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As explained in the sub-item methods, both spouses had the right to make an appeal against final verdicts, regardless of whether they had been rendered in summary proceedings or in evidence proceedings. Below, these proceedings will be examined in more detail, both quantitatively and qualitatively.

1. APPEAL PROCEEDINGS (A)

AGAINST A VERDICT IN COHABITATION, SEPARATION OR DIVORCE PROCEEDINGS

In 17 proceedings in which one spouse had demanded a divorce (11 proceedings), the separation of bed and board (3 proceedings) or an order for cohabitation (3 proceedings), the court verdict did not come into force after two weeks, as usual, because one spouse had appealed. Eight out of the 17 verdicts had not been made in summary proceedings, but only after generally very long evidence proceeding. In 13 cases, one spouse appealed against a verdict that prescribed cohabitation, in 3 cases against a verdict that had divorced the marriage indefinitely from bed and board, and in one case against the limitation of the separation to one year.

From a gender perspective, it is firstly noticeable that it was mainly women who decided to appeal. 13 of the 17 appeal proceedings were initiated by them. In 11 cases, the wives challenged the cohabitation order, in two cases the divorce decree. While the vast majority of the wives tried to prevent having to resume marital life after often years of litigation, two out of four husbands appealed against a separation or divorce decree.

The overwhelming majority (15 of 17) of the proceedings resulting in the appeal were also initiated by the wives, who had demanded divorce (10 proceedings), separation from bed and board (2 proceedings) and an order for cohabitation (3 proceedings). Two of them, Elisabeth Spänglin and Maria Catharina Parzerin, were sued in advance for unauthorized separation

from their husbands and were given the right to present legitimate grounds for divorce in evidence proceedings. Elisabeth Spänglin, who accused her husband of physical and verbal violence, lost the evidence proceedings and would therefore have been obliged to resume cohabitation with her husband. She appealed against the cohabitation ruling in 1667.

Maria Catharina Parzerin, on the other hand, succeeded in proving her husband's physical violence in a trial that dragged on for four and a half years. After she additionally swore under oath

“that Partzer [sic] had threatened to throw the hook and cleaver at her, and also to load pistols and to shoot her to death”. (DAW WP 140_93r-93v)

the consistorial councils divorced the marriage from bed and board in June 1752. Johann Parzer appealed against the divorce decree. Anton Scheib also appealed against the divorce of bed and board which Catharina Scheibin had obtained in August 1780. After almost three years of proceedings, she had succeeded in providing the required proof of her husband's physical violence. The nunciature followed the argumentation of Johann Parzer and his lawyer and on 8 January 1753 overruled the verdict of the first instance, whereby Maria Catharina was again ordered to cohabit with her husband. In the case of Anton Scheib's appeal, no verdict has been handed down.

The two other men, on the other hand, wanted to enforce the divorce in the second instance. Count von Althan had been sued by Barbara Elisabeth, née Herzin, for unauthorised separation. Arguing that the marriage was invalid, he had refused the demanded cohabitation, but had nevertheless been obliged to cohabit by the consistorial councils. He appealed against the cohabitation ruling in 1749. Anton von Brambilla appealed in 1781 because the consistorial councils had not divorced his marriage to Franziska, née Kronin, as requested, but had granted him only one year's tolerance.

Court Settlements

Similar to the evidence proceedings, the appeal proceedings were not only time consuming

and emotionally draining, but also cost-intensive. It is therefore not surprising that the plaintiff wives agreed to make out-of-court settlements, which most likely were not always recorded in the consistorial record books. We know for sure about four women who made a settlement with their husbands. Sibylla Landringer requested a divorce from bed and board in 1659. In the conditional final verdict, which ordered her to either resume cohabitation or to initiate evidence proceedings, the consistorial councils summarized her claims as follows:

“concerning an intolerable cohabitation ex puncto saevitici [due to violence], capitalis inimicitiae [emnity] and bodily harm, the honourable official and venerable consistory issue, after both parties have presented their arguments in the hearing, their verdict: The plaintiff is obliged to cohabit with the defendant, or to provide evidence of the presented complaint. The defendant is entitled to provide counter-evidence.” (DAW WP 20_761-762)

After Sybilla Landringerin lost the evidence proceedings, she appealed against the cohabitation order in 1662 and swore the oath of appeal on 3 November 1662. The minutes of the consistory from 26 February 1663 document that she withdrew the appeal suit:

"Landringerin [wife] versus Landringer [husband] requests the gracious acceptance of the withdrawal of the complaint".

Maria Clara Niclasin, who was ordered to resume cohabitation after having lost the evidence proceedings in February 1664, also agreed to a settlement with her husband in appeal proceedings. The same option was chosen by Elisabeth Praunin and Christina Kellnerin, who appealed against their cohabitation orders in summary proceedings in 1710 and 1763, respectively.

Verdict not available

Anna Sophia Strohmayerin did not agree to a settlement, but rather continued with her

appeal proceedings right up to the end. In 1716, she petitioned for a separation from her husband, substantiating her petition with the grounds of adultery. After having lost the evidence proceedings she was ordered to resume cohabitation in June 1718. She made an appeal to this verdict. According to an entry in the minutes of the consistory from 5 April 1724, after almost six years of proceedings, the nunciature came to a decision in this case. However, the "Abschied", as the definite verdict is usually called in appeal proceedings, was not recorded.

"the following proceedings were decided upon in the cathedral provost: in the case Anna Sophia Stromayerin versus Johann Stromayer, husband. The definite verdict is recorded separately."

Also in the case of Catharina Hammerin, the definite verdict of the appeal proceedings was also recorded separately, and can no longer be found. In 1660, her husband petitioned for a separation and in 1662 the evidence proceedings ended with a divorce verdict against which Catharina Hammerin appealed primarily because she had not been awarded maintenance. As can be seen in an entry in the minutes of the consistory from 3 September 1663, the documents from the appeal proceedings were handed over to the papal nunciature for the purpose of reaching a verdict:

"epistle to the apostolic nunciature concerning the appeal proceedings of Catharina Hammerin and Gregor Sigismund Hammer, filed after the verdict from 4 September [1662], oath given on 15 September [1662]. Attached are the 4 main writs, which were recorded in German and translated into Latin." (DAW WP 22_548r)

In this case the verdict is also not recorded in the minutes of the consistory.

Abandoned proceedings

For two married couples, we were able to reconstruct that, for whatever reason, the plaintiff

wife did not continue with the appeal proceedings and that the husband also did not demand a verdict.

Sabina Weißhappelin, née Dreßlin, who filed for divorce in 1763, appealed against the cohabitation order. In December 1763, the husband requested to have the appeal proceedings declared “abandoned”. The wife, he argued, had made her appeal on 14 November and therefore within the prescribed time period, but she had not delivered the first writ of appeal to him until 1 December, and thus not within the prescribed time period. The consistorial councils rejected the request and decided that Sabina Weißhappelin had the right to continue with the appeal proceedings, stating:

“that the plaintiff, who recently petitioned for an appeal on 24 November of this year, should, as is in accordance with order, be allowed to proceed.”(DAW Wp 150_167)

As is clear from divorce proceedings filed by Sabina Weißhappelin 15 years later, Sabina neither continued with the appeal proceedings nor did she live with her husband. In the divorce proceedings in 1779, she argued that since the cohabitation verdict of 1763 “she had been living alone in order to avoid getting killed.” The consistory ordered her to initiate evidence proceedings, which she presumably did not submit, as no further entries on the Weißhappel*in couple are recorded in the minutes of the consistory afterwards.

Josepha Widtmannin, who filed for divorce in 1772 and was sentenced to resume cohabitation with her husband after three years of evidence proceedings, apparently also abandoned the appeal proceedings and yet still did not live with her husband. In 1779, Anton Widtmann, who was stationed in Poland as an “imperial-royal governor’s secretary”, demanded that his wife follow him to Poland or else be sent to live in a convent. He did not refer to a verdict in the appeal proceedings, but to the cohabitation order of the first instance from 25 February 1775. Josepha Widtmannin responded that her husband “had been here for more than an entire year without having asked for cohabitation” and refused to follow him to Poland.

Although both Elisabeth Spänglin and Elisabeth Praunin initially took advantage of their legal right to appeal proceedings after having lost their evidence proceedings in which they had

demanded a divorce and were ordered to resume cohabitation, it can be assumed that they also did not proceed with their appeal proceedings. It appears that the proceedings of Anton Scheib, who appealed against the divorce verdict awarded to his wife after evidence proceedings in 1780, met with a similar fate.

Verdict suspended or amended

As mentioned above, in Johann Adam Parzer's appeal proceedings the nunciature had ruled in favour of the husband and annulled the divorce decree of the first instance but ordered the husband to make a "deposit" and to "cohabit peacefully". At the hearing on 8 January 1753, Johann Adam Parzer had to take an oath that he would "cohabit peacefully" with his wife in the future. The consistorial councils ordered Maria Catharina to live with her husband in accordance with the verdict passed by the nunciature. They also granted Johann Adam Parzer the right to have the verdict of the appeal proceedings enforced with the help of the consistory:

"vigore sententiae nuntiaturae [...] to live with him, otherwise Parzer should have her forced through the censure of the ecclesiastic authorities." (DAW WP 140_235r)

As countless enforcement proceedings for the "enforcement of cohabitation" in the following years document, Maria Catharina Parzerin was not willing to comply with the verdict passed by the nunciature or the consistory despite being put under church arrest several times.

In the appeal proceedings of Anton von Brambilla, imperial-royal court surgeon, who on 1 December 1780 had received only a one-year tolerance from the Viennese consistorial councils instead of the requested divorce, we were able to deduce the appeal verdict through follow-up proceedings. The consistorial councils justified the limitation to one year as follows:

"Please note: After the consistory took notice of Brambilla's insurmountable aversion to his wife, he was still unable to present causes for a divorce, even though he presented many reasons which were then contradicted by his wife, we found it necessary to grant

this couple a tolerance in order to facilitate reconciliation." (DAW WP 160_52-53)

The appeal verdict extended the time period of the tolerance from one year to two years. The verdict also denied the wife the right to choose her own place of residence. Franziska von Brambilla was sentenced to spend the tolerance period in a convent. Referring to the appeal verdict, Anton von Brambilla requested that Franziska von Brambilla be transferred from the Dominican convent of St. Laurenz to the Ursuline convent in June 1781. He also demanded that she should not be allowed to leave the convent. Franziska von Brambilla successfully contested both the transfer to the Ursuline convent as well as the exit ban. She agreed to stay in the St. Laurenz convent on the condition "that she be given maintenance of 600 gulden, as had been awarded her by the royal court's marshal."

"But she would not allow herself to be forbidden to leave the convent, there was no reason for this, and this prohibition was neither in the consistorial nor in the nunciature's sentence, on the contrary, the right to leave the convent was granted to her on 19 October 1780." (DAW WP 160_202-203).

The consistorial council rejected the husband's suit and ruled that Franziska von Brambilla was allowed to continue "living with board in the St. Laurenz convent", and that she "was allowed to go out and visit her relatives as long as the Mother Superior of the convent was informed beforehand". (DAW WP 160_203)

2. APPEAL PROCEEDINGS (B)

AGAINST A VERDICT IN ANNULMENT PROCEEDINGS

Another six of the appeal proceedings in our source sample pursued the goal of enforcing the annulment of marriage in the second instance. In these appeal proceedings, too, the overwhelming majority (5 of 6) of the verdicts had been made only in the evidence proceedings. All six verdicts or final verdicts rejected the proposed annulment of the

marriage and ordered cohabitation.

From a gender perspective, a similar picture emerges as to that of the appeals proceedings outlined above. After they were supposed to resume marital cohabitation, usually after many years of evidence proceedings, four wives and one husband tried to enforce the annulment of the marriage in the second instance. The sixth case is different in that the father of the minor wife appealed against the decision of the consistorial councils not to annul the marriage of his minor daughter.

In the case of Maria Tantler, née Premin, Anna Maria von Zollikofer, née Voglin, and Helena Hochenauerin, the consistorial councils had decided in the first instance that they had not succeeded in proving the alleged impotence of the husbands. Maria Premin and Balthasar Tantler had been married only a short time when Maria demanded the marriage be declared invalid on the grounds of impotence in January 1656. As was customary in such cases, the consistorial councils decided in the evidence proceedings that

“the parties are to be ordered to the completion of three years of cohabitation.” (DAW WP 20_119, Original Latin, translation Johann Weißensteiner)

Anna Maria von Zollikofer first petitioned for the annulment of her marriage on grounds of impotence in 1662 and lost the evidence proceedings in 1665. Wilhelm von Zollikofer also had no interest in cohabitation. However due to proprietary considerations he wanted a divorce rather than an annulment. In the divorce proceedings he applied for in 1665, Anna Maria von Zollikofer was again ordered to provide evidence for the annulment of the marriage. On 14 May 1668, almost three years later, the consistorial councils decided once again that “the plaintiff had not legally proven the impotence of the defendant”. (WP 24_681). Anna Maria took advantage of the legal right of appeal against the verdict. As we learn from an entry in the consistorial records, she and Wilhelm reached a settlement. At the hearing on 5 July 1669, her lawyer announced that Anna Maria abandoned the appeal proceedings and that it was therefore no longer necessary to send the already collated files to the nunciature:

“his principal appellant has abandoned the appeal, therefore sending the acts further to the nunciature is unnecessary.” (DAW WP 24_992)

Helena Hochauerin was sued by her husband for unauthorised separation in 1751. With the argument that her husband was impotent, she demanded the annulment of the marriage. The consistorial councils also ordered her to produce evidence of “the plaintiff’s alleged impotentiam perpetuam absolutam [complete and permanent impotence]”. In February 1754, the consistorial councils decided that she had failed to produce the required evidence and sentenced her to cohabitation. We learn that Helena also lost the appeal proceedings from an entry on 19 December 1755. Relying on both the consistory and the nunciature’s verdict, Joseph Hochenauer or his lawyer Dr. Appelt complained that Helena continued to refuse cohabitation and demanded “the marital cohabitation or the interrogation of the censures.” DAW WP 143_102-103)

The fourth wife who wanted to enforce the annulment of a marriage by appeal was Rosina Eckhardtin, née von Ranzau. In 1663, she justified her application for annulment before the first instance, the Viennese consistory, on the grounds that Christoph Eckhardt was still a soldier at the time of the marriage. In the evidence proceedings Christoph Eckhardt submitted a certificate of discharge from the military, whereupon the consistory declared the marriage valid. Rosina Eckhardtin appealed against the final verdict. Her main argument was that the date on the military discharge certificate had been “erased”, i.e., falsified. After three years of litigation, the Viennese consistory handed over the epistle, the collated files of the appeal proceedings, to the nunciature on 22 April 1667. The verdict has not been handed down and there are no further entries on the couple in the consistory records.

Alexander Julius Torquati, the only husband in the source sample who wanted to enforce the annulment of the marriage in appeal proceedings, was sued by Agnes Marianna, née Lobniskin, for unauthorized separation in 1677. He lost the evidence proceedings in 1678, in which he had been ordered to prove his claim that his wife had still been legally married at the time of their marriage. In his case, too, the verdict of the appeal proceedings has not survived. We are also unable to reconstruct it from other proceedings.

The last case is unusual. Here the appeal was made by the father of the wife and not by one of the spouses. The father objected to the validity of the marriage of his under-aged daughter. In May 1775, Augustin Böck, doctor of both civil and canon law and licensed advocate of the Vienna Consistory, demanded that the Vienna Consistory annul his daughter's marriage. According to Böck, the bridegroom Alois Herzog

"had fraudulently obtained the right to copulate with the plaintiff's under-aged daughter, Barbara Bökin, in Hernals." (DAW WP 156_363-366)

In addition to the "kidnapping" of his daughter, Augustin Böck's main argument was that the marriage had been carried out in the wrong parish because the groom "belonged to the Schotten parish, while the bride belonged to the Klosterneuburg parish". Therefore, the parish of Hernals was responsible neither for the bride nor for the groom.

Remarkably, the majority of the consistorial councillors chose not to decide in favour of the plaintiff. At the beginning of September 1775, they declared the marriage valid and ordered the father not to hinder the couple any further:

"therefore, the concluded marriage is valid, and the man present as the plaintiff on behalf of his daughter is instructed to abstain from every type of hindrance to the quiet and peaceful cohabitation of his daughter Maria Barbara Bökin and the mentioned Aloys [sic] Herzog. (Original Latin, translation JW)

Anton Böck enforced the annulment of the marriage of his underaged daughter in the appeal proceedings. After the marriage had been unanimously declared invalid in the appeal proceedings, the Viennese consistorial record for 19 December 1777 notes,

"this copulation certificate has now officially been collected and torn up in the council." (DAW WP 158_259)

For further reading:

Susanne Hehenberger, Das fehlende fleischliche Band: Sexuelles Unvermögen als Scheidungsargument vor dem Passauer und Wiener Konsistorium (1560–1783), in: Frühneuzeit-Info 26 (2015), 77–94.

3. ENFORCEMENT PROCEEDINGS | COHABITATION

As is made clear in the slightly more than 100 execution proceedings for the “enforcement of cohabitation”, in all of the time periods examined it was obviously not a given that spouses sentenced by the consistorial courts to cohabit always obeyed the verdict. 50 of the proceedings for the enforcement of cohabitation were initiated by men, 51 by women. Therefore the gender was obviously not a statistically relevant factor for the decision not to obey the verdict nor for the decision to have the verdict enforced through means of legal execution.

If the husband or wife did not comply with the consistorial council’s first command do what was stipulated in the verdict first in the course of eight, and thereafter in the course of three days, the plaintiff was entitled to request the enforcement of the cohabitation verdict using coercive measures carried out by the church. This included measures ranging from exclusion from church services up to church arrest. As a general rule the requests for church arrest were not granted immediately, but rather first after several interlocutory judgements had been declared warning the defendant of the threat of arrest.

If the consistory decided to grant permission for the arrest, and if the married party was not present at the hearing, the bailiff of the church court was to ensure that the respective party was taken under church arrest. If he or she resisted arrest, the consistory – once again through an application submitted by the plaintiff – had to make a request for assistance from the secular authorities. If the whereabouts of the married party was unknown, the plaintiff could request that a search be made via an “edict”, as the public notices were called.

The arrested married party remained under church arrest until he or she declared him/herself willing to resume cohabitation. This willingness could be “increased” through tougher

conditions of detention, for example water and bread only and/or deprivation of light.

KATHARINA AND FRANZ VOGL*IN

At the hearing on 9 September 1774 Franz Vogl repeated his demand that his wife be taken under consistorial arrest. Katharina Voglin had ignored the instruction to cohabitation. She did not obey the 8 day or the subsequent 3 day deadline for resuming cohabitation. However, she was present at the hearing. After she still refused to resume married life at the hearing, the consistorial council chose to place Katharina Voglin under arrest until she would declare herself willing to comply with the court's judgement. She was to be:

"placed immediately under consistorial arrest, and in the case of continued obstinacy, be punished increasingly until she agrees to cohabit".

After three days the consistorial council called Katharina Voglin from arrest and exhorted her "repeatedly to resume cohabitation". Katharina Voglin gave up her resistance and declared herself willing to resume cohabitation under the condition that the consistorial council should forbid her husband to claim "her savings". Under the condition of returning for a hearing together with her husband after four days' time, Katharina Voglin was released from consistorial arrest on 12 September 1774. At the hearing on 16 September 1774 Katharina Voglin, or respectively her lawyer, set the following conditions for the cohabitation which are noted in the consistorial records: first, that her husband is no longer to hit her, second, that he provide her and the child maintenance, third, that he should pay her rent due and for her removed bed to be bought back, and fourth, that she would not be required to bring her savings into the marriage.

On 16 January 1775, four months after this agreement, the married couple once again stood before the court. Franz Vogl had once more requested that his wife should be placed under arrest because she was not living with him. Katharina Voglin countered that he had neither paid the rent due, nor had he replaced her removed bed. The consistorial council ordered the husband to fulfil these two conditions of the agreement and held him, instead of his wife, under church arrest for one day "because of his evil mouth".

4. ENFORCEMENT PROCEEDINGS | MAINTENANCE

As already made clear in the case study of Katharina and Franz Vogl*in, in a few cases the consistorial councils ordered the husbands to pay maintenance during the marriage. If the husband refused both the enforcement of cohabitation and to pay maintenance for the wife and any children, then, as the next case study shows, the spousal maintenance could be enforced. The collected source sample contain a few requests for the compulsory enforcement of maintenance in the case of an ongoing marriage.

Anna Barbara Grevin, for example, repeatedly sued for the unpaid maintenance payments from her husband at the consistory of Vienna. On 11 February 1675 she requested that her husband be arrested, which the Vienna Consistory authorized, should he not pay the maintenance due within 24 hours of the passing of the verdict:

“approved, arrest as requested, however, even if it is not likely [that he will pay] to tell him that if he does not pay the amount due within 24 hours of the issuance of this decree, the arrest is will be approved without further ado.”

What is remarkable about this arrangement is that Anna Barbara and Friedrich were not separated from bed and board or divorced, but the husband had refused to live with his wife and children for three years. In June 1672 Anna Barbara requested cohabitation for the first time. We do not know how long she had been married to the medical student. Friedrich Greve refused the cohabitation with the argument that both children were not his. The consistory allowed Friedrich evidence proceedings and awarded Anna Barbara a weekly maintenance of one gulden for herself and the two children. At the hearing on 21 November 1672, the couple agreed that in future they would “live together in peace and harmony and treat each other well”.

Barely six weeks later, on 6 April 1653, Anna Barbara complained again that Frederick was not paying her maintenance and also demanded that the consistorial councils order him to avoid the “Traxlerin” with whom she apparently suspected her husband of having an affair. Contrary to the usual procedure, the consistorial councils this time did not order Friedrich

Greve to cohabit or to take evidence but decided that he should pay his wife and two children one gulden a week in maintenance. In July 1673, Friedrich asked the consistorial councils for an

“order for his wife to follow him with his children to his home”, and in December 1673 he demanded a “complete divorce”.

Both requests were refused by the consistorial councils.

After he continued to not or only partially pay the maintenance, Anna Barbara demanded that the maintenance be enforced and, as quoted above, also his arrest. Unfortunately, there is no indication in any of the very brief entries in the minutes as to where and from what Anna Barbara fed herself and her children.

From an entry on 5 July 1675 we learn not only that Friedrich Greve abused his wife when she demanded the payment of the maintenance due, but also that in February 1675 he gave Anna Barbara Grevin money for herself and the children only under the condition that she signed an out of court agreement in which she accepted that in the future she would receive only 2 gulden in maintenance per month instead of the three which had been agreed upon in court. Although at the hearing at the Vienna Consistory on 5 July 1675 Anna Barbara Grevin argued that she had signed this agreement from February 1675 only under duress, she consented to a new, now ratified court settlement which provided that the husband pay her the 3 gulden owed within the next three days, and that as long as he paid the maintenance on the agreed date he would be required to pay only two gulden monthly from that time forward.

Andrea Griesebner, July 2018, translation Jennifer Blaak

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Next sub-item: Follow-up Proceedings

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Ecclesiastical Jurisdiction (1558-1783), in: Webportal. Marriage at Court 3.0, 2024, <http://ehenvorgericht.univie.ac.at/?page_id=4492&lang=en&pdf=4492>. [Date of access: 2024-04-17]