1. Marriage law
2. Procedural law
3. Evidence proceedings

1. MARRIAGE LAW

The medieval church believed that marital spouses were joined together through a sacramental marriage bond, a bond which could be dissolved only through the death of a spouse or by procuring a declaration of its invalidity (annulment) from the ecclesiastical court. The institution of divorce or separation from bed and board was meant to give estranged married couples an alternative to divorce according to Roman law, and without putting the validity of the concept of marriage as a sacrament in question.

By their refusal to see marriage as a sacrament, reformers like Martin Luther, Philipp Melanchthon, Ulrich Zwingli and also Johannes Calvin created the theological prerequisite for divorce with the option of remarriage. However, they simultaneously also continued to hold onto the use of the institution of separation from bed and board as an option for those married couples who did not fulfill the narrowly defined conditions set out for a divorce with the right to remarry for the innocent part.

CANONS ON THE SACRAMENT OF MATRIMONY (1563)

On 11 November 1563, as an answer to the reformed conception of marriage, the Council of Trent adopted 12 canons on the sacrament of marriage, referred to als Tametsi Decree. After giving a summary of the marriage doctrine the canons listed the opinions to be sanctioned with excommunication; among them, the opinion that the matrimonial bond could be dissolved

“on account of heresy or irksome cohabitation, or by reason of the voluntary absence of one of the parties (Can. 5) and “for reason of adultery on the part of one of the parties” (Can. 7).

The canons confirmed the institution of divorce or seperation from bed and board. They did

not explicate the conditions justifying a limited separation or an unlimited divorce from bed and board, but sanctioned with excommunication,

> "if anyone says that the Church errs when it declares that for many reasons a separation may take place between husband and wife with regard to bed, and with regard to cohabitation for a determinate or indeterminate period" (Can. 8).

Apart from “the solemn religious profession of one of the parties”, if the matrimony was contracted but not consummated, the canons do not contain any further reasons for a divorce or separation. Therefore, the canonists, e.g. the teachers of canon law had particular importance. Strict interpretations stipulated that a consistory could authorise a life-long divorce from bed and board only under the condition that adultery could be proven. An additional prerequisite was, that the innocent party had not forgiven the offender, had not reassumed his or her marital duties, and had not also committed adultery.

In his interpretation of canon law from the year 1758 the canonist Franz Xaver Zech, for example, stated the opinion that only adultery allows an unlimited divorce from bed and board. As reasons for a limited separation from bed and board he specified:

> Adulterium spirituale – spiritual adultery, heresy
> Periculum animae – danger for the soul
> Periculum corporis – danger for the body
> Saevitia aut furor mariti – physical violence or fury of one spouse
> Molesta cohabitation – unbearable cohabitation

The practice of the ecclesiastical courts demonstrates that the councillors very rarely decided upon an unlimited divorce from bed and board. Even if adultery could be proven or was confessed by the spouse, they often allowed only a limited separation. In contrast, they sometimes voted for an unlimited divorce in cases where adultery was no topic in the proceedings.

2. PROCEDURAL LAW

The ecclesiastical courts conducted the matrimonial proceedings according to the accusatorial rules of the civil law suit. The initiation of proceedings required a formal legal complaint. Only the married parties were entitled to sue each other, and not the parents, parents-in-law or the priests.

In the case of married couples who were reported by a priest because they had “separated unauthorized” or because they “were living discordantly”, the consistory usually cited the disputing parties *ex officio* (by right of office) to a hearing. If no spouse lodged a complaint, the consistory could sentence the couple only to “peaceful cohabitation”. However, in general, the verdict contained “conditions of cohabitation”, so to say orders regarding what a spouse was to do or to refrain from doing in the future.

With the exception of very few only verbally conducted matrimonial proceedings, primarily from the 16th century, the initiation of matrimonial proceedings additionally required, that the written complaint was signed by a lawyer. The complaint was to be submitted at the legal office of the consistory responsible on one of the two weekly appointed days set out by the consistory. In this claim the plaintiff was to state all his or her arguments, enclose all possible evidence and request a hearing for the negotiation of the marital disputes.

If the consistory accepted the complaint, its legal office generally issued a summons for a hearing of which the plaintiff was to inform the defendant. In rare cases the consistory demanded a written report from the defendant. In this case the further steps in the matrimonial proceedings were conducted in written form.

When the defendant received a summons to a hearing he or she was entitled to present his or her arguments either at the hearing or to submit a written “exception” before the court date, in which he or she could file a counterclaim. Also in these cases the proceedings were subsequently conducted in written form. The plaintiff was supposed to submit a “reply”, referred to as the “*Replik*”, to the “exception” within 14 days. The defendant also had 14

days to submit a “rejoinder”, referred to as a “*Duplik*”. Prior to the hearing – respectively provided with varying attachments – up to six main documents could be exchanged:

1) *Klage or Memorial*: Complaint of the plaintiff
2) Exception: Exception to the complaint by the defendant
3) *Replik*: Reply to the exception by the plaintiff
4) *Duplik*: Rejoinder to the plaintiff’s reply by the defendant
5) *Schluss*: Conclusion of the plaintiff
6) *Gegenschluss:* Counter-Conclusion of the defendant

OBLIGATORY LAWYERS

When the proceedings were carried out in written form both parties were required to be represented by a lawyer who had to sign all main documents. The married parties were not completely free to choose their lawyers. They had to commission a lawyer who was licensed by the consistory. If a party was not able to afford a lawyer he or she was entitled to have a lawyer appointed by the consistory.

A university degree in both types of law, namely secular civil law and canon law, were formal requirements for being admitted as a lawyer at the consistory. The application for this license was reviewed by the consistory. Before starting to work the lawyers were required to take the lawyer’s oath in front of the members of the consistory.

HEARINGS

Until well into the 18th century the summon to the oral hearing was not delivered by the court, but rather by the party who had requested and had received an appointment for the hearing. The plaintiff was therefore responsible for making sure that the defendant was informed of the date of the scheduled court hearing.

If the defendant did not appear at the hearing and had not submitted an “exception”, the consistory did not automatically order a new hearing. In this case the plaintiff had to request a postponement of the hearing. If the defendant continued to refuse to appear, the plaintiff

was required to ask for the issuance of a “compass writ”, as a request for the administrative assistance was called, to the relevant secular authority. In the majority of cases this “compass writ” was not immediately approved. In fact, often many petitions had to be made before the “compass writ to the dominion” or to “the Lower Austrian government” was submitted by the consistory.

If the secular authorities were also unsuccessful in their attempts to make the defendant appear before the consistory, the consistory could pass in absence of the defendant a verdict in *conformitaet des petitio in contumaciam*, e.g. a verdict in accordance with the interest of the plaintiff. Another possibility, albeit very rarely used by the consistory, was the threat of excommunication.

The hearings took place on designated hearing days, usually Wednesdays and Fridays. At the hearings the married couples were usually present with their lawyers, who, in some cases, spoke for their clients. Hearings in which one, or occasionally both, of the married parties appeared with their parents or the mother or father respectively, indicate that the spouses were minors, e.g. younger than 24 years. There are also a few cases passed down in which children appeared at the hearing on behalf of a sick or frail parent.

Analogous to the written procedure the married parties at the hearings also had two, or rarely three, speeches each in which they could present their arguments and counterarguments. In the first speech (*petitio*) the plaintiff repeated the main arguments presented in the complaint. After this, the defendant could bring his or her arguments forward in the *exceptio.* The third speech (conclusion) allowed the plaintiff to assert what was verified by attestations or what was admitted to by the spouse in the *exceptio*. Additionally, this speech also provided the opportunity to respond to any eventual counteraccusations. The last word (*counter-conclusion*) was given to the defendant.

The goal of the consistory was to reconcile the married couple to one another and to persuade them to “live together peacefully”. If one of the spouses refused a settlement the councillors either delivered a judgment or they postponed the hearing to the next or the next following date for hearings on the pretext that “the time was not long enough to achieve the reconciliation of the couple”. If no settlement could be achieved by the time of this hearing the consistory passed the verdict.

“COLLATION” OF THE DOCUMENTS

If the summary proceedings were conducted in written form in the preliminary stages, the documents and their addendums submitted to the consistory had to be “collated”. At a separate “collation hearing” it was decided which of the documents, produced in the course of the proceedings, were to be given over to a consistorial councillor for his preparation of a sentence recommendation. The court rulings were transcribed, *vidimirt* (certified) and merged together with the accepted documents and the addendums into one bundle, bound together with a string and provided with the seal of the married parties or their lawyers, respectively, and the expeditor.

DECISIONS OF THE ECCLESIASTICAL COURTS

The summary proceedings were concluded either with a settlement between the married parties, a final judgment or with a conditional final judgment.

If the married couple agreed at the hearing to continue cohabitation, the notary recorded the reconciliation or the **settlement**. If these settlements were legally binding and could therewith be enforceable through execution proceedings, depended on whether or not a spouse had reserved “further rights” to continue the litigation if the opposing party did not hold to this or her obligations set out in the settlement.

If the consistory decided that the enquiries were sufficient or saw no reason to order one, or even both, parties to provide more evidence, the summary proceedings ended with a **final verdict**.

The final verdict was legally valid, providing none of the parties made an **appeal** or the appeal had been denied by the consistory. The execution of the final verdict was enforceable for both parties in execution proceedings. If one married party would or could not accept the final verdict the only option was to initiate new litigation for which she or he had to provide new arguments.

A conditional or preliminary verdict was made by the consistory when the summary

proceedings remained without a final decision. The **conditional verdict** was connected with the right and the duty to prove the validity of certain arguments in a further procedural step, the **evidence proceedings.** The consistory could also award this right to the defendant if he or she refused the cohabitation and the ecclesiastical court saw good, but insufficiently proven grounds for this denial. As a general rule the other spouse was given the right to counter-claim (Gegenweisung).

If the authorised spouse did not initiate the evidence proceedings or did not issue the documents within the deadlines laid down, the opposing party could demand the enforcement of the conditional verdict. If the consistory approved the request, the conditional verdict became the final verdict against which an appeal was permitted.

In some matrimonial proceedings the consistory did not pass conditional verdicts but rather made **provisional dispositions** in which, for example, a spouse could be given permission to live in a separate domicile for the duration of the evidence proceedings. If the authorised party did not take advantage of his or her right to initiate the evidence proceedings or had forfeited this right due to tardiness, the documents had to be "collated" in order to formulate the final verdict.

The General Court Order, which came into force on May 1 1781, introduced the obligation for the courts to substantiate their decisions in written form. Before that the consistories integrated their decisive grounds – if at all – into the verdict. On 24 May 1782 the Viennese Consistory explicitly substantiated a verdict for the first time. With the caption "*motiva von der toleranz*" (Motives for the tolerance) it justified why it approved only a one–year tolerance instead of the unlimited divorce from bed and board which Katharina Strohmayerin requested.

> Motives for the tolerance: first, because they have worldly disputes, secondly, because the mood is currently too bitter, thirdly, because at time being he cannot be ordered to live in Vienna and she cannot be ordered to live in Banat; and fourthly, because both have requested a tolerance (DAW WP 160_408-411.

3. EVIDENCE PROCEEDINGS

If both parties were given the right to provide evidence (Weisungsrecht), the ecclesiastical court authorised the initiation of the spouse who had first announced his or her will to do so. The person who conducted the evidence proceedings was referred to as the plaintiff, irrespective of whether or not that person was the plaintiff or the defendant in the summary proceedings. The term "witness presenter" (*Zeugenführer (m) or Zeugenführerin (f)*), as the Civil Code (Allgemeinen Gerichtsordnung) of 1781 called the party who had to prove his or her accusations was not adopted by the consistories in the last months of their jurisdiction.

The evidence proceedings were to be registered within 14 days of the communication of the conditional verdict or the provisional disposition. The party had the following opportunities to provide evidence at his or her disposal:

1. Submission of statements, about which the opposing party was to be questioned

Once the court accepted the statements both parties had to swear to tell the truth (*Jurament de dicenda veritatis)*. The plaintiff swore that the statements were true, and the defendant swore that he or she would respond to these statements truthfully. It wasn't until these oaths were made, that the defendant, was heard, either immediately or at a special hearing. If the opposing party had the right to provide counter evidence *(Gegenweisungsrecht),* he or she had the possibility to submit counter-statements, to which, in the case that the court accepted them, the plaintiff was required to respond.

2. Submission of question list, about which the witnesses are to be questioned

If the plaintiff requested a hearing of witnesses, he or she had not only to submit a list of witnesses, but also a list of questions, about which the court was to question the witnesses. It wasn't until after two "letters of information" ("*Vorwissensverordnungen*") that the court approved the hearing for the witnesses. The reason for this was that the list of the witnesses as well as the list of questions had to be presented to the opposing party, who, in turn, had

the right to make statements regarding the witnesses and to formulate questions (*interrogatoria*) directed at the witnesses.

3. Swearing of the "*Juramentum litis decisivum*", e.g. the main or evidence oath.

QUESTIONING OF WITNESSES

It wasn't always easy for the court to find the witnesses. The married parties often named servants who were no longer employed by them as witnesses to the domestic violence. At the time of the marriage proceedings it was often not known for whom these former servants were then working or where they were living. If the witnesses refused to appear before the court, the consistory had to request the cooperation of the secular authorities by means of submitting a "compass writ".

Before being questioned, the witnesses had to swear an **oath** (*Juramentum testium* or *dicenda veritate)* promising to tell the truth. They had to swear before God the Almighty,

> *"that I, in the matter for which I have been called forth to bear witness, will answer the questions which I am asked with the complete and utter truth, as far as I, to my knowledge, am able. I will not take any person, friendship or enmity, my own gains or harm, or anything else, whatever it could be, into consideration, but will answer in the way in which I would answer before God on Judgment Day, I will also reveal my statement to no one before the court will publish it. So help me God and the holy Gospels." (Book of Oaths 9-10).*

The actual questioning regarding the list of questions submitted and the *interrogatoria* submitted by the opposing party was conducted by an appointed member of the consistory.

If the married parties wished to know what the witnesses had testified they had to apply for the "**opening and handing over**" of the witness statements. These requests were also approved by the court only after several "previous knowledges orders". The reason for this was that after the "handing over" of the witnesses' statements the opposing party could no

longer call witnesses of his or her own.

Once the statements were answered to and/or the witnesses were heard, **four original documents** could be exchanged in the course of the evidence proceedings

1) Erste Probationsschrift (First Evidence Writ) of the plaintiff
2) Erste Probationsimpugnationsschrift (First Challenging Evidence Writ) of the opposing party
3) Zweite Probationsschrift (Second Evidence Writ) of the plaintiff
4) Zweite Probationsimpugnationsschrift (Second Challenging Evidence Writ) of the opposing party

Analogous to the written proceedings the evidence proceedings were also closed with the **collation of the documents**, and the collated documents were handed over to a member of the consistory for the drafting of a verdict recommendation.

Before the court approved a hearing for the **announcement of the verdict** the party who requested the hearing had to pay the **court costs**. The amount of these costs depended on the number of documents produced and the complexity of the proceedings. If one of the married parties did not appear at the publication, the final verdict was issued *in contumaciam*, in the absence of that party. Generally speaking, the last day of the month was used for the announcement of the verdict.

JUDGMENTS FOLLOWING EVIDENCE PROCEEDINGS

The evidence proceedings were not only lengthy, they were also very expensive. In order to shorten the proceedings many married couples decided upon a **settlement** which nonetheless had to be ratified by the consistory. If these settlements were legally binding and could therewith be enforced in execution proceedings depended on whether or not one of the married parties had reserved “further rights”, meaning that the evidence proceedings could be resumed if the opposing party did not comply with the terms of the settlement.

The judgments made after evidence proceedings were referred to as **discharges** or

sententia definitiva. Both parties could appeal against this verdict.

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Next sub-item: Method