The annulment of marriage in the jurisdiction of the Regional Court in Cracow in the years 1919-1939.

[abstract]

In this dissertation I aim at presenting the problems of the annulment of marriage in the light of the jurisdiction of the Regional Court in Cracow in the mid-war period. I focussed exclusively on the analysis of matrimonial law binding in the area belonging to former Austrian annexation in the times of the Second Polish Republic. The basis of the dissertation were the case files for the annulment of marriage heard by the Regional Court in Cracow in the years 1918-1939, lain in the National Archives in Cracow.

In view of the Austrial Civil Act (hereinafter called ABGB or u.c.) the grounds for annulment were: minority, mental illness, constraint, abduction, error as to the person, pregnancy, impotence, bigamy, impediment of ordinations, religious differences, blood relation, affinity, lack of valid banns or improper clergyman.

In the area belonging to former Austrian annexation the following Civil Code of 1811 was valid and binding: Allgemeine Bürgerliches Gesetzbuch (Common Civil Code). The Civil Code was implemented with the commission of 1 July 1811 (Austrian Journal of Laws no. 946) in Austria, and in particular, also in Galicia and in Bucovina, excluding the free city of Cracow, the areas of Wieliczka, Podgórze and Ternopil Land. ABGB was valid and binding since 1 January 1812. In the areas of Wieliczka and Podgórze it became effective on 1 November 1815 and in Ternopil Land- on 1 February 1816. In the Republic of Cracow of 1815-1846 Napoleonic Code was in force, and it allowed for divorces. In Cracow and its areas Austrian Civil Code replaced Napoleonic Code on 23 March 1892. On the basis of the special commission the regulations concerning martial law became effective on 20 April 1852. The matrimonial law regulations in the former Austrian annexation areas had the intermediate features of purely civil and purely religious system. For the state, only the state law was valid and binding. However, the regulations were divided into religious groups and approximated to ecclesiastical law. ABGB implemented the system of dispensation from marital impediments and entrusted the powers to grant it to administrative authorities. Austrian Civil Act did not stipulate the irremovable impediments. The matters of marriage dissolution or annulment

were passed on to the state courts. The Catholics were forbidden to have their marriages dissolved.

In the procedural scope, in the former Austrian annexation area the Jurisdiction Standard of 1 August 1895 was in force (Journal of Austrian Laws no. 110). On the basis of this Act the Ordinance of the Minister of Justice was enacted, of 9 December 1897 on the proceedings in the matrimonial matters in dispute. Austrian Civil Procedure of 1895 was valid and binding in appellate regions of Cracow, Lvov and partly Katowice (Cieszyn Silesia) up to 1930. By virtue of the Ordinance of the President of the Republic of Poland dated 29 November 1930 (Polish Law Gazette No. 83, item 651, 652) the uniform Code of Civil Proceedings came into force on 1 January 1931. The Code of Civil Proceedings interpreted matrimonial matters as separation, possibly- in the former Prussian annexation area- abrogation of marital community of goods, then divorce and annulment of marriage, and the court proper was the regional court.

The marriage was established via the marriage contract. In this contract, two persons of different sex, declared their will to "live in non-separable marital union, to procreate, bring up children and provide assistance to each other." (§ 44 u.c.).

The Act stipulated the absolute annulment of marriage contracted by people deprived of general legal capacity. The aforementioned people were only allowed to contract marriage upon the permission of their legal custodians, which meant father's permission, relatively upon the declaration of the custodian and court's permission or declaration of the guardian or assistant and court's permission. A minor, who was under thirteen, was absolutely deprived of legal capacity.

Further reasons for the annulment of marriage:

- mental illness;
- constraint;
- error as to the person;
- pregnancy;
- impotence;
- moral impossibility;
- bigamy;
- impediment of ordinations;
- religious differences;
- impediment of blood relation;

- impediment of affinity;
- impediment of adultery;
- spouse-murder;
- lack of valid banns;
- improper clergyman;
- lack of deliverance of will;

One could have the dispensation granted from these impediments.

Complaint concerning the declaration of marriage invalidity was in principle the only legal manner of separation of spouses. The divorce of Catholics, pursuant to § 111 u.c., was unacceptable.

There is a difference between nonexistence and invalidity of the legal act, as a result- nonexistence and invalidity of marriage. This is a substantial theoretical difference, whereas with reference to the subject of the dissertation, immaterial. The complaint concerning the declaration of marriage invalidity was lodged ex officio or upon the request of a party (§ 94). The complaint was lodged ex officio if one of the impediments mentioned in §§ 56 occurred (marriage with the abducted person), 62 (bigamy), 63 (higher ordinations, solemn monastic vows), 64 (religious differences), 65 (blood relation), 66 (affinity), 67 (adultery), 68 (spouse-murder), 75 (lack of deliverance of will) and 119 (restrictions for re-marriage).

The validity of marriage could also be the subject of surveillance ex officio after the demise of one or both spouses, insofar as the interested parties, authorized by law, demanded the procedure and judgement of invalidity for the purpose of materialization of their private and legal claims; also upon the motion of the criminal court judge, or- if it was in the interest of the state itself- upon the motion of the proper administrative authority.

Pursuant to art. 43 Code of Civil Proceedings, the marital action, if at least one of the parties had Polish citizenship, could be brought taking into account the last common place of residence in Poland, if at least one of the spouses stayed there. In the absence of the aforementioned ground the action was brought taking into account the place of stay of the Respondent, and if this was impossible to establish- then the place of residence of the Petitioner. Art. 4 of the Code of Civil Proceedings stipulated the laws principles, the non-property marital affairs, as well as family affairs, whereas art. 43 of the Code of Civil Proceedings stipulated the affairs connected with marital bonds such as separation, divorce, annulment. The difference was that art. 4 allowed for suing a citizen of Poland before the

foreign court, whereas art. 43 stipulated the exclusive jurisdiction for Polish citizens, and was not applied to foreigners.

Pursuant to the principles of private international law of 1926, Poland failed to reserve the right for exclusive jurisdiction in matrimonial affairs. Pursuant to art. 17 section 3, it was possible for Polish citizens abroad to be subject to the authorities of the country of residence, as far as the Polish law was observed. With reference to the acknowledgement of foreign courts' judgements in Poland, the principle was that the acknowledgement concerned Polish citizens and the Polish law was applied. Enforcement of foreign courts' judgements was stipulated in art. 17 section 3 of the Act on private international law; it states the identical requirements for judgement acknowledgement as in art 7 of the Hague Convention. The matter of enforcement of foreign court judgement took place only when Poland had the convention of judgement enforcement signed. However, Poland did not sign such a convention.

If in the course of the procedure of marriage annulment it turned out that the parties had been aware of the impediment to marriage and concealed this impediment deliberately, they were punished according to the penal act concerning serious constabulary offences (§ 102 u.c.). The law stipulated for a party to claim damages.

As fas as the material jurisdiction was concerned, pursuant to art. 13 § 2 section 1 of the Code of Civil Proceedings concerning the non-material right disputes as well as property rights, these were resolved by a regional court. Local jurisdiction was stipulated in art. 43 Code of Civil Proceedings. Matrimonial action, if at least one of the contracting parties had Polish citizenship, was to be brought to the court proper for the last common place of residence of spouses in Poland. When one of the spouses did not reside in this place, the action was to be brought in the place of residence of the Respondent, and in case of absence of this legal ground, then in the place of residence of the Petitioner. Art. 4 Code of Civil Proceedings allowed for bringing an action against a citizen of Poland staying abroad, whereas art. 43 settled the exclusive jurisdiction when one of the contracting parties is a citizen of Poland. As a consequence, if spouses had had their last place of cohabitation in Poland and both or one of them had resided in Poland, then the place of bringing the action was their most recent cohabitation place. The jurisdiction according to the place of stay of the Respondent was in case of cohabitation abroad, then permanent stay of one spouse in Poland and in case both spouses had no place of cohabitation in Poland and none of them stayed in the territory of Poland. In case of the absence of premises stipulated in art. 43 Code of Civil

Proceedings, the art. 17 point 3 of private international law was taken into account, in the view of which in case of spouses who had Polish citizenship or Polish citizenship was their most recent one they both had, then Polish authorities or authorities of their country of residence were of proper jurisdiction.

Pursuant to § 4, in case of settling the reason for invalidity, the court was not bound with the statement of claim or acknowledgement of facts; the court was allowed to admit the evidence the parties waived or opposed to and demand the witnesses and to make an oath experts, even when the contracting parties absolved them from that obligation. Code of Civil Proceedings as well as Austrian Civil Code stipulated that the evidence- hearing of the parties, could have been admitted after the exhaustion of all other means of evidence.

The grounds of each and every complaint should have been the adequate matrimonial impediment. Percentage distribution of particular impediments was as follows: bigamy (§ 62 u.c.) – 23.81%, next: threat (§ 55 u.c.) – 18.10%, lack of valid banns (§ 70 u.c.) - 14.29%, impotence (§60 u.c.) – 13.33%, mental illness (§ 48 u.c.) – 10.48%, improper clergyman (§ 75 u.c.) – 5.71%, religious differences (§ 64 u.c.) – 4.76%, pregnancy (§ 2,86%,lack of permission for the minor (§ 49 u.c.) – 2.85%, error (§ 57 u.c.) – 1.90%, other – 1.91%.

After the reception of the claim concerning the invalidity of marriage, First Justice of the court appointed the defence attorney for marital bonds from the list of attorneys performing the profession in the region of given court jurisdiction. The defence attorney for marital bonds was appointed in the suits for divorce, annulment and declaration of marriage invalidity.

Austrian civil procedure did not regulate the burden of proof. Each of the parties was supposed to present the matter of fact, truthfully, present evidence and prove facts supporting the evidence, however the court was to examine the evidence on the basis of material procedural management, including the inquisitional element. However, Polish Code of Civil Proceedings did not include the provision concerning the distribution of the burden of proof.

Judgements of courts declaring the invalidity of marriages were of declarative character, and not constitutive, as they did not establish new state of things, as it took place in case of divorces, but they merely declared the existing status quo which was the absence of the valid marriage in the absence of validity requirements from the very beginning. As a result the expression "annulment of marriage" was inaccurate. Invalidity of contracting marriage did not cause the invalidity of marriage by right (*ipso iure*), but merely provided the grounds for annulment of marriage in the course of legal action. Only the lack of maintaining the proper

form, for instance accepting the declaration on the contraction of marriage, caused marriage to be nonexistent. Marriage contracted in invalid manner caused immediately all legal consequences of a valid one, and became invalid only after one of the spouses demanded the annulment by the court upon request. As long as the marriage was not annulled after the course of course proceedings, none of the spouses or any other person could invoke the invalidity of marriage, and all the authorities were obliged to regard the marriage as contracted in a valid manner, and - as a result- causing the same legal consequences as a valid marriage.

Judgement of the cleric court within its scope of powers had the same weight as the judgement of the state court, which means equal and not superior. At times the absurd judgements were passed, completely in contrary with the law in force, however still valid. The literature quotes the judgement of the consistorial Evangelical and Reformed court in Warsaw, regarded as illegitimate in the area of Małopolska as it had passed the divorce judgement in which- at the moment of contracting marriage- both parties were Catholic, which was seen as contradictory with § 111 u.c.,, without examining the matter whether the divorce suit could have been resolved according to the laws of the former Austrian annexation area. Cleric courts were not subject to the supervision of the Superior Court and merely, pursuant to art 45 of the Act on the Organization of Common Courts, competence disputes could be resolved in the Superior Court. When the cleric court failed to apply law which -pursuant to mid-district private law- should have been applied, the judgement of this court could not be regarded as deprived of significance, even taking into account the position expressed by the Superior Court in many marital matters of spouses who had their last common place of residence in the area of the Austrian law binding force.

With reference to the courts of other districts, cleric courts were regarded as equal to state courts. Their judgements were acknowledged unconditionally and it was not possible to investigate whether local jurisdiction was proper, or whether personal jurisdiction was accurate and whether the matter was duly adjudged. The only thing possible to investigate before the civil court was whether a clergyman of a given district was authorized to adjudge in marital actions.

§111 PCA stipulated that the "bonds of the valid marriage between Catholics could only be dissolved by the demise of one of the spouses. Also, marital bonds are inseparable even when only one of the contracting parties was of Catholic creed." The same matter was differently resolved according to Russian law, valid and binding in Lithuania. In case of

spouses belonging to different Christian denominations it was possible to have the marriage blessed by clergymen of both these denominations. In the view of Austrian law it was necessary to recognize the legal consequences of marriage as of the date of contracting marriage, whereas in Russian law it was essential which of the clergymen blessed the married couple first and what was the creed of the Respondent as of the date of bringing action.

Citizen of Poland who moved to another district and lived there at least two years, was subject to rules and regulations binging in the new district. As a result of the above, if a resident of Cracow contracted marriage in the area of former Austrian annexation with Evangelical person, and the married couple was first blessed by the minister, after the two-year-long stay in Vilnius, such a person could bring a divorce suit in that city. The same possibility in Cracow was excluded.

The first case is the marriage of Catholics from the area of former Austrian annexation who made a mutual agreement that the spouse would change creed into Augsburg and Reformed. Next the Catholic wife summons the husband before the consistorial Augsburg and Reformed court in Vilnius. The contracting parties do not make objections as to the lack of court jurisdiction, and -moreover- the proceeding does not include the defence attorney for marital bonds. In order to speed up the procedure, the contracting parties order their attorneys to acknowledge the immediate legal validity of the judgement. Yet another case referred to the situation in which one of the spouses of Catholic marriage from the area of the former Austrian annexation did not consent to divorce. Then the spouse who absolutely longed for divorce, moved to Vilnius, registered for residence there for the period of six weeks. Of course, the spouse in question declared the change of creed. Then he summoned his wife before the consistorial Evangelical-Reformed court, and claimed the place of residence of the Respondent was unknown. The court did make a notice in the Polish Official Gazette about the pending procedure. If a spouse failed to read such an announcement, then the legal guardian was appointed from the group of the attorneys of Vilnius. The outcome of the case was easy to predict. The spouse who did not consent to divorce learnt about it when it was valid and binding and it was impossible to vitiate this judgement. The mid-war literature quoted directly that the rules and regulations concerning divorces were easily evaded due to the act on private mid-district law, in which "art. 17 stipulated that for divorce or separation from board and bed, the proper jurisdiction of the one the spouses were subject to at the time of divorce or separation, and pursuant to art. 2 the one who moves the place of residence in

the area of Poland, (s)he is subject to laws of a new place of residence in personal and matrimonial matters after one year."

The emergence of altering creeds and divorce migrations was the consequence of the unacceptability of divorces. The change of creed referred to the legal regulations binging the religious affiliation of contracting parties, and divorce migrations (divorces of Vilnius) with legal differences within verious areas of the same country.