji" (hereinafter: PPA) 1938, no. 1, item 3.

[56] These reasons were of a strictly personal nature and could only be raised by the innocent spouse. In a situation when both spouses committed adultery, each of them could separately request divorce referring to the other spouse's fault, or they could jointly file for uncontested divorce if the adultery caused invincible repugnance in at least one of them towards the other one. S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 102; J. Poznański, *Cudzołóstwo, jako przyczyna rozwiązania małżeństwa*, "Współczesna Myśl Prawnicza" 1936, vol. II, no. 5(8), p. 9.

interpretation.[57] However, it was not sufficient for that "repugnance" to be of an ordinary kind in order to seek divorce; it had to be qualified as "invincible", i.e. permanent.[58]

On the other hand, for those spouses who contracted a "ritual" marriage in the Mosaic religion (satisfying the requirements of the secular rules), the catalogue of grounds for divorce was narrowed down to only the wife's adultery and only concerned the situation where the divorce was requested by the husband regardless of the will of the wife (§ 135 ABGB).[59]

In the situation where Jewish spouses voluntarily wanted to get divorced before a magistrates' court (county court before 1929), the ABGB did not specify its own catalogue of grounds for divorce but referred in this scope to the internal laws of the Jewish religious association (§§ 133–134 ABGB). Thus, the catalogue of grounds for divorce specified in the Mosaic Law was very wide, and a common court was not authorised to narrow it down to the situations only known in the civil law.

In the situation where one of the Jewish spouses converted to a Christian religion after the wedding, divorce was admissible for various reasons depending on the grounds for and manner of requesting it (§ 136 ABGB). As a matter of fact, only the wife's adultery constituted grounds for divorce by unilateral request of the husband, while the other Talmudic grounds were only applicable in the situation of voluntary joint request for divorce.

In the Austrian law, negative grounds for divorce were basically not set forth.

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[57] In specific circumstances, invincible repugnance could be caused by grave verbal or written insults. With regard to separation due to fault on the husband's part, it was deemed that insults might include, in the situation concerned, groundless accusations against the wife of adultery with her son-in-law, and stealing from the husband; and in another situation, the husband's lack of reaction to the wife's caressing, coupled with his response that he did not want the wife but her money (cf Supreme Court ruling of 30th October 1930, C II 1369/36, published in PPA 1937, No. 1, item 4). On another occasion, repeated and annoying harassment, which was understood as insulting the spouse's dignity and honour, could be taken as an independent reason for separation (and possibly divorce due to invincible repugnance). Another example is a husband's verbal reaction to his wife's carnal intercourse with another man in a period of the spouse's troubled conjugal life (Supreme Court ruling of 19th January 1937, C II 422/37, published in PPA 1937, No. 4, item 289), or groundless accusations against the other spouse of having an adulterous relationship (Supreme Court ruling of 21st October 1938, C II 689/38, published in PPA 1939, No. 1, item 3). On the other hand, a husband's irregular, admittedly brutal rebuking of his wife so that she should properly perform the obligations of wife and mother, was not considered as frequent and annoying harassment (Supreme Court ruling of 2nd April 1931, Rw 460/30, published in PPA 1931, item 210); as was also found in a case of a husband touching his wife with his finger- and toenails during carnal intercourse, and suffering from unintentional drooling of saliva (Supreme Court ruling of 18th May 1937, C II 77/37, published in PPA 1937, No. 4, item 290). See S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 94; P. Kasprzyk, *Separacja prawna …*, p. 89.

[58] In the German jurisprudence this type of reason was classified among relative grounds for divorce, the assessment of which depended on the parties' circumstances, their social and professional positions, education, background, religion, and social and political views, etc. J. Poznański, *Zniewaga, jako przyczyna rozwiązania małżeństwa*, "Współczesna Myśl Prawnicza" 1936, vol. II, 1936, no. 2(5), p. 9.

[59] As already indicated in footnote 54, the Austrian law that applied in the Second Republic did not require that the spouse guilty of adultery should have been convicted of this crime for a divorce petition to be effective. Furthermore, the fact of adultery could be referred to at any time, and there was no time limitation for requesting divorce on this particular ground. S. Wróblewski, *Powszechny Austriacki Kodeks…*, pp. 102–103.

6. Manners of instigating divorce proceedings

The manner of starting divorce proceedings was subject to statutory regulations. The right to bring divorce proceedings to court was strictly personal and was not subject to any time limitations (there was no lapse period). This means that the proceedings could not be instigated by anybody else, like e.g. a curator in absentia (*absentis*), a prosecutor, a defender of the marriage bond [hereinafter: DM (*Defensor Matrimonii*)], or a representative of a person legally incapacitated, either partially or completely.

The Austrian law knew two different manners of instigating divorce proceedings:

1) by unilateral request (petition) of one of the spouses, or

2) by joint request (petition) of both spouses.

The first case was subject to the principle of recrimination. This means that divorce could not be requested by the spouse who was solely responsible for the occurrence of the ground for divorce or was deemed to be at fault for the other person's behaviour (§ 115 *in fine* ABGB, § 96 ABGB).[60] Thus, the unilateral right to request divorce was conferred on the spouse who was not at fault for the occurrence of the reason for requesting divorce, and also to a spouse who was jointly at fault for the occurrence of the reason for requesting divorce.[61]

Under the ABGB, the right to request divorce was not subject to any time limitations (cf § 1481), but the right to request divorce could be lost by pardoning the spouse at fault. It is settled case-law that the mere fact of continuing married life by the innocent spouse after the occurrence of a reason justifying requesting divorce (e.g. due to adultery) did not deprive them of the right to seek divorce at a later time unless by continuing married, life they tacitly forgave the spouse at fault. In any event, pardon of the spouse at fault could be offered either expressly or concludently.

Invincible repugnance (to the marital act), either unilateral or bilateral, was the only statutory positive ground for uncontested (joint) request for divorce,[62] and the catalogue of factual circumstances that might induce invincible repugnance to the marital act was very comprehensive. Hence, the role of the divorce court, which was provided by the

[60] The same was applicable with regard to separation from bed and board.

[61] The principle of recrimination in requesting divorce was known to other legislatures, e.g. the Swiss [art. 142(2)], German, and, after the war, also to the Polish law on marriage of 1945 (art. 24), and later on in the Family Code of 1950 (art. 30) and the Family and Guardianship Code of 1964 (art. 56 § 3); this principle was also known to the Soviet law of 1944, the Czechoslovakian after 1949, the Bulgarian law, etc. The principle of recrimination was unknown or known in a very limited scope with regard to matrimonial matters in marriage laws of the Scandinavian countries and in the post-war East German law on marriage. See J. Górecki, *Rozwód. Studium socjologiczno-prawne*, Warszawa 1965, p. 220 et seq, 234–235. He established that in the early 1960s, in the opinion of approx. 73.5% of parties, approx. 80.5% of judges and approx. 88.3% of lawyers the principle of recrimination did not prevent spouses from breaching their marital duties, which means that its educational function was weak.

[62] In the Austrian case-law it was commonly considered that spouses' invincible repugnance need not be mutual, but it was sufficient if it occurred on one side; however, it was required that the divorce request due to this reason be bilateral, i.e. uncontested. And in order for the divorce to be granted for this reason, such repugnance had to be proven before the court based on objective circumstances. Reference to repugnance made by one of the spouses, or even by both, was not a proof excluding any further evidence that might be provided. S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 103.

Austrian legislature with a wide range of discretion, was to establish whether a particular actual reason could have led to the occurrence of invincible repugnance to the marital act in one or both spouses.[63] In order for a divorce to be granted, the mere bilateral and voluntary petition for divorce due to invincible repugnance was not sufficient; it had to be proven and examined by the court.[64] In the case of uncontested divorce petitions, the spouse at fault could be one of the petitioners. In this manner of instigating divorce proceedings the spouses were allowed, as an exception, to appoint a shared attorney to represent their interests. In such a situation, it was not the other spouse that was the opponent, but a representative of the public interest, i.e. a DM. The task of the spouses, or one of them, was to present the negative details of their married life that would enable the court to pass a judgment granting divorce. Results of the research prove that spouses quite frequently acted jointly in offering evidence and filing mutual consents to divorce.[65] However, such evidence was not binding for the court, which could allow other evidence on its own initiative in order to establish the substantive truth. The fault in such divorce cases was established based on general principles.

7. Divorce among Jewish spouses[66]

As a rule, Jews in the territory of Małopolska in the inter-war period contracted marriages before their own religious authorities but according to the rules provided for by the Austrian civil law. There were also those who did not comply with the rigours of the civil acts and contented themselves merely with the religious effects of their union. As a result, marriages contracted under the former procedure produced effects in both legal orders, i.e. in the Mosaic Law and the civil law, while marriages contracted under the latter one only produced effects in the religious law. In practice, both variants of those marriages were jointly termed as "ritual" (*Judenehe*).[67] However, such marriages had to be examined differently, not only with regard to their legal effects but also to the possibility of requesting divorce. The former variant had its legal existence in both the Mosaic and the civil orders, which meant that usually divorce was first brought before a rabbinical court and thereafter before a civil court, by uncontested joint request of the spouses in compliance with provisions of §§ 133–134 ABGB (before a magistrates' court), or by

[63] If the ground for divorce was other than invincible repugnance to the marital act or repugnance coupled with other reasons, then it was, as a rule, a divorce petition and not an uncontested divorce request that was brought to court. E. Till, *Prawo prywatne austriackie…*, pp. 156–158, also Z. Zarzycki, *Rozwód …*, p. 689 et seq.

[64] The idea was to prevent uncontested divorce requests due to invincible repugnance from becoming voluntary divorces. Hence, the task of the court was to strive to establish the substantive truth pursuant to §§ 13–19 of the Decree of the Imperial Legal Office of 23rd August 1819 on Proceedings in Contentious Matrimonial Matters (Collection of Judicial Acts, No. 1595). E. Till, *Prawo prywatne austriackie…*, pp. 157–158.

[65] Z. Zarzycki, *Rozwód…*, p. 391 et seq.

[66] See M. Allerhand, *O rozwodzie małżeństwa…*, pp. 7–47.

[67] See Z. Zarzycki, *Rozwód…*, p. 416, table 6.9. List of divorce cases of Jewish religious "ritual" marriages conducted before the District Court in Krakow in 1918–1945. Also E. Till, *Prawo prywatne austriackie…*, p. 159.

way of the husband's petition pursuant to § 135 ABGB (before a district court). Usually, the bill of divorce from the religious proceedings was attached to the petition. With regard to an exclusively religious Jewish marriage, divorce could not be obtained before a civil court because such a marriage did not exist under civil law. The only option was to get divorced in the religious manner before a competent Jewish authority.

In any case, as far as a Jewish marriage contracted in the religious ("ritual") form before the competent religious authority is concerned, divorce could be obtained by a bill of divorce (*Scheidebrief*) given to the wife in either of two manners, i.e. 1) voluntary divorce by mutual consent (§§ 133 and 134), and 2) divorce against the will of the wife (§§ 135 and 136).[68] On the other hand, in the case of a civil marriage of individuals being non-believers of Jewish nationality[69] (and a so-called civil marriage of necessity of a believer in Mosaic religion with an individual of another denomination),[70] divorce was subject to the regulations provided for in § 115 ABGB and the proceedings took place in compliance with a principle of taking account of a separate mode for matrimonial matters. Such a marriage could not be deemed a Jewish religious ("ritual") one pursuant to the post-Austrian regulations.[71] Exceptions were made in cases where a so-called civil marriage of necessity was contracted before a duly empowered authority of a Jewish community and both spouses declared Mosaic religion on the date of filing the divorce petition.

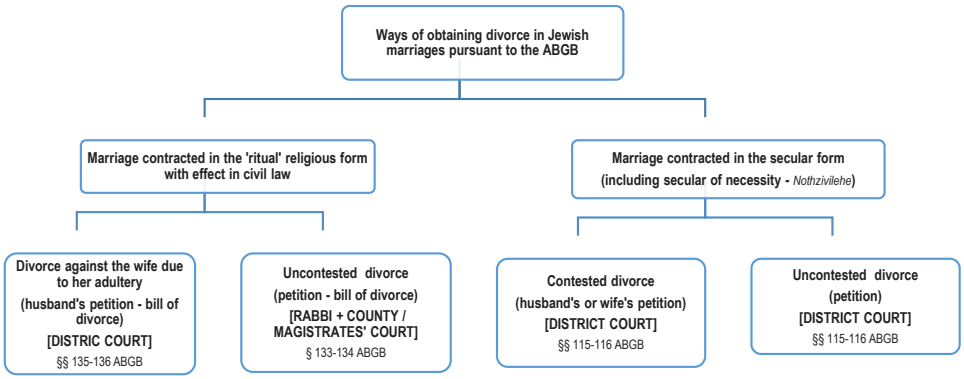
[68] The Austrian law did not specify the form of the bill of divorce but referred to the provisions of the Mosaic Law.

[69] Such was the case I Cg 381/31 of a twelve-year long Jewish marriage from Krakow, with three minor children where the petitioner M.H. sued her Jewish husband F.H. for divorce on 18th November 1931. However, six days earlier the petitioner left the religious community of Mosaic confession – which she evidenced by a certificate from the Municipal Office of the City of Krakow – and did not join any other religious community, which meant she was a non-believer. In the petition (sheets 3–6) she wrote that their married life was unhappy. Her husband was violent and bad-tempered, he gravely insulted the petitioner in a manner that was not practiced in the community she comes from. He harassed her physically and morally. He disrespected her at home and in public, with words like "whore, prostitute, asshole, idiot". He shouted at her in a shop, "you slutty dog, get out!" Finally, after the petitioner was granted 200 zlotys in temporary alimony and permission to live separately, the proceedings came to a halt [were suspended].

[70] See art. II § 10 of the Act of 25th May 1868 *On Conditional Admissibility of Contracting a Marriage before a Civil Authority* (Journal of State Laws No. 47). The different ways of contracting marriages among the Jewish population or mixed marriages (Jewish with non-Jewish) depended on the degree of the sense of national and religious identity. Jews with traditional views as a rule did not enter into marriages with non-Jews or in a 'non-ritual' form while more liberal Jews were varied in their choices. The identity of Krakow's Jews was often described in books; see e.g. H. Halkowski, *Świat przed katastrofą?* [in:] *Świat przed katastrofą. Żydzi krakowscy w dwudziestoleciu międzywojennym*, Kraków 2007, p. 27.

[71] W.L. Jaworski, *Kodeks cywilny austriacki*, vol. I, Krakow 1903, p. 336.

Graph 2. Ways of obtaining divorce in Jewish marriages pursuant to the ABGB (the legal situation in Poland in 1918–1945)[72]



1. **Uncontested Jewish divorce (§§ 133–134 ABGB)**. A Jewish religious ("ritual") marriage validly contracted under civil law could be dissolved by divorce by mutual consent by the husband's presenting the wife with a so-called bill of divorce.[73] In such cases, other grounds for divorce than those specified in §§ 115 and 116 ABGB could be referred to as long as they were accepted by the court as reasons for invincible repugnance to the marital act.

In such a divorce case, the provisions provided for in the Law of Moses were applied, and those were more comprehensive than the catalogue of grounds specified in § 115 ABGB and were, as a rule, other than just the wife's adultery. In such cases the divorce proceedings were instigated pursuant to § 135 ABGB, i.e. by the husband's unilateral petition (in the form of a bill of divorce). A voluntary divorce in a Jewish "ritual" marriage was handled according to uncontested proceedings, i.e. an Austrian Edict on Procedures in Matters of Non-Contentious Jurisdiction of 9th August 1854[74], and § 114 of the jurisdictional norm, retained in Małopolska even after 1933.[75] Divorce proceedings were divided into clear stages, the first of which took place before a rabbi competent with respect to the place of residence of the husband, and the second before a county court (from 1929: magistrates' court). On two occasions the spouses had to present a voluntary

[72] Source: own work.

[73] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 64.

[74] J. Tałasiewicz, *O postępowaniu w sprawach niespornych w zastosowaniu dla Galicyi*, Kraków 1899, pp. 16–17; *Postępowanie w sprawach niespornych (Patent niesporny) i ustawa o ubezwłasnowolnieniu z 28. l. 1916 l. 207 dpp. Wraz z orzecznictwem b. sądów austrjackich i sądów polskich, dodatkowemi ustawami i rozporządzeniami polskiemi, oraz okólnikami ministerjalnymi*, ed. A. Laniewski, Lviv 1928; Z. Fenichel, *Stosunek postępowania niespornego do spornego*, "Przegląd Sądowy" 1933, vol. IX, no. 2, p. 43.

[75] § 114 of the jurisdictional norm specified territorial competence of courts in such manner that, "For granting voluntary separation [§ 103 ABGB] and divorce pursuant to § 133, this court will be appointed that is the common court of the husband". Territorial competence was determined according to art. 24–26 and 50 CCP. For more on this, see M. Allerhand, *Miejscowa właściwość sądu dla spraw ze stosunku małżeństwa*, Warszawa 1936, p. 29–30; also M. Śliż, *Rytualne małżeństwa Żydów…*, pp. 97–110. Other non-property matrimonial matters were considered according to the territorial competence set forth in art. 43 CCP.

bill of divorce drawn up in writing according to the religious principles in the Polish language[76] which had to clearly suggest that they exchange it with each other mutually along with mutually accepting it from each other. The rabbi's task was to make three attempts at conducting settlement (conciliatory) proceedings with the Jewish spouses, and if those proved futile, he was obliged to issue a written certificate of having conducted the procedure.[77] The effectiveness of the conciliatory attempts could become complicated if one of the spouses had changed their religion.[78] There were also procedural difficulties for Jewish spouses in Małopolska who contracted civil marriage under German law, the BGB, and fulfilled it religiously there or in the territory of Małopolska.

The second, and proper, stage of the divorce proceedings was conducted by a common court, i.e. county (magistrates') court competent with respect to the place of residence of the husband, where the parties once again had to present the voluntary bill of divorce with the attached rabbi's certificate.[79] The divorce court (one professional judge) continued the proceedings and heard the petitioners and witnesses. It could also allow other evidence *ex officio*. Due to the limitation of the principle of accusatorial, adversarial procedure to the minimum, the court had to establish the substantive truth. Hence, unlike at the "ordinary" divorce the court proceedings were characterised by a prevail-

[76] Cf the Imperial Decree of 22nd October 1814 (Collection of Judicial Acts, No. 1106). The impermissibility of drawing up a bill of divorce in the Hebrew language was discussed on several occasions in the case-law. J. Gwiazdomorski (*Osobowe prawo małżeńskie…*, p. 65) gives an example of a typical bill of divorce: "Bill of divorce (Get). On the second day of the week, the 3rd day of the month of Tammuz, in the year 5679 after creation of the world, according to the calendaric calculations that we count here, in the city K., which is situated on the W. river, and situated near springs of water, I, Salomon the son of Baruch, who today am present in the city K., which is situated on the W. river and situated near springs of water, willingly consent, being under no duress, to release, discharge, and divorce you to be on your own, you, my wife Maria, daughter of Maurice, who are today in the city of K., which is situated on the W. river, and situated near springs of water, who has hitherto been my wife. And now I do release, discharge, and divorce you to be on your own, so that you are permitted and have authority over yourself to go and marry any man you desire. No person may object against you from this day onward, and you are permitted to every man. This shall be for you from me a bill of dismissal, a letter of release, and a document of absolution, in accordance with the law of Moses and Israel". This was followed by the date of drawing up the bill and signatures.

[77] This obligation arose from § 133 ABGB and form art. 56 and art. 47 of the provisions on the organisation of Jewish religious communities, announced as an annex to the Regulation of the President of the Republic of Poland of 14th October 1927 (Journal of Laws, No. 91, item 818 as amended). In the part of the Silesian Province centred on Cieszyn, the corresponding Act of 21st March 1890 (Journal of State Laws No. 57) was applicable. See also J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 64.

[78] In such a situation, the applicable laws included the Imperial Decree of 10th August 1821 on Divorce and Separation of Jewish Spouses in the Event of Conversion to the Christian Religion (Collection of Judicial Acts, No. 1789), the Decree of the Imperial Legal Office of 4th February 1837 on Regulations Applicable in Divorces of Israelites who Converted to the Christian Religion (Collection of Judicial Acts, No. 168), the Regulation of the Minister of Justice of 8th August 1853 on Regulations Applicable in Divorce and Separation of spouses of the Israeli Faith who Converted to the Christian Faith (Journal of State Laws No. 160) and § 1 of the Act of 9th April 1870 on Marriages between Individuals not Belonging to any Statutorily Recognised Church or Religious Associations and on Keeping Registers of Births, Marriages and Deaths (Journal of State Laws No. 51). See F. Zoll, *Prawo cywilne opracowane…*, p. 68.

[79] Initiation of such a procedure took place by filing the appropriately completed official form as specified in the Rescript of the Ministry of Justice of 10 November 1912, Implementing New Forms for Uncontested Cases (Journal of State Laws No. 57). See E. Piechnik, *Postępowanie niesporne i formularze do niego*, Kraków 1925, pp. 254–256 (Form No. 150).

ing share of the written form, secrecy, and indirectness.[80] It was possible to suspend the proceedings for two or three months if the court became convinced that there was hope for reconciliation between the spouses.[81] As a completion of the divorce procedure, the husband would present his wife with a bill of divorce on the spot in the courtroom, often in the presence of the rabbi who supervised the religious requirements of this act, and the wife was obliged to accept the bill (§ 134 ABGB).[82] The fact of serving the bill of divorce had to be confirmed by the court by drawing up and announcing a resolution (ruling) on the dissolution of the marriage. A legally valid dissolution of a Jewish religious marriage had to be entered in the book of marriages and in the marriage record.[83] Regulations of the Austrian law enabled obtaining voluntary divorce by those Jewish spouses who contracted their marriage e.g. under the German law, the BGB, or Russian law, and then had difficulties in obtaining divorce there.[84]

2. **Divorce against the wife's will (contested divorce)**. A Jewish husband had the right to unilaterally dismiss his wife by presenting her with a bill of divorce (*Scheidebrief*), but only in cases of her adultery (§ 135(1) ABGB).[85] The law did not provide for the opposite, i.e. bringing a divorce action by the wife because of the husband's adultery.[86]

Divorce proceedings in a Jewish marriage instigated by unilateral petition by the husband pursuant to § 135 ABGB *in fine* (also § 136 ABGB) were conducted in compliance with the general procedural principles, in the mode of contested proceedings, taking into consideration slight differences that were typical for these kinds of matters.

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[80] Z. Fenichel, *Stosunek postępowania niespornego…*, p. 41. In practice it would happen that a bill of divorce was drawn up in Hebrew, and, upon the parties' request, the rabbi who previously conducted the conciliatory proceedings could participate in the presentation of the bill at the court.

[81] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 64.

[82] As a rule, a bill of divorce was given and received personally between the spouses in accordance with the provisions of the Imperial Decree of 11th June 1813 (Collection of Judicial Acts, No. 1053). In exceptional cases, when a Jewish spouse converted to a Christian religion, they were obliged to appoint a believer of the Mosaic religion as their proxy and draw up a power of attorney in compliance with the Imperial Decree of 19th May 1827 (Collection of Judicial Acts, No. 2277). The content of the power of attorney could not be at odds with the principles of the Catholic religion or another Christian religion that they confessed. See W.L. Jaworski, *Kodeks cywilny austriacki…*, p. 339; J. Ordyński, *O separacji, rozwodach…*, p. 52; J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 65.

[83] In practice, this obligation was discharged in different ways. Hungarian Registry Offices only accepted such rulings of Austrian courts on voluntary divorce of Jewish marriages that made mention of the fact that the marriage concerned was contracted before a civil registrar (but it was not necessary to add that it was according to the Jewish ritual), and in practice, a certificate of such wedding was attached. E. Piechnik, *Postępowanie niesporne…*, *p.* 256.

[84] However, under the condition that both spouses obtained jurisdiction of the Austrian law after residing here for at least one year. E. Margulies, *Rozwód i unieważnienie…*, p. 64.

[85] W.L. Jaworski (*Austrian Civil Code*, p. 339) states that attempts to obtain divorce by a husband due to his Jewish wife's adultery in an orthodox marriage were very rare. "If it should be proven that a wife committed adultery, the husband shall be entitled to send her away by a bill of divorce, even against her will". K. Sójka-Zielińska, *Historia prawa…*, p. 242. Again, in order to start divorce proceedings, it was not required that she should be first convicted of adultery.

[86] Where a wife lodged a divorce petition against her husband's will, the court passed resolution on rejecting the petition as legally inadmissible. A. Gulczyński (*Cywilnoprawne skutki cudzołóstwa na ziemiach polskich w XIX i XX wieku*, "Studia z Dziejów Państwa i Prawa Polskiego" 2002, vol. VII, Łódź, p. 249) states that the husband in a Jewish marriage was not legally bound to marital fidelity and therefore could not commit adultery. See also M. Allerhand, *O rozwodzie małżeństwa…*, p. 7 et seq.

Therefore, they differed from the divorce proceedings instigated by a voluntary petition (§§ 133–134) of Jewish "ritual" spouses (in uncontested proceedings), and from the divorce proceedings (conducted in a separate mode) instigated pursuant to §§ 115–116 ABGB by a petition of one of the spouses who contracted the marriage in the civil form as non-believers or non-Catholic Christians.[87]

In such proceedings it was not proper, *inter alia*, to establish a DM,[88] and evidence for the wife's adultery could be based exclusively on the wife's confession or on a hearing of the parties.[89] In certain circumstances the Jewish husband could lose the divorce petition where, after finding out about his wife's adultery, he took up conjugal living with her. Another characteristic was the very content of the divorce ruling deciding in favour of the petition, which stated that the husband is entitled to present, and the wife is obliged to accept the bill of divorce issued by the husband, commonly within 14 days under pain of enforcement action.[90] In these proceedings a Jewish husband's wife was entitled to file a counterclaim demanding maintenance, which was the case in some of the files examined.[91]

The restrictive requirements of the Austrian divorce law concerning Jewish marriages, permitting only the husband to instigate the proceedings and only due to his wife's adultery meant that such spouses often "migrated" to other legal jurisdictions which were more lenient to them.[92]

3. **Divorce after a change of religion**. Proceedings concerning Jewish spouses could become complicated if in the course of the marriage one of them converted to one of the Christian religions that did not permit divorce. In such a situation, the religious conversion did not constitute an independent ground for divorce as opposed to adultery or any other that might lead to invincible repugnance between the spouses (§ 136 ABGB).[93] In such circumstances, conciliation attempts could be undertaken by both a rabbi compe-

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[87] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, pp. 65 and 66.

[88] See the Imperial Decree of 13th November 1816 (Collection of Judicial Acts, No. 1296), which was upheld in § 18 of the Regulation of the Minister of Justice of 9th December 1897 (Journal of State Laws No. 283), and then partly upheld in art. XXVII (6) of the provisions implementing the CCP of 1930.

[89] E. Margulies, *Rozwód i unieważnienie…*, p. 59.

[90] Thus, the divorce came into effect at the moment that the husband presented his wife with the bill of divorce. In a situation where the wife refused to accept the bill of divorce, she could be coerced to take it on the basis of the court's enforcement judgment. See J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 66. The territorial competence of the court was determined based on art. 43 CCP.

[91] A counter claim for maintenance was handled according to the same procedure, i.e. contested, ordinary, and in relation to the main action. More details can be found in M. Allerhand, *Powództwo wzajemne*, Warszawa 1938, pp. 15–16.

[92] In practice, such spouses usually migrated to the territories of the former Prussian (BGB) or Russian partition (the Decree of 1836 and the Digest of Laws of the Russian Empire of 1832), and there, after at least one year of residence, they could instigate divorce proceedings. In these jurisdictions they had at their disposal a more extensive catalogue of grounds for divorce, and above all, the wife was also entitled to file a divorce request. E. Margulies, *Rozwód i unieważnienie…*, pp. 64–65.

[93] According to § 136 ABGB: "Marriage shall not be dissolved by a conversion of a Jewish spouse to the Christian religion". In such a situation, divorce was only possible due to the grounds specified in §§ 133–135 ABGB. J. Ordyński (*O separacji, rozwodach…*, p. 54) is of the opinion that the impediment of Catholicism was not applicable in such cases, and thus, a divorced Catholic was free to enter into a new marriage, even with a Catholic, while the former spouse was still alive.

tent for the Jewish part and a minister of the Christian religion to which the other of the Jewish spouses had "migrated".[94]

8. Legal effects of divorce[95]

Within the civil procedure theory, petition for dissolution of a marital union (divorce) was classified in the category of actions for changing (creating) a legal relation.[96] A legally binding judgment on divorce was a constitutive factor, which means that it created a new legal situation between the former spouses and had an *ex nunc* effect.[97] Above all, the marriage between the parties was dissolved and both of them became single individuals and were free to enter into new marital unions with third parties or even with each other (§ 118 ABGB).[98] A divorce judgement entered into effect when it was appropriately recorded in the register of weddings (marriages) pursuant to § 122 ABGB.[99]

In such a situation, all personal and property rights and obligations of the spouses relative to each other for the future expired; these included the duty of mutual marital fidelity, of conjugal life, the obligation of "decent dealing with each other", the obligation of mutual assistance, which in turn included the wife's obligation of helping the husband in the household, the obligation of cohabitation, the husband's obligation to represent the wife in all matters, etc.[100] The former wife was no longer subject to her husband[101] and could not rely on the presumption of her place of residence being together with her husband. Upon the divorce, the contractual marital property provisions ceased to apply,[102]

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[94] Conciliation attempts took place under the Imperial Decree of 10th August 1821 on Divorce and Separation of Jewish Spouses in the Event of Conversion to the Christian Religion (Collection of Judicial Acts, No. 1789).

[95] L. Domański, *Skutki rozwodu osobiste i majątkowe*, "Gazeta Sądowa Warszawska" 1911, vol. XXXIX, no. 26, p. 388 et seq.

[96] *Kodeks postępowania cywilnego*, vol. I, ed. J.J. Litauer, W. Święcicki, Poznań 1947, p. 530; Z. Fenichel, *Postępowanie w sprawach małżeńskich niemajątkowych wedle k.p.c.*, "Głos Adwokatów" 1931, vol. VI, issue 3, p. 70 and J.J. Litauer, *Komentarz do kodeksu postępowania cywilnego*, Warszawa 1933, p. 4.

[97] M. Waligórski, *Polskie prawo procesowe cywilne*, part I: *Funkcja i struktura procesu*, Warszawa 1947, p. 44; Z. Fenichel, *Powództwo o ukształtowanie stosunku prawnego w kodeksach polskich*, "Nowy Proces Cywilny" 1935, vol. III, no. 11–12, p. 348.

[98] A marriage contracted between former spouses was considered to be a new marriage. See J. Ordyński, *O separacji, rozwodach…*, p. 50 and F. Zoll, *Prawo cywilne opracowane…*, p. 70.

[99] S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 91, and also J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 56 and F. Zoll, *Austriackie prawo prywatne. Cześć ogólna*, Kraków 1909, p. 328.

[100] The limitations that were still retained had their source primarily in the 19th-century religious regulations and concerned particularly Catholics or women (e.g. the so-called waiting period for mourning or restrictions with respect to remarriage of a pregnant woman prior to delivery). See W.L. Jaworski, *Kodeks cywilny austriacki…*, pp. 330–331 and J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 67.

[101] An adult wife regained full legal capacity and a minor one was returned to the custody of her father (§ 175 ABGB) or legal guardian (§ 260 ABGB). See F. Zoll, *Prawo cywilne opracowane…*, p. 69.

[102] It was a principle of the Austrian law that the default matrimonial regime was separation of property.

and the divorced spouses could neither automatically inherit from each other nor demand the so-called preferential legacy (§ 759 and § 796 ABGB).[103]

The determination of the party at fault in the divorce had an essential impact on the content of the property relations between the former spouses. If the divorce ruling established that both parties were at fault, or in the case of a no-fault divorce, the husband's alimony obligation towards his wife ceased, and the husband lost the right to manage the wife's property and had to return the dowry. If the divorce ruling judged that only one party was guilty in divorce, then the other (innocent) party would have an advantageous position. The party who was not guilty in divorce could demand compensation from the guilty party pursuant to § 1323 ABGB, as well as all that was contractually agreed upon in the event of the other party's death [§ 1266(2) ABGB]. The effects of a ruling on exclusive fault in divorce impacted the former wife, who was then not eligible to demand from the former husband the rights specified in § 1264 ABGB, i.e. alimony for herself or the so-called necessary maintenance.[104] Where it was the husband who was at fault in divorce, the wife's right to demand alimony from him was applicable until she married again. In the case of contractual community property, the property was divided as if it were inherited (§ 1266 ABGB).[105]

In the Austrian law (§ 142 ABGB) spouses could reach an amicable settlement with regard to the domicile of their minor children and the details of their maintenance. If there were no contractual settlements in this respect, the court often judged that children up to the age of seven years should stay with their mother, and older children with the spouse who was not at fault in the divorce. If both spouses were at fault, the court was to place sons under the care of the father and daughters under the care of the mother. Child maintenance after divorce rested upon the father of the child, and in the event of his poverty, on the mother of the child. The law provided for the possibility of meeting and visiting those children that were left for upbringing with the other parent by the non-custodial parent; a guardianship court could specify the frequency of such meetings and their form, or also exclude them if such action were determined to be in the interest of the child.[106]

It should be observed that the legal presumptions or the rights and obligations arisen in connection with the former marriage did not expire.[107] Above all, the presumption of paternity of a child born during marriage was maintained if the child was born within 300 days of the divorce ruling.[108] The former wife retained the right to the husband's surname even if she was exclusively at fault in the divorce;[109] she did not lose any citi-

[103] See § 1265 and § 1266; also *Austriackie prawo familijne. Wykład prof. dr F. Zolla juniora*, Kraków 1909, p. 32.

[104] E. Till, *Prawo prywatne austriackie…*, p. 247; J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 64.

[105] E. Till, *Prawo prywatne austriackie…*, pp. 247–248.

[106] M. Allerhand, *Prawo małżeńskie obowiązujące na Spiszu i Orawie*, (ectype) PPA 1926, issues 10–12, pp. 24–25.

[107] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 66.

[108] Children born after that time could not benefit from the statutory presumption of being born in wedlock (legitimate birth).

[109] A husband could bring a separate action against his wife to forbid her to use his surname, but he had to prove, *inter alia*, that he might otherwise be at risk of sustaining material or non-material (moral) injury. M. Allerhand, *Prawo małżeńskie obowiązujące…*, p. 24; E. Margulies, *Rozwód i unieważnienie…*, p. 111.

zenship that may have been acquired through marriage, nor the right of the so-called nativeness (*swojszczyzna*), i.e. she retained the rights acquired as a result of contracting the marriage.[110] Among other things, the relation of affinity between one spouse and the other spouse's relatives remained in force.

9. Temporary separation in divorce proceedings

The Austrian law took into consideration the institution of so-called temporary separation from bed and board, which should be distinguished from a legal separation granted by the court for an indefinite duration. Temporary separation could be granted by request of one of the parties in the course of divorce or separation proceedings (§ 115 ABGB). A divorce court could grant temporary separation only where the parties referred to mutual invincible repugnance as the ground for divorce.[111] Thus, temporary separation granted by a court in divorce proceedings was only possible for those spouses who contracted marriage in the secular form (e.g. non-believers) or for some who married in the religious form (i.e. non-Catholic Christians). The ordinance on temporary separation could be issued several times in the course of one set of divorce proceedings. In such cases the court wanted to establish the permanence of the repugnance, and the impossibility of continued cohabitation of the spouses.[112] Temporary separation typically meant that one of the spouses (usually the wife) was allowed or ordered to leave the place of joint residence due to the threatening danger posed by the other spouse (usually the husband).[113]

A result of the ordaining of temporary separation was the lapse of the marital community, i.e. the obligation for the spouses to live together, run the household jointly, and pursue conjugal life. Nevertheless, the marital bond still existed, and it was not possible to contract new marital unions; the spouses were obliged to remain faithful and respectful towards each other; and the wife retained her husband's surname (and his rights of status), but lost her affiliation to the husband's domicile.[114]

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[110] J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 66; A. Dziadzio, *Monarchia konstytucyjna w Austrii (1867–1914). Władza – obywatel – prawo*, Kraków 2001, pp. 222–223.

[111] J. Ordyński, *O separacji, rozwodach…*, p. 14. In accordance with the Supreme Court ruling of 21st June 1927, III. Rw. 214/27, published in Rulings of the Polish Supreme Court. Civil Department, volume III, p. 49, a divorce court was not obliged to order temporary separation in such a situation.

[112] S. Wróblewski, *Powszechny Austriacki Kodeks…*, p. 103, and also J. Ordyński, *O separacji, rozwodach…*, p. 14 and J. Gwiazdomorski, *Osobowe prawo małżeńskie…*, p. 63; Likewise H. Warman, *Prawo o rozwodzie i separacji. Przepisy kodeksów obowiązujących i ustaw związkowych, orzecznictwo sądowe austriackie, rosyjskie i polskie*, Warszawa 1939, p. 134 and P. Kasprzyk, *Separacja prawna…*, p. 92.

[113] P. Kasprzyk, *Separacja prawna …*, p. 90.

[114] J. Ordyński, *O separacji, rozwodach…*, p. 14. In practice, temporary separation obtained under the ABGB could in some circumstances be a basis for obtaining divorce in other districts of Poland, e.g. in the territory of the former Prussian partition (BGB) or in the Spiš and Orava regions, under the Hungarian law of 1894.

10. Regulations on divorce proceedings

Proceedings in divorce matters before the District Court in Krakow (as the court of first instance) as well as before courts of higher instance, in the period 1918–1945 are characterised by substantial dispersion and an essential change in regulations. This concerns not only the rules of civil procedure (amended in 1933), including court jurisdiction, but also the court system (e.g. the law on the structure of the Supreme Court of 1919 and on the system of common courts of 1929), court fees, (1933) and many other issues. A large number of legal standards also changed during the Second World War in connection with the German occupation (1939–1945) and the existence of a Polish (and parallel German) judiciary system under the occupation in the General Government (General Governorate). Nevertheless, the essential regulations of the Austrian non-property (substantive) marriage law and some of the procedural ones remained unchanged until the end of 1945.

If the criterion for division should be only the rules of civil procedure according to which divorce proceedings (including marriage nullification and separation) were conducted before the District Court in Krakow (as the first instance) in 1918–1945, then this period of time should be clearly divided into two stages, i.e. 1918–1932 and 1933–1945.[115]

The latter period should be clearly divided into three sub-periods. The first of them comprises less than seven years of the duration of the Second Polish Republic, immediately preceding the outbreak of the war, i.e. from the introduction of the new Polish code of civil procedure on 1st January 1933 until 31st August 1939 (the eve of the outbreak of war). After 31 days in the autumn of 1939, when the activity of the Krakow courts was suspended (between 1st September 1939 and 1st October 1939), we have the second, more than five-year long period of the activity of the Polish judiciary under the occupation in the General Governorate (from its introduction on 2nd October 1939 to the liberation of Krakow on 18th January 1945). Finally, the third and last sub-period comprising more than three quarters of a year (from 18th March 1945 until 31th December 1945) partly overlaps with the time of the system of justice being restored in the beginning of the Polish People's Republic.

10.1. Austrian procedural rules

In the Second Republic, for over 14 years (1918–1932), divorce proceedings before the courts of Małopolska (e.g. the District Court as the first instance and the Court of Appeal as the second instance) were conducted according to the general standards of the Austrian code of civil procedure of 1st August 1895[116] taking into account the specific rules that

[115] A source that proved helpful was B. Bladowski, *Metodyka pracy sędziego w sprawach cywilnych* (Warszawa 1993) and one of the compendia by A. Zieliński, *Postępowanie cywilne. Kompendium*, (Warszawa 1996, *Skrypty Becka*, part 5).

[116] The Austrian Act of 1st August 1895 on Court Proceedings in Contested Civil Cases was announced on 9th August 1895 (Journal of State Laws No. 113) and entered into force on 1st January 1898. It was partly

concerned proceedings in marital matters. Those included the Regulation of the Ministry of Justice of 9th December 1897 (Journal of State Laws No. 283) concerning proceedings in contested matrimonial matters[117] as well as an earlier Imperial Decree (*Hofdekret*) of 23rd August 1819 regulating proceedings in contentious matrimonial matters (Collection of Judicial Acts, No. 1595),[118] and a number of specific regulations (concerning e.g. Jewish marriages). An important complement to the Austrian procedural regulations was the Austrian Jurisdiction Act (1895/1898) which laid down the rules concerning jurisdiction *ratione loci* and *ratione materiae* of civil courts (including divorce courts).[119]

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amended by the Imperial Regulation of 1st June 1914 (Journal of State Laws No. 118) in two stages, i.e. from 1st July 1914 and later on from 1st August 1914. As stated by J. Windakiewicz in *Ustawa o postępowaniu sądowem w cywilnych sprawach spornych (procedura cywilna) obowiązująca na ziemiach b. zaboru austriackiego tudzież na Spiszu i Orawie i ustawa zaprowadzająca procedurę cywilną (ustawa wprowadcza)* (Warszawa 1925, p. VII), the amended Austrian code of civil procedure entered into force in the Polish territories that were incorporated into the reborn Polish State after the collapse of the Austro-Hungarian Empire, on 11th November 1918, i.e. in the four provinces which were at the time within the region of Małopolska [Krakow, Lviv, Stanisławów (a.k.a. Ivano-Frankivsk) and Tarnopol], as well as in the southern part of the province of Silesia (the region of Cieszyn).

[117] This regulation introduced a number of procedural differences in relation to the general procedures applied in the Austrian code of civil procedure (ACP). For this reason, there appeared serious doubts in the judicature and literature as to its applicability, and it was alleged that the executive authorities (e.g. the Ministry of Justice) exceeded the legally permissible scope of competence with regard to issuing regulations. Z. Fenichel, *Postępowanie w sprawach małżeńskich…*, issue 4, p. 115. On the other hand, W. Sygierycz (*O tzw. rozwodach wileńskich*, PS R. VI, 1930, No. 3, p. 64) evaluates the Austrian law, including the regulation quoted, and states, in grossly simplified terms and erroneously, that "The courts should in each case appoint *ex officio* a DM whose task is to take the case through all the three instances". The major procedural differences provided for in the regulation included, the absence of a requirement of legal representation [as in § 27(2) ACP], no obligation of holding the first audience (as in § 239 ACP), and no provisions on default judgement. The divorce court was supposed to prevent long, drawn-out procedures [§ 9(2)], was supposed to strive to establish the substantive truth, and was permitted to admit evidence on its own initiative regardless of the scope of the evidence submitted by the parties. Furthermore, the divorce ruling was to include a statement on the fault (§ 11), and the appointed DM was obliged to lodge an appeal against the divorce judgment of the first instance (§ 16). Finally, the final ruling was to be entered *ex officio* into the register of weddings (§ 17).

[118] In divorce cases, the most essential provision (§ 18) placed the DM under obligation to lodge an "appeal" against the divorce judgement.

[119] Along with the entry into force of the Austrian Code of Civil Procedure on 1st January 1898, the Act of 1st August 1895 on Exercising the Judiciary Power and on the Jurisdiction of Common Courts in Civil Cases (Journal of State Laws No. 111) was introduced. In short, it was called the "jurisdictional norm", and was formally introduced by the Implementing Act of 1st August 1895 (Journal of State Laws No. 110). The jurisdictional norm basically followed the development of the code of civil procedure. First, it was amended (together with the code of civil procedure) by the Imperial Regulation of 1st June 1914 (Journal of State Laws No. 118), also referred to as the "amendment on relieving courts", and particularly §§ 7, 8, 18, 31, 37, 45, 49 l.6, 60, 63, 83, 87, 88, 93, 100, 104, 109, 111 and 193; also new §§ 7a, 83a, 83b and 87a were added. The jurisdictional norm (along with the amendments and the implementing act) was enacted after Poland regained independence on 11th November 1918, and entered into force in the four provinces of the region of Małopolska, and in the southern part of the province of Silesia (the region of Cieszyn). On 26th November 1922, the territorial scope of application of the jurisdictional norm was extended to cover the Spiš and Orava regions.

The jurisdictional norm (and the Austrian code of civil procedure) was amended in Poland on several occasions, *inter alia* by the Act of 9th March 1920 Amending Certain Provisions of the Acts on Civil Court Procedure Applicable in the Former Austrian District (Journal of Laws, No. 24, item 144) and the Act of 5th August 1922 (Journal of Laws, No. 86, item 769). See J. Windakiewicz, *Ustawa o wykonywaniu sądownictwa i o właściwości sądów zwyczajnych w sprawach cywilnych (Norma jurysdykcyjna) obowiązująca na*

10.2. Polish procedural rules

As a rule, from 1st January 1933 courts of Małopolska applied rules of the Polish code of civil procedure of 29th November 1930.[120] As has been proven by Z. Zarzycki, court proceedings in divorce cases differed from general civil procedure, and the details (differences) were regulated *inter alia* by the provisions of art. X of the implementing provisions of the Polish Code of Civil Procedure (CCP).[121] Furthermore, the implementing provisions of the Polish CCP retained some post-Austrian rules in force[122], along with

ziemiach b. zaboru austriackiego, tudzież na Spiszu i Orawie i ustawa wprowadzająca normę jurysdykcyjną (ustawa wprowadcza), Warszawa 1926, p. VII.

[120] The provisions of art. I of the Regulation of the President of the Republic of Poland of 29th November 1930 implementing the Code of Civil Procedure (Journal of Laws, No. 83, item 652) stated that "Upon the entry into force of the Code of Civil Procedure, the existing provisions on proceedings before common courts in contested civil cases, regulated in the Code of Civil Procedure and in this regulation shall be repealed. In particular, repealed shall be, with reservations contained in articles XVII § 1, 2, 3 and 7, XXV and XXXI, the hitherto effective in this scope provisions with subsequent amendments and supplements thereto, namely: […] 2) the jurisdictional norm along with the implementing act, as well as the civil procedure along with the implementing act of the 1st of August 1895" (Journal of State Laws No. 110–113).

Moreover, it should be noted that Polish civil procedure in the pre-war period was amended on several occasions. The original text of the Regulation of the President of the Republic of Poland of 29th November 1930 – the Code of Civil Procedure – was published in the Journal of Laws, No. 83, item 651. Before it entered into force, it was amended by the Regulation of the President of the Republic of Poland of 27th October 1932 (Journal of Laws, No. 93, item 803), and thereafter the consolidated text of this act was enacted by the Notice of the Minister of Justice of 1st December 1932 (Journal of Laws, No. 112, item 934) with effect from 1st January 1933, using new continuous numbering of the units of text. Further amendments to the Code of Civil Procedure were introduced by the Regulations of the President of the Republic of Poland of 28th October 1933 (Journal of Laws, No. 82, item 603), 14th April 1935 (Journal of Laws, No. 22, item 129), 1st May 1938 (Journal of Laws, No. 24, item 213) and 28th November 1938 (Journal of Laws, No. 89, item 609), and by Decrees of the Council of Ministers of 31st July 1945 (Journal of Laws, No. 25, item 149) and of 25th September 1945 (Journal of Laws, No. 48, item 271).

[121] Art. X of the Regulation of the President of the Republic of Poland of 29th November 1930 on Provisions Implementing the Code of Civil Procedure (Journal of Laws, No. 83, item 652) provided that: "In non-property matrimonial matters, provisions of the Code of Civil Procedure shall apply, subject to the following provisions:

§ 1. Legal representation shall not be obligatory in proceedings before a district court. The hearing shall take place irrespective of non-appearance of either party. In the event of non-appearance on the part of the claimant at the first hearing, the court shall reject the petition unless the request for nullification of the marriage is supported by the prosecutor. Provisions on default judgements shall not apply.

§ 2. Court session in cases concerning marriage nullification, separation or divorce shall be held behind closed doors unless both parties request public nature of proceedings and the court considers that the public nature will not violate good morals […].

§ 4. With regard to establishing the cause of the invalidity or divorce, the court shall not be bound by the recognition of the petition or acknowledgement of facts, but may also admit evidence that the parties renounced or objected to, and to require that an oath be taken by a witness or an expert even if the parties released them from this obligation.

§ 5. Taking evidence by hearing the parties may be admitted first after exhausting other evidence and only for the purpose of supplementing it".

The regulation was repealed on 1st January 1946 (pursuant to IX of the Decree of 25th September 1945, Provisions Implementing the Law on Marriage, published in the Journal of Laws No. 48, item 271).

[122] On 1st January 1933 an amendment to art. XXVII of the implementing provisions of the CCP entered into force (Journal of Laws of 1932, No. 93, item 802) based on which some provisions contained in acts and special regulations, *inter alia* on a court's jurisdiction and procedure, remained in force, and in particular

some Polish ones from the 1920s, including rules concerning jurisdiction of the courts.[123] From the above it follows that after 1933; the rules that regulated the course of a divorce action in Małopolska (within the jurisdiction of the Courts of Appeal in Krakow and Lviv, and the District Court in Cieszyn) were appropriately rank-ordered at a certain level of generality (art. XXVII of the implementing provisions of the CCP) in such manner that art. X of the implementing provisions of the CCP and art. XXVII of the implementing provisions of the CCP were to be applied in the first place, followed by the post-Austrian Regulation of 1897, as amended and supplemented, and finally by the Polish CCP and the Polish laws.[124]

Regardless of the period, the Polish CCP guaranteed everyone the opportunity to seek legal protection before Polish courts[125], even though that Code did not provide for any different regulations concerning divorce proceedings apart from art. 127(4) and art. 414(2).[126]

Here, attention should be drawn to the investigated divorce cases brought to the District Court prior to 1933 and completed after this date. The transitional provisions (art. XXXVI) contained in the Act implementing the CCP stated[127] that with respect to the matters brought to court prior to the date of entry into force of the (Polish) Code of Civil Procedure (1st January 1933), they should be adjudicated to completion in compliance with the provisions existing at the time of their commencement, i.e., in the terri-

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(para 6): "Regulation of the Minister of Justice of 9th December 1897 (Journal of State Laws No. 283) on proceedings in contested marriage cases, with subsequent amendments and supplements thereto, as well as with the amendments provided for in art. X of this present Regulation and with such further amendment that there is no first audience or pre-trial proceedings, and the existing provisions on remedies shall be replaced with provisions of the Code of Civil Procedure". Also maintained was § 114 on judiciary in uncontested cases concerning voluntary separation and voluntary divorce among Jewish religious marriages referred to in § 133 ABGB. In addition, attention should be given to the essential impact of the solutions found in the Austrian procedure on the Polish one, which was presented in a comparative study by S. Gołąb [*Polski kodeks postępowania cywilnego a procedura cywilna austriacka* (ectype of "Ruch Prawniczy i Ekonomiczny"), Kraków 1934, pp. 1–19] searching for similarities between the Polish and the Austrian procedures (p. 2).

[123] Art. 297 § 1 of the Regulation of the President of the Republic of Poland of 6th February 1928, Law on the System of Common Courts (Journal of Laws, No. 12, item 93) repealed, as of 1st January 1929, *inter alia*, the Polish Decree of 8th February 1919 on the Structure of the Supreme Court (Journal of State Laws, No. 15, item 199), the Imperial Patent of 3rd May 1853 containing a court instruction (Journal of State Laws No. 81), the Austrian Law on the Organisation of the Judiciary of 27th November 1896 (Journal of State Laws No. 217), amended on 1st June 1914 (Journal of State Laws No. 118), with the exclusion of §§ 37, 40, 42 last section, 54(1)(3), 55, 56, 57, 59, 83, 84 and 86–90. Art. 297 § 1 cited above also repealed a number of other post-Austrian and Polish regulations including some provisions frequently referenced in the literature (§§ 5, 6, 7(1)(2), 8, 17, 18 and 47(1), §§ 7a and 60) of the Act of 1st August 1895 on Application of Jurisdiction and on Jurisdiction of Common Courts in Civil Cases (often referred to in shortened form as the jurisdictional norm – Journal of State Laws No. 111).

[124] A similar view was expressed, albeit in a rather chaotic way, by Z. Fenichel, *Postępowanie w sprawach małżeńskich…*, issue 4, p. 115 et seq.

[125] Art. 3 CCP: "Each individual may seek legal protection not only when their own right has been breached but also when preventing their own right from being breached they have a legal interest in determining a legal relationship or determining the rights".

[126] The former provision released a foreign petitioner from the obligation to provide financial security in respect to the future cost of the trial, while the latter denied immediate enforceability with respect to appeal judgements concerning, *inter alia*, divorce cases.

[127] Regulation of the President of the Republic of Poland of 29th November 1930 on Provisions Implementing the Code of Civil Procedure (Journal of Laws, No. 83, item 652) (Journal of Laws, No. 83, item 652).

tory of Małopolska, in compliance with the Austrian code of civil procedure and other specific provisions. It was specified that the deciding factor with regard to commencing the proceedings would be the date when the petition or another relevant document was received at the court. Among the divorce cases investigated, there were only two commenced prior to 1st January 1933 and conducted and completed after that date. The files have been preserved, but only one of those cases is relevant for our considerations.[128]

The Polish procedural law was further amended in the pre-war period. One of the most important amendments was the decree of the President of the Republic of Poland of 21st November 1938 on Streamlining Court Proceedings (Journal of Laws No. 89, item 609) which entered into force on 28th November 1938.[129] At that time the rules for granting parties poor relief were liberalised (art. 112 CCP), including an option for partial granting of such relief (art. 116 CCP). The requirement concerning indication of domicile by the parties at the seat of the district court was abolished (art. 145 CCP), and clergymen were freed from the obligation to take an oath when appearing as witnesses before a civil court (art. 294 § 2 CCP), etc.

During the September Campaign of 1939, the Polish judicial authorities, like many other public institutions, ceased to function. Courts in Krakow suspended their functioning on 1st September 1939 (Friday) until 1st October 1939 (Sunday).[130] By way of example, the First Civil Department of the District Court in Krakow functioned, like the court correspondence register, until 31st August 1939 (Thursday).[131]

11. Divorces in the Polish courts under the occupation 1939–1945

After a disruption of more than a month due to warfare, the District Court and the Court of Appeal in Krakow resumed their activity in the changed political and legal conditions

[128] In the case I Cg 362/31 commenced on 31st October 1931, at the first hearing on 23rd December 1931 the content of the petition was changed from divorce to nullification of marriage. The judgement nullifying the marriage was passed on 20th April 1933, and the appeal and cassation did not bring any additional changes.

It is only once that we encounter a typical divorce case processed before the District Court in Krakow between these key dates (I C 243/32). In the case concerned, the petitioner brought action on 1st June 1932 and after two hearings (31st October and 22nd December 1932) the District Court in Krakow passed the divorce judgment and found the defendant at fault. An appeal to this judgement, entitled "cancellation" in accordance with the previous legislation, was lodged by the DM (barrister M. Łuczko) on 7th February 1933 (sheets 47–50) along with a specification of the costs of the "cancellation" amounting to 72.50 zloty. The Court of Appeal passed a validating judgement on 28th April 1933, and the defendant was obliged (paragraph 2 of the judgement) to pay the cost of the appeal proceedings amounting to 37.80 zloty.

[129] See J. Bibring, *Zalety i wady części cywilnej dekretu o usprawnieniu postępowania sądowego*, „Głos Sądownictwa" 1939, vol. XI, 1939, no. 1, pp. 35–47.

[130] No new entries were found in the Repertory of the District Court in Krakow (Rep. SOKC I C 1272, vol. 2) concerning divorce or other personal matrimonial matters in the specified period; neither were any procedural steps taken by any parties of their proxies.

[131] The last civil case on that day was registered in the Repertory of the District Court in Krakow (SOKC I C 1272, vol. 2) under No. 992 and concerned legal separation in a marriage.

as Polish occupation courts established by the Germans on 2nd October 1939 (Monday).[132] Until the end of 1939, the District Court in Krakow received 27 civil actions, of which 6 concerned non-property matrimonial matters, but none of them was a divorce case.[133]

The provisions of the Polish Code of Civil Procedure were applicable in pre-war courts in Krakow, and later on in the Polish judiciary system under the occupation in the General Governorate, and yet further on (in a slightly changed form) in the post-war period, until 31st December 1964. In the period during the war, the most essential changes concerned the limitation of the hierarchical nature of the court system, which meant that e.g. laws on cassation and proceedings before the Supreme Court could not be applied.[134] The District Court in Krakow (being part of the Polish occupation courts) was competent in all marital matters concerning individuals who had Polish citizenship and domicile with the jurisdiction of the ABGB. Thus, all who had German citizenship belonged to the jurisdiction of the parallel system of German occupation courts (along with the two-instance one).[135]

On the tide of the broadly understood policy of "Aryanisation" that was then implemented, the German legislature introduced a group of regulations that excluded the jurisdiction of German courts (and German occupation courts), as well as the option of applying German personal and marriage laws by any courts (whether German or non-German) in relation to marital matters concerning female German citizens married to any man who was neither a German citizen nor belonged to the German nation.[136] Those regulations, as shown by research (Z. Zarzycki, *Rozwód…*, e.g. in case I C 484/40, pp. 180–181), had practical application to several marriages of Polish citizens of Jewish nationality who contracted marriages in Germany with German (or Polish) citizens, and in 1938–1939 were forcibly displaced from Germany by the authorities of the Third Reich (and migrated to Poland). The wives who wanted to recover their lost citizenship, and

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[132] The first entry in the Repertory of the District Court in Krakow (SOKC I C 1272, vol. 2) after the September Campaign is under No. 993 on 2nd October 1939 (it concerned a civil claim). As of 31st December 1939, the District Court in Krakow ended with entry No. 1020 (although the Repertory contains only 1015 items-cases as five of them were crossed out for unknown reasons).

[133] In the fourth quarter of 1939 four separation petitions altogether were brought to the Polish judiciary under occupation (the District Court in Krakow) (all in December 1939) and two petitions for nullification of marriage (one in October and one in November 1939).

[134] The Polish judiciary under occupation (parallel to the German) was regulated by the provision of § 1 of the Regulation on Restoration of the Judiciary in the General Governorate of 26th October 1939 (Journal of Regulations of the General Governorate, p. 4). The basis for the legal activity of the Polish courts was finally regulated by the Regulation of 19th February 1940 on the Polish Judiciary in the General Governorate (Journal of Regulations of the General Governorate I, p. 64) with effect from 24th February 1940. These provisions clarify that Polish judicial activity was performed by Magistrates' Courts, District Courts, and Courts of Appeal [§ 5(1)]. Concerning the Supreme Court it was written that "for the time being it does not undertake its activity" [§ 5(2)].

[135] Cf § 2 (2) of the Regulation on Restoration of the Judiciary in the General Governorate of 26th October 1939 (Journal of Regulations of the General Governorate, p. 4). The legal situation concerning the activity of German courts was finally regulated by the Regulation on the German Judiciary in the General Governorate of 19th February 1940 (Journal of Regulations of the General Governorate I, p. 57) with effect from 24th February 1940. See A. Wrzyszcz, *Okupacyjne sądownictwo niemieckie w Generalnym Gubernatorstwie 1939–1945. Organizacja i funkcjonowanie*, Lublin 2008, p. 22.

[136] This concerns, *inter alia*, the Regulation of 19th February 1940 on the German Judiciary in the General Governorate (Journal of Regulations of the General Governorate I, p. 57) as amended (e.g. 14th December 1940).

perhaps save their lives, were forced to obtain a divorce before a Polish occupation court under less favourable provisions of the ABGB instead of the more liberal provisions of the German law.

Particular attention should be given to two divorce cases that were brought before the courts before the outbreak of the war and were completed during its course, i.e. I C 1827/38[137] and I C 1891/38.[138] These cases are among the many that indicate that the Polish occupation courts in the General Governorate were competent to continue civil cases (including divorce) initiated in the former legal situation.

Noteworthy also is the fact that the Polish state authorities after the Second World War perceived the need for legalising court judgements (including those concerning divorces, nullifications, and legal separations in marriages) passed by the Polish occupation courts.[139] The judgments and other decisions passed by the occupation German courts were treated in a completely different manner, as they were deemed invalid and devoid of legal effect (art. 1(1)). In some cases, the option of resuming divorce proceedings interrupted due to the war was available, but it was subject to special circumstances.[140] It was also possible to continue cassation proceedings before the Supreme Court for those cases that were completed in the second instance before the outbreak of the war, but were prevented by the war from taking the case any further.[141]

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[137] The files of the case I C 1827/38 have not survived to the present day. From the repertory of the District Court in Krakow we only know that on 12th June 1938 I. Sz. sued her husband St. Sz. for divorce and alimony, but the case was suspended after the fourth hearing at the District Court (10th March 1939). On 2nd August 1940 she filed a petition for resumption of the suspended proceedings, but unfortunately we do not know from the documents when or how the case ended.

[138] In the case concerned, Evangelical spouses from Krakow – engineer W.K. and his wife Z.K. filed a joint uncontested request for divorce on 23rd December 1938. The case ended with a divorce granted at the fourth hearing on 15th May 1939 but on a non-fault basis (sheets 87–88). After the appeal of the DM (sheets 97–99) the case was finally settled by the Court of Appeal in Krakow as late as 1st February 1940 (sheets 133–134).

[139] For this purpose the Council of Ministers issued (and the State National Council approved) a decree on 6th June 1945 on Legal Effect of Court Rulings Passed under German Occupation in the territory of the Republic of Poland (Journal of Laws, No. 25, item 151 as amended). Pursuant to art. 11 of this decree, "Proceedings before Polish courts in the period of occupation in the territory of the General Governorate and the rulings passed by those courts shall be valid".

[140] According to art. 12 of the Decree cited: (section 1) "If a ruling passed by a Polish court in a civil or penal case was based on provisions enacted by the invader or bypassing the Polish laws, or was passed in special circumstances brought about by the war or occupation which prevented a party from acting with discretion in the case, then resumption of the proceedings shall be admissible. (section 2) Application or complaint concerning resumption of the proceedings may be lodged not later than within one year of the date of re-establishing peace in the country".

[141] In accordance with art. 14 of the Decree cited (section 1): "Rulings of Polish courts of the second instance, issued before the occupation, for which the time limit for lodging cassation complaint or appeal to the Supreme Court did not expire, as well as such rulings of Polish courts that were issued in the period of occupation or after the cessation of the occupation but prior to the resumption of activity by the Supreme Court, may be appealed to the Supreme Court within three months of the date that shall be specified by the Minister of Justice. (section 3) Lifting the time bar for reasons due to circumstances of war shall be admissible but the relevant application must be lodged not later than within one year of the date of re-establishing peace in the country". Provisions of the above Decree were confirmed by art. XIV § 2 of the Decree of 25th September 1945. The Provisions Implementing the Law on Marriage (Journal of Laws No. 48, item 271) with effect from 1st January 1946 recognised the divorce judgements passed by Polish courts during the war. According to art. XIV § 2 of the Implementing Decree: "The above provision is without prejudice to the provisions of

12. In the Polish post-war judicial system after 1945

The liberation of Krakow from German occupation on 18th January 1945 (Thursday) caused the fall of the judicial system in the General Governorate, and matters were quickly taken over by the Polish judicial authorities. Initially, there were not many changes among the judges. First, after several months it could be noted that a number of judges departed to other professions or to the western and northern Recovered Territories; or arrived in Krakow from the territories seized by the USSR (beyond the River Bug). That was a period of intensive work on a new law on marriage, which entered into force on 1st January 1946 (Tuesday).[142]

Here, attention should be drawn to three divorce cases that were brought to court during the war, but were completed in 1945, after the end of warfare, i.e. I C 283/41[143], I C 301/43[144], and I C 61/44.[145]

A specific group of divorce cases were those that were brought to court after the end of the war in 1945, but for which the proceedings continued into a later period when the new provisions of the law on marriage, enacted on 1st January 1946, were applied. There are four such cases, I C 273/45, I C 965/45, I C 966/45 and I C 974/45, where in the first and the last one the proceedings were discontinued in early 1946, while the other two resulted in divorce (despite the fact that the marriages were contracted in the religious form, namely Catholic).

Under the new law on marriage, marriages contracted prior to 1st January 1946 could only be nullified or dissolved in compliance with the (substantive) provisions of that new law (see art. XVI § 1 of the Implementing Decree).[146] As of 1st January 1946, divorce proceedings were modified in such manner that they were conducted under the formerly existing provisions of the CCP with the inclusion of the amendments provided for in Chapter one, *Matrimonial proceedings*, which concerned Title V of the CCP *Separate*

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the Decree of the 6th of June 1945 on Legal Effect of Court Rulings Passed under German Occupation in the territory of the Republic of Poland" (Journal of Laws of the Republic of Poland, No. 25, item 151). Anyway, contracting, nullification, or dissolution of a marriage had to be considered in accordance with the former law (art. XIV § 1 of the Decree cited).

142 Above all, the provisions of §§ 44–136, 142, 153, 160 and 245 ABGB as well as §§ 1263–1266 and 1382 ABGB were repealed. See A. Dziadzio, *Austriacki kodeks cywilny…*, pp. 507–508.

143 On 13th June 1941, Jewish spouses, I. B. and his wife L. B., filed a joint uncontested request for divorce. The District Court in Krakow, after five hearings, suspended the proceedings (1st October 1942), and discontinued the proceedings on 20th February 1947. Altogether, those spouses instigated divorce proceedings on three occasions, e.g. 1945 (I C 55/45).

144 On 12th June 1943, a citizen of Italy J.G. sued her husband L. G. for divorce due to his fault. The District Court in Krakow, after two hearings, pronounced a divorce on 8th October 1943. The appeal proceedings initiated by the DM were suspended upon joint uncontested request of the parties on 14th July 1944, and discontinued the proceedings on 11th March 1949 pursuant to art. 204 CCP.

145 On 6th February 1944, petitioner K. K. sued his wife J. K. for divorce. The District Court in Krakow, after four hearings, discontinued the proceedings on 26th April 1944. However, after the petitioner's appeal, the Court of Appeal in Krakow first suspended the proceedings, and then discontinued the proceedings them on 15th April 1950.

146 Pursuant to art. XV of the implementing decree, the new marriage law was also to be applied to marriages contracted, nullified, or dissolved by divorce prior to this law's entering into force with respect to the obligations arising out of marriage as well as to other civil effects provided for in this new marriage law.

proceedings, art. 457[1]–457.[18] [147] With regard to the novelties, worth noting is, *inter alia*, the obligation that rests upon the appointed judge to conduct a so-called conciliatory meeting with both parties to divorce proceedings participating (art. 457[10] CCP)[148], as well as the disappearance of the institution of the DM. From 1946, the Polish marriage law was of an exclusively secular nature while the elements of ethics and religion were pushed to the ethical level.[149]

13. Summary

From 1868 the Austrian non-property marriage law was basically subjected to a consistent process of secularisation, which resulted in the introduction of the exclusively secular form of contracting marriages with a universal right to divorce in the territory of Austria in 1938.[150] However, those regulations were not introduced in Poland. This means that in the territory of Małopolska until the end of 1945, marriages were generally contracted in the religious form before a clergyman competent for the domicile of either party, while civil marriages were only admissible by way of exception. The latter ones were contracted before a public authority in three situations, i.e. 1) where a clergyman refused to announce the banns and could not bless the marriage due to a canonical obstacle that was not recognised by the state; such a marriage was called civil marriage of necessity (*bedingte, Nothzivilehe*), 2) where the marriage was contracted by individuals belonging to a religion that was not recognised by the state, and 3) where a party (the parties) to the marriage had declared that they were unbelievers. In the reality of Małopolska this last behaviour was mainly encountered in attempts to circumvent the prohibition on contracting marriages between Jews and Christians (§ 64 ABGB).

The Austrian legislature generally permitted divorce, but the option of obtaining it depended on whether this institution existed on the internal law of the church to which the betrothed couple belonged at the time of the wedding. Regardless of the circumstances, divorce proceedings were conducted before common courts in compliance with the state procedural provisions.

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[147] These regulations were introduced by art. VIII (2) of the provisions implementing the Law on Marriage of 25th September 1945 (Journal of Laws, No. 48, item 271).

[148] From the very beginning, the conciliatory meetings caused mixed opinions among legal professionals due to their negligible effectiveness. They were considered to be a waste of so-called "social energy" but not at the fault of the judge. See S. Garlicki, *Z zagadnień prawa małżeńskiego: posiedzenia pojednawcze*, „Demokratyczny Przegląd Prawniczy" 1948, no. 8, p. 17; also J. Górecki, *Rozwód. Studium…*, p. 165 et seq. The negligible effectiveness of the conciliatory meetings is evidenced by the fact that in Poland, in the period of 1959–1963, the percentage of proceedings discontinued as a result of reconciliation between the spouses was from 3.5% to 3.9% relative to the total number of cases finally completed. As is known, despite the well-deserved criticism, conciliatory meetings survived until 10th December 2005 and were replaced by mediations. See Z. Zarzycki, *Mediacja osoby duchownej w postępowaniu o rozwód i separację* [in:] *Funkcje publiczne związków wyznaniowych*. Materials of the III National Symposium of Law on Religion, (Kazimierz Dolny, 16th–18th May 2006), ed. Artur Mezglewski, Lublin 2007, p. 354 et seq.

[149] A. Lityński, *Historia prawa Polski Ludowej*, Warszawa 2005, p. 192.

[150] H. Świątkowski, *Prawo małżeńskie i rozwodowe Rzeszy*, „Głos Sądownictwa" 1939, vol. XI, no. 6, pp. 490–492 and Z. Zarzycki, *Rozwód…*, pp. 89–91.

This means that marriages between individuals of the Roman Catholic religion could not be dissolved by divorce [§ 111(1) ABGB], and the same applied to marriages where at least one party confessed the Roman Catholic religion on the date of entering into marriage with a non-Catholic Christian [§ 111(2) ABGB].[151] Any conversion of the Catholic party after the date of the wedding did not create the possibility of obtaining divorce by such a person. In practice, Catholic residents of Małopolska took advantage of several ways of circumventing the provisions that forbade them to divorce; among other things, they "migrated" to another confession (religion) which permitted divorce, or to being non-believers, or took citizenship of a state that permitted the civil form of contracting a marriage – typically Hungarian, from 1894 (so-called Transylvanian marriages), or German, from 1st January 1900 (BGB).

In the Austrian law there was a general principle stating that a change of religion by one of the spouses made after contracting the marriage did not imply a change of the provisions pursuant to which a divorce petition should be considered [cf § 111(2), § 116 and § 136 ABGB]. By way of exception, spouses who were non-believers on their wedding date, or belonged to a religion that permitted dissolution of marriage by divorce, lost that right upon Catholic christening, i.e. due to incurring the obstacle called *impedimentum catholicismi*.

Divorce proceedings could be initiated in two ways, i.e. by unilateral petition of one of the spouses or by joint request of both spouses. The former way could not be used, pursuant to the principle of recrimination, by the spouse who was solely responsible for the occurrence of the ground for divorce, or was deemed to be at fault for the other person's behaviour (§ 115 *in fine* ABGB, § 96 ABGB). A joint unanimous petition for divorce could only be filed for the reason of unilateral or bilateral invincible repugnance to the marital act.

Certain legal differences concerned divorce in a Jewish marriage, which could also be commenced in two ways, i.e. by a voluntary uncontested request of both spouses (§§ 133–134 ABGB) or by way of a divorce application filed by the husband [§ 135(1) ABGB]. In both cases, the procedures were aimed at terminating the marriage by the husband's presenting the wife with a so-called bill of divorce. Uncontested Jewish divorce procedure could be based on a broader set of positive grounds for divorce than those specified in §§ 115 and 116 ABGB, and it involved two phases. The first took place before a competent rabbi and the second before a county court (magistrates' court from 1929). A husband could only present his wife with a bill of divorce before a District Court, and exclusively on the ground of his wife's adultery [§ 135(1) ABGB].

A peculiarity in divorce proceedings of Jewish marriages was the absence of a representative of the public interest, i.e. a DM, and the evidence of the wife's adultery could be based exclusively on the wife's confession or on a hearing of the parties. Another characteristic feature was the very content of the divorce ruling, which directly gave the husband the right to present a bill of divorce to his wife, who was obliged to accept it within 14 days under pain of enforcement action.

[151] Such spouses were only left with separation from bed and board (upon joint request, § 103 ABGB, or unilateral petition, § 107 ABGB), or nullification of the marriage for statutory reasons.

Divorce cases in Krakow in the described period of 1918–1945 were heard according to two different civil procedures, i.e. the Austrian, until the end of 1932, and then the Polish one of 1930.[152] Divorce cases, like other non-property matrimonial cases, were handled based on the same principles as other civil cases, but with consideration given to the necessary differences resulting from the different nature of marriage relative to other civil cases. Those differences concerning the course of the proceedings were regulated by a ministerial edict of 1897, retained in Poland until the end of 1945. Its scope was essentially modified in 1933 by the provisions implementing the Polish Code of Civil Procedure (art. X and art. XVII).

In conclusion it can be stated that regulations on proceedings in divorce (other non-property matrimonial) cases were, unfortunately, not entirely consolidated in Poland before 1946 despite the introduction in 1933 of a code of civil procedure that was uniform for the whole country.

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[152] It should be observed that the course of the proceedings was essentially impacted by the regulations on the system of common courts (1929), the structure of the Supreme Court (1919), and a number of others.

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