

# The influence of National Socialism on divorce law in Austria and the Netherlands

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Mariken LENAERTS, Maastricht

## The influence of National Socialism on divorce law in Austria and the Netherlands\*

*This article provides a comparative overview of the influences of National Socialism on divorce law in Austria and the Netherlands between 1938 (Austria)/1940 (the Netherlands) and 1945. One of the primary goals of National Socialism was the establishment of a racially 'pure' Volksgemeinschaft. To that end, marriages that, for whatever reason, were no longer productive, or which would lead to the mingling of Aryan blood and racially "inferior" blood should be dissolved. Therefore the National Socialists substantially revised German divorce law, which was introduced in Austria in 1938 as well. This 1938 Marriage Law, albeit substantially altered and denazified, still serves as the basis of Austrian marriage and divorce law. In the Netherlands, regarded as much a brother nation to Germany as Austria was, attempts were made during the occupation to revise Dutch divorce law, partly because it was generally believed that the grounds for divorce had to be widened somewhat, partly to attune Dutch divorce law to National Socialism. However, these revisions were never enacted.*

**Keywords:** Austria – divorce law – Germany – National Socialism – the Netherlands

### 1. Introduction

It is beyond questioning that the National Socialist period shook Europe while it lasted and left its mark after it had been ended. This article will try to answer the question how divorce law was influenced by National Socialism in Austria and the Netherlands. The choice for these two countries might seem arbitrary but they provide for an interesting comparison, given the countries respective positions with regard to Nazi Germany. Both countries were regarded as brother nations of Germany, with its people sharing the same blood. The National Socialist mode of operation with regard to these two countries was different, though.

As of March 1938, Austria was incorporated into Germany. This incorporation is generally referred to as "Anschluss", which is somewhat euphemistic, or in English, annexation. However, it is debatable whether the incorporation of Austria into Germany can indeed be character-

ised as an "annexation", as annexation is a unilateral act by the conquering state, preceded by a military conquest. Through annexation, the enemy state ceases to exist, thereby ending the war. This is called subjugation. In this respect, the conquering state acquires enemy territory and de jure sovereignty through conquest followed by subjugation.<sup>1</sup> Although Germany certainly put considerable military pressure on Austria, this pressure does not qualify as "conquest". Furthermore, the incorporation was a bilateral act although, again, Austria was under pressure, however, not only from Germany but also from within.<sup>2</sup>

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\* This article is a shortened and amended version of (part) of my book: LENAERTS, National Socialist Family Law, which was published by Brill in December 2014.

<sup>1</sup> OPPENHEIM, International Law 518–519.

<sup>2</sup> BUKEY, Hitler's Austria 25–39.

The Netherlands was not incorporated into the German Reich, but occupied by German military forces in May 1940. Eight days after the invasion, Hitler replaced the military administration in the Netherlands with a civil one. At that time occupations were governed by the Regulations Respecting the Laws and Customs of War on Land of 1907. These determined in Article 43 that the occupant had “to take all measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the occupied country”. It is therefore debatable whether the German occupying forces were at all authorised to change family law in the Netherlands.

In order to see whether divorce law in Austria and the Netherlands was influenced by National Socialism, we first have to look at the situation in Germany as the “home base” of National Socialism.<sup>3</sup> Therefore, this article will first briefly explain the German rules concerning divorce before the National Socialist assumption of power, and the key ideas of National Socialism with regard to the concept of marriage; then, the Marriage Law of 1938 and its consequences for Austria will be explained. Subsequently, the Dutch rules concerning divorce that were applicable before the German occupation will be dealt with, followed by the attempts to revise these rules during the occupation.

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<sup>3</sup> Although National Socialism does not find its origins exclusively in Germany, we can regard Germany as its “home base”, as this was the first country in which the National Socialists came to power. Germany was therefore the first country in which rules regulating the nation’s behaviour could substantially be influenced by National Socialism.

## 2. German divorce law before the Nazi take-over

With regard to the dissolution of marriage, church doctrine and the more modern notion of man as an individual being with his own needs (which had emerged during the Enlightenment) did not conform. According to the doctrine of the Catholic Church, marriage was a sacrament not to be separated by man. However, according to the Enlightenment doctrine of man as an individual, every person had his or her own soul; two individual souls could as a couple share their lives but might at a given moment not be able to live together any longer. German divorce law during the Weimar Republic was based on a compromise between these two doctrines. The German state considered marriage the germ cell of the social order and therefore had its own interests in preventing divorce.<sup>4</sup> Their conviction was that the state had to recognise the possibility of divorce for cases where a marriage could no longer fulfil its social tasks, but that divorce could never be an individual affair. Therefore, divorce was largely grounded on the guilt principle (*Verschuldensprinzip*), which meant that, except in cases of a mental disorder, marriages could only be divorced if the summoned partner had committed some wrong. However, since the beginning of the 1920s, the question had been discussed whether the guilt principle should be replaced with more objective grounds for divorce, that is, the question whether a marriage had irretrievably broken down (*Zerrüttungsprinzip*).<sup>5</sup>

The German Civil Code distinguished two types of grounds for divorce, absolute and relative ones. In the case of absolute grounds, a judge was obliged to pronounce the divorce without further judging the marriage. Absolute grounds

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<sup>4</sup> MITTEIS, *Familienrecht* (1923) 15.

<sup>5</sup> MITTEIS, *Familienrecht* (1931) 26–27.

for divorce were adultery and crimes against morality (Ehebruch und Sittlichkeitsdelikte, § 1565), crimes against life or cruelty (Lebensnachstellung, § 1566) and desertion with malicious intent (bössliche Verlassung, § 1567). For its definition of adultery and crimes against morality, § 1565 refers to the relevant sections in the Penal Code.<sup>6</sup> Crimes against morality included bigamy (§ 171 StGB) and perverse illicit sexual acts (§ 175 StGB), such as sodomy and bestiality. Culpable breakdown (schuldhafte Eheerrüttung, § 1568) and mental disorder (Geisteskrankheit, § 1569) were considered relative grounds for divorce. Mental disorder as a ground for divorce did not fall under the guilt principle, but was acknowledged as a cause of the permanent breakdown of a marriage. The mental disorder had to be complete, not partial, and it had to last for a minimum of three consecutive years, leading to a permanent disruption of the “mental community”. Culpable breakdown, however, did fall within the scope of the guilt principle, as the summoned partner had to be found guilty of the disruption. The judge had to decide objectively whether or not the marriage was permanently disrupted and which facts had caused the disruption. Furthermore, the spouse who had caused the disruption could not invoke § 1568 as a ground for divorce.<sup>7</sup>

### 3. Volksgemeinschaft – the strength of a nation

The National Socialist assumption of power in 1933 brought some significant changes with

regard to the perception of the state, the family and the individual.

The concept of a “state” was renounced by the National Socialists, especially the way it had manifested itself during the Weimar period. According to the National Socialists, the individual had become too important during this period, which had led to egocentrism and moral decline.<sup>8</sup> Instead of a state, which was centred upon the idea of a group of individuals sharing a common language and living under constant governmental supervision,<sup>9</sup> a “Volksgemeinschaft” had to be created,<sup>10</sup> in which the public interest would prevail over the rights and interests of the individual. Every person, every member of the Volk should consider himself a member of the whole, whose rights were limited by the interests of the community. Man should not be self-sufficient, but serve the community.<sup>11</sup> Although the term Volksgemeinschaft somehow embodied the National Socialist legal idea, it cannot be defined exactly. It can best be compared with a body that consists of several indispensable parts, which all together form an indivisible, organic whole.<sup>12</sup> This Volksgemeinschaft is managed by one leader, the “Führer”, who is not so much a leader but a servant of the Volksgemeinschaft. He makes the laws, but, as the Führer is the embodiment of “community personality”, these laws will only reflect the interests of the Volksgemeinschaft. The Führer therefore needs no supervision, as he serves the

<sup>6</sup> See § 172 StGB: “Der Ehebruch wird, wenn wegen desselben die Ehe geschieden ist, an dem schuldigen Ehegatten, sowie dessen Mitschuldigen mit Gefängnis bis zu sechs Monaten bestraft. Die Verfolgung tritt nur auf Antrag ein.”

<sup>7</sup> MITTEIS, Familienrecht (1931) 28–32.

<sup>8</sup> PINE, Nazi Family Policy 9.

<sup>9</sup> HITLER, Mein Kampf 426–427.

<sup>10</sup> CARP, Nationaal-Socialisme 20.

<sup>11</sup> HITLER, Mein Kampf 327.

<sup>12</sup> Carp however insists that a National Socialist “leader-state” cannot be compared with a corporative state, as the parts of which it consists do not represent their own interests, but represent the interests of the community in their own expertise. See CARP, Nationaal-Socialisme 47–48.

community.<sup>13</sup> Stolleis shows that the concept of *Volksgemeinschaft* pervaded all spheres of life and therefore also different areas of law, such as property law, the law of obligations and criminal law.

The primary goal of this *Volksgemeinschaft* was the preservation of the Volk, the Aryan race:<sup>14</sup> "In general it should not be forgotten that the highest aim of human existence is not the preservation of a state, let alone a government, but the preservation of the species."<sup>15</sup> With regard to the preservation of the Aryan race, we can identify a dichotomy: on the one hand the expansion of the Aryan race had to be encouraged, while on the other hand 'inferior' races and weak elements had to be eliminated from society. 'Mingling' of races therefore had to be prevented at all costs. With regard to racial doc-

trines, National Socialism was outspokenly anti-Semitic. Jews – a race, not a religious group according to Hitler<sup>16</sup> – were considered to be responsible for the defeat of Germany in the First World War; the Weimar Republic – with all its shortcomings – was described as a "Jewish republic" and Jews were considered to have caused the destruction of Germany, not only economically, but morally as well. The devastating consequences of this anti-Semitism need no further explanation.

Concerning the expansion of the Aryan race, the family was regarded as the "germ cell of the nation".<sup>17</sup> In order to preserve the Aryan race, the main function of marriage was to produce healthy Aryan children, the so-called "images of the Lord". Newlyweds were expected to produce a significant amount of children – Himmler demanded a minimum of four children in each SS marriage<sup>18</sup> – of whom the boys would later join the army and the girls become the mothers of the next generation.<sup>19</sup> The existence of the nation was dependent on the nation's fertility

<sup>13</sup> Ibid. 40; LEPSIUS, *Perceptions* 25–26; LEPSIUS, *Staatsrecht* 106–107; STOLLEIS, *Law under the Swastika* 68. *Volksgemeinschaft* and *Führer* are held together by the principle of the movement (*Bewegung*), the "political bearer of the will of the Volk", CARP, *Nationaal-Socialisme* 35–36. See for an elaborate analysis of this principle LEPSIUS, *Perceptions* 23–27 and LEPSIUS, *Staatsrecht* 105–108. This principle of the movement was expressed in the National Socialist Party, which in the Netherlands was aptly named *Nationaal Socialistische Beweging*.

<sup>14</sup> According to Carp, the Volk in the National Socialist sense was imagined as a racial community, in which blood was the binding factor. The *Volksgemeinschaft* presupposed this racial community but was also based on elements like common language, culture, territory and fate. CARP, *Nationaal-Socialisme* 24–25. See furthermore STOLLEIS, *Law under the Swastika* 64–83, about the legal terminology introduced by the Nazis and the legal consequences of the use of the word "community". He explains that by the very use of the word *Volksgemeinschaft* (national community) it did not become clear whether all Aryan people without regard of national boundaries were meant, or just a "political nation" (p. 82).

<sup>15</sup> HITLER, *Mein Kampf* 104: "Im allgemeinen soll aber nie vergessen werden, daß nicht die Erhaltung eines Staates oder gar die einer Regierung höchster Zweck des Daseins der Menschen ist, sondern die Bewahrung ihrer Art." Translation by Ralph MANHEIM 96.

<sup>16</sup> Ibid. 253: "Die besten Kenner aber dieser Wahrheit über die Möglichkeiten der Anwendung von Unwahrheit und Verleumdung waren zu allen Zeiten die Juden; ist doch ihr ganzes Dasein schon auf einer einzigen großen Lüge aufgebaut, nämlich der, daß es sich bei ihnen um eine Religionsgenossenschaft handle, während es sich um eine Rasse – und zwar was für eine – dreht." "The foremost connoisseurs of this truth regarding the possibilities in the use of falsehood and slander have always been the Jews; for after all, their whole existence is based on one single great lie, to wit, that they are a religious community while actually they are a race – and what a race!" Translation by MANHEIM 232.

<sup>17</sup> GROß, *Unsere Arbeit* 105. See also PINE, *Nazi Family Policy* 8–9; GRUNBERGER, *Social History* 298.

<sup>18</sup> PINE, *Nazi Family Policy* 45.

<sup>19</sup> HITLER, *Mein Kampf* 10: "'Deutscher Knabe, vergiß nicht, daß Du ein Deutscher bist!' und 'Mädchen, gedenke, daß Du eine deutsche Mutter werden sollst!'" "'German boy' do not forget you are a German', and, 'Little girl, remember that you are to become a German mother.'" Translation by MANHEIM 12.

and the will of healthy German families to fulfil their biological obligation.

In order to make the Volksgemeinschaft a success, marriage could no longer be considered a private issue between two persons; it had to serve the nation: "And marriage cannot be an end in itself, but must serve the one and higher goal, the increase and preservation of the species and the race. This alone is its meaning and its task."<sup>20</sup> Germans belonging to the Aryan race should marry at a young age, since only then could a couple be assured of "healthy and resistant offspring".<sup>21</sup> Besides, early marriage could be used as a weapon to combat prostitution and syphilis, which were – according to Hitler – a disgrace to humanity.<sup>22</sup> Even so, marriage should not find its origins in pure sexual desire, but in "sincere mutual love", as these bonds were likely to be much stronger. A stable and enduring marriage was considered the best guarantee for the way children were raised and therefore a guarantee for "the future of the German people".<sup>23</sup> In order to stimulate marriage – and early marriage in particular – and to protect the Aryan race against undesired racial mixing, a number of measures were taken.<sup>24</sup> In June 1933, for example, a marriage loan scheme was introduced that provided a newly-wed German couple – of whom the woman had been employed and given up her job upon marriage –

with an interest-free loan of up to 1,000 Reichsmark, provided in vouchers to be used for the purchase of furniture and household equipment.<sup>25</sup>

Measures that had more fundamental consequences were the adoption of the so-called Nuremberg Laws and the Marriage Health Law in 1935. The Nuremberg Laws, a collection of three laws<sup>26</sup> which presented the fundamentals of the National Socialist racial outlook on the world and which were the result of the Reich Party Conference of Freedom in Nuremberg of 15 September 1935, amongst other things prohibited marriages and extramarital (sexual) intercourse between Jews and state nationals of German or kindred blood. The First Supplementary Decree to the Reich Citizenship Law, which was promulgated on 14 November 1935, furthermore specified who was to be considered Jewish.<sup>27</sup> The Marriage Health Law was aimed at the hereditary health of the Aryan race and prohibited marriages where one of the partners had a contagious or hereditary disease or suffered from a mental illness, whether or not this had led to a (temporary) legal incapacity.<sup>28</sup> Prior to marriage a couple was obliged to obtain a certificate which proved that the intended marriage was not hindered by any such impediment. The marriage certificate could also be refused pursu-

<sup>20</sup> Ibid. 275–276: "Auch die Ehe kann nicht Selbstzweck sein, sondern muß dem einen größeren Ziele, der Vermehrung und Erhaltung der Art und Rasse, dienen. Nur das ist ihr Sinn und ihre Aufgabe." Translation by MANHEIM 252.

<sup>21</sup> Ibid. 276.

<sup>22</sup> Ibid. 275. See also BOCK, Antinatalism 123.

<sup>23</sup> PINE, Nazi Family Policy 15–16.

<sup>24</sup> HITLER, *Mein Kampf* 276: "Freilich ist zu ihrer Ermöglichung eine ganze Reihe von sozialen Voraussetzungen nötig, ohne die an eine frühe Verehelichung gar nicht zu denken ist." "To be sure, it can be made possible only by quite a number of social conditions without which early marriage is not even thinkable." Translation by MANHEIM 252.

<sup>25</sup> Gesetz zur Verminderung der Arbeitslosigkeit vom 1. Juni 1933, dRGBL. I 1933 S. 323. See also BOCK, Antinatalism 123; GRUNBERGER, *Social History* 300; PINE, *Nazi Family Policy* 17.

<sup>26</sup> Reichsflaggengesetz vom 15. September 1935, dRGBL. 1935 I S. 1145; Reichsbürgergesetz vom 15. 9. 1935, dRGBL. 1935 I S. 1146, hereafter Reich Citizenship Law; Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre vom 15. September 1935, dRGBL. 1935 I S. 1146, hereafter Blood Protection Law.

<sup>27</sup> Erste Verordnung zum Reichsbürgergesetz vom 14. November 1935, dRGBL. 1935 I S. 1333.

<sup>28</sup> Gesetz zum Schutze der Erbgesundheit des deutschen Volkes vom 18. Oktober 1935, dRGBL. 1935 I S. 1246.

ant to § 6 of the First Supplementary Decree to the Blood Protection Law, which prohibited all marriages from which offspring was to be expected that constituted a threat to the purity of German blood.<sup>29</sup>

#### 4. The new matrimonial law for the new Germany

Despite having an enormous impact in terms of the nazification of matrimonial law, the Blood Protection Law and the Marriage Health Law only served as makeshift measures. They did not solve the problem of the already existing mixed marriages, and when the Third Reich was expanded because of the incorporation of Austria, a general revision of matrimonial law proved to be necessary. Especially the revision of the rules concerning divorce led to controversies between the firm adherents of National Socialism who viewed marriage as an institution that should stand entirely in the service of the National Socialist Volksgemeinschaft, and the more conservative forces, those who believed in the traditional concept of marriage as a bond for life. Minister of Justice Franz Gürtner belonged to that latter category and he cleverly made use of the importance National Socialists attached to the concept of family and marriage to strengthen his message.<sup>30</sup> Furthermore, a discussion arose about the question whether only divorce law had to be amended or the rules concerning the conclusion and annulment of marriage as well. Several people were of the opinion that family law in its entirety should be revised to dovetail with National Socialist principles.<sup>31</sup> However,

Gürtner initially limited himself to the revision of divorce law. Between 1935 and September 1937 several draft revisions of the rules concerning divorce were presented and discussed. The draft that was finally accepted was a compromise between the Ministry of Justice and the Academy for German Law.<sup>32</sup> By the time everyone agreed to the final draft, however, Germany had incorporated Austria, and as Austria had its own share of problems with regard to marriage and divorce law, this changed the perspective of the legislative activities again.

#### 4.1 Marriage and divorce law in Austria and the need to adapt the draft revision

Unlike many Western European countries, such as Germany and the Netherlands, Austria did not have an obligatory civil marriage which was generally applicable. Marriage was largely organised according to religious principles. This appears clearly from the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch – ABGB*),<sup>33</sup> which stated for example in § 64 that marriages between Christians and non-Christians were not allowed. Marriages were, furthermore, concluded in the presence of a priest who acted as the registrar.<sup>34</sup> In 1868 the possibility of a civil marriage was introduced with the concept of the “*Notzivilehe*”. This “emergency civil marriage” could be concluded

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BERT, *Familien- und Erbrecht* 220–221, and a letter from the Reich and Prussian Minister for the Interior (Wilhelm Frick) to the Reich Minister of Justice (31 March 1938), published in *ibid.*, 252.

<sup>29</sup> Neufassung des Entwurfs eines Gesetzes über die Ehescheidung durch das Reichjustizministerium (Anfang September 1937), published in *ibid.*, 126–236.

<sup>30</sup> *Allgemeines bürgerliches Gesetzbuch für die gesamten Deutschen Erbländer der Österreichischen Monarchie vom 1. Juni 1811*, JGS 946/1811 (hereafter *ABGB*).

<sup>31</sup> § 75 *ABGB*. See also LEHNER, *Familie – Recht – Politik* 29.

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<sup>29</sup> Erste Verordnung zur Ausführung des Gesetzes zum Schutze des deutschen Blutes und der deutschen Ehre vom 14. November 1935, *dRGBl.* 1935 I S. 1334.

<sup>30</sup> BLASIUS, *Ehescheidung* 198–199.

<sup>31</sup> See e.g. a letter from the Reich and Prussian Minister for Church Affairs (Hanns Kerrl) to the Reich Minister of Justice (28 April 1937), published in SCHU-

if a priest refused to marry a couple for reasons which were not acknowledged by the state as an impediment to marriage.<sup>35</sup> The only part of Austria which had obligatory civil marriage for all inhabitants was Burgenland, which had been part of Hungary until 1921. Obligatory civil marriage had been introduced in Burgenland in 1894, and in 1922, the Parliament of Burgenland decided to maintain Hungarian matrimonial law.<sup>36</sup> The situation was further complicated when the “Konkordat” – an agreement between the Holy See and Austria (represented by Federal Chancellor Engelbert Dollfuß) on the position of the Roman Catholic Church and the applicability of canon law in Austria – was ratified in 1934.<sup>37</sup> Matrimonial law was dealt with in Article VII, which stated in § 1 that marriages concluded according to canon law would also have legal consequences under civil law. This was further elaborated by an implementing law of 4 May 1934.<sup>38</sup> The law made a distinction between marriages concluded according to canon law after the concordat had come into force and those which had been concluded before then. Overall, the concordat did not end the chaos in Austrian matrimonial law; it only made it worse. Especially divorce law was very fragmented, resulting in an unclear and unsatisfactory situation.<sup>39</sup>

The ABGB had already stated in § 115 that divorce (*Trennung dem Bande nach*) should be

organised according to the rules of the religious community to which the (non-Roman Catholic) partners adhered. According to § 111 Roman Catholics could not divorce at all, even when the other spouse was not a Roman Catholic. Separation from bed and board (§ 103 ABGB) was allowed for everyone, but this did not include the possibility to contract a second marriage.

This rigidity of Austrian divorce law had given rise to a questionable legal practice, the “Dispensehe”.<sup>40</sup> The concept itself was not new – the “Dispensehe” came into use in 1919, after Albert Sever, a Social Democrat, had been elected and appointed “Landeshauptmann” (head of government) of Lower Austria. In order to send a political signal regarding the problems concerning the fragmented and therefore unjust divorce law, Sever had decided to make use of a dispensation clause in the ABGB to allow for second marriages after a separation from bed and board.<sup>41</sup> § 83 ABGB stated that on important grounds, one could apply for a dispensation from an impediment to marriage to the head of government<sup>42</sup> of a federal state.<sup>43</sup> However, it was not entirely clear from which impediments to marriage exactly dispensation could be granted, and Sever used this vagueness to allow for second marriages for Roman Catholics by granting them dispensation from the impediment of marital bond after a separation from bed and board. This allowed for a *Notzivilehe* before a registrar or – if the partners were willing to convert to another religion – a second marriage,

<sup>35</sup> Gesetz vom 25. Mai 1868, RGBl. 47/1868. See also LEHNER, *Familie – Recht – Politik* 67, 89.

<sup>36</sup> LEHNER, *Familie – Recht – Politik* 110; GRUCHMANN, *Ehegesetz* 68; HOFMEISTER, *Privatrechtsgesetzgebung* 130.

<sup>37</sup> Konkordat zwischen dem Heiligen Stuhle und der Republik Österreich, BGBl. 2/1934. The concordat was signed on 5 June 1933.

<sup>38</sup> Bundesgesetz vom 4. Mai 1934, betreffend Vorschriften auf dem Gebiete des Eherechts zur Durchführung des Konkordates zwischen dem Heiligen Stuhle und Österreich vom 5. Juni 1933, BGBl. 8/1934.

<sup>39</sup> LEHNER, *Familie – Recht – Politik* 115–117; HOFMEISTER, *Privatrechtsgesetzgebung* 130.

<sup>40</sup> BLASIVUS, *Ehescheidung* 204; HOFMEISTER, *Privatrechtsgesetzgebung* 130.

<sup>41</sup> LEHNER, *Familie – Recht – Politik* 101, 107.

<sup>42</sup> § 83 speaks of “Landesstelle” – state government. This authority had been transferred to the head of government in 1918. See GRUCHMANN, *Ehegesetz* 69.

<sup>43</sup> § 83 ABGB: “Aus wichtigen Gründen kann die Nachsicht von Ehehindernissen bei der Landesstelle angesucht werden, welche nach Beschaffenheit der Umstände sich in das weitere Vernehmen zu setzen hat.”



albeit not a canon one.<sup>44</sup> The Dispensehe led to a lot of controversy, first of all about whether the marital bond of the first marriage was dissolved by the dispensation, the second marriage, or not at all. And was this kind of dispensation even valid, and could the second marriage be concluded validly? Despite the risks of bigamy or of ending up with an invalid marriage, the use of the Dispensehe boomed. By 1930 around 50,000 Dispensehen had already been concluded.<sup>45</sup>

Given this uncertainty, it is not remarkable that with regard to family law the incorporation led to high hopes among the Austrian population. The problems related to matrimonial law and especially divorce law were pressing, and Gürtner was aware of this.<sup>46</sup>

Already in April 1938 Gürtner had discussed the problem of a possible reform of Austrian matrimonial law and especially the Dispensehe. Hitler had stated that the matter should be taken care of as soon as possible. The concordat would not stand in the way of a reform, according to him.<sup>47</sup> The question was how to reform Austrian matrimonial law in the light of the steps already taken in Germany. Opinions differed on that matter. Gürtner wanted to introduce the newly reformed German divorce law in Austria as well, broadened to include a revision of the rules concerning the conclusion of marriage. He asked the representative of the Vienna Ministry of Justice Johann Antoni to draft transitional provi-

sions for Austria.<sup>48</sup> On 10 May 1938 Gürtner sent a letter to all departments involved, stating that in the light of the recent incorporation of Austria it had become necessary to harmonise Austrian matrimonial law with German law, which required not only a reform of Austrian divorce law, but also a reform of the Austrian rules concerning the conclusion of marriage. Therefore he proposed, contrary to the original plan, to reform not only German divorce law, something Minister of the Interior Wilhelm Frick had only agreed to after much deliberation – but also the German rules concerning the conclusion of marriage. A draft proposal was enclosed. Furthermore, he invited everyone to a meeting on 28 May 1938 to discuss the matter.<sup>49</sup>

One day before the meeting was to take place Frick replied to Gürtner, stating he agreed to the need for reform in Austria. However, he disapproved of the draft proposal concerning rules on the conclusion of marriage, as this would be another partial reform in the field of family law, further endangering the general revision of family law. According to Frick it would have been better to introduce the existing German rules concerning the conclusion of marriage in Austria, accompanied by some transitional provisions, until a general revision of family law could be brought into force in both Germany and Austria.<sup>50</sup>

These remarks were presented by Frick's representative in the meeting of 28 May. Despite Frick's objections, which were shared by Hitler's deputy Rudolf Heß, the full draft was discussed

<sup>44</sup> LEHNER, *Familie – Recht – Politik* 107; GRUCHMANN, *Ehegesetz* 69.

<sup>45</sup> *Ibid.* 107–108, 69.

<sup>46</sup> During a department meeting on 28. Mai 1938, Gürtner stated that it was evident that Hitler, when travelling to Austria, would be asked about this matter. See Report on a department meeting held at the Ministry of Justice, about a draft law on the conclusion of marriage (28 May 1938), published in SCHUBERT, *Familien- und Erbrecht* 280–281.

<sup>47</sup> Note from Gürtner (9 April 1938), published in *ibid.*, 252.

<sup>48</sup> HOFMEISTER, *Privatrechtsgesetzgebung* 132.

<sup>49</sup> Letter to all departments involved concerning and including a draft proposal concerning the rules of conclusion of marriage (10 May 1938), published in SCHUBERT, *Familien- und Erbrecht* 252–273. See also GRUCHMANN, *Ehegesetz* 69.

<sup>50</sup> Letter from the Minister of the Interior to the Minister of Justice (27 May 1938), published in SCHUBERT, *Familien- und Erbrecht* 279. See also GRUCHMANN, *Ehegesetz* 70.

and approved. The representative of Hanns Kerrl, Reich and Prussian Minister for Church Affairs, suggested that the character of the law's content be expressed in its title, as in "Vereinheitlichung des Eheschließungsrechts im Deutschen Reich" or "Bis zu endgültigen Regelung des Ehegesetzes erläßt die Reichsregierung das nachstehende Gesetz", etc.<sup>51</sup>

On 31 May Gürtner informed the departments that he would combine the draft concerning the rules on the conclusion of marriages with the already approved draft on divorce law. Although he fully understood the objections of Frick and Heß about this being only a partial revision, he pointed out that a general revision of family law for Germany and Austria would take too long. Introducing existing German matrimonial law in Austria would not do, as German divorce law in particular was not in line with the current tide, and introducing only the new draft on divorce law in Austria would have made no sense without a revision of the rules concerning the conclusion of marriage. By combining the two existing drafts, marital property law would remain untouched and eligible for reform in a general revision of family law at a later stage. A slightly altered draft – a result of the meeting of 28 May – was attached, as were some transitional provisions for Austria.<sup>52</sup>

Frick, however, did not throw in the towel immediately. When he was in Vienna on 1 June 1938, he asked the former Austrian Minister of Justice Franz Hueber, through his representative Hoche, whether Hueber could not himself draft a bill introducing obligatory civil marriage in Austria. Hueber, however, rejected this com-

promise, arguing that it would take too long. In order to tackle all problems from which Austrian matrimonial law was suffering, this law had to be quite extensive. This would involve a lot of work, while it was likely that it would be replaced by a German revision of family law within the foreseeable future anyway.<sup>53</sup> Gürtner pointed out to Frick once more how very time-consuming his proposed way of dealing with the problems concerning matrimonial law was,<sup>54</sup> and Frick finally gave in when he called Gürtner on 10 June 1938 and gave his approval. As agreed with Frick, Gürtner sent a telegram to Heß the following day, pointing out that Frick had approved the combination of the two drafts and asking Heß to do the same.<sup>55</sup> Heß agreed on 14 June 1938.<sup>56</sup>

The following day Hitler asked Gürtner to inform him about the combined drafts.<sup>57</sup> Bar some minor remarks, he approved of the combined drafts the same evening.<sup>58</sup>

On 29 June 1938 the Law for the Uniformity of the Law concerning Conclusion of Marriage and Divorce in Austria and in the remaining territories of the Reich, or in short, Marriage Law was passed.<sup>59</sup> It was enacted on 6 July 1938, published in the *Reichsgesetzblatt* on 8 July 1938 and came into force on 1 August 1938.<sup>60</sup>

<sup>51</sup> Report by Nordmann on a department meeting of 28 May 1938, published in SCHUBERT, *Familien- und Erbrecht* 280–281. See also GRUCHMANN, *Ehegesetz* 70–71 and HOFMEISTER, *Privatrechtsgesetzgebung* 133.

<sup>52</sup> Letter from the Minister of Justice to the departments involved (31 May 1938), published in *ibid.*, 281–283. See also GRUCHMANN, *Ehegesetz* 71–72.

<sup>53</sup> Letter from the Austrian Minister of Justice Hueber to the Minister of Justice (2 June 1938), published in *ibid.*, 283–285. See also GRUCHMANN, *Ehegesetz* 72–73 and HOFMEISTER, *Privatrechtsgesetzgebung* 133.

<sup>54</sup> GRUCHMANN, *Ehegesetz* 73.

<sup>55</sup> Note from Gürtner (11 June 1938), published in *ibid.*, 285. See also GRUCHMANN, *Ehegesetz* 73.

<sup>56</sup> GRUCHMANN, *Ehegesetz* 73.

<sup>57</sup> *Ibid.*

<sup>58</sup> Note from Minister of Justice Gürtner concerning a meeting with Hitler (15 June 1938), published in SCHUBERT, *Familien- und Erbrecht* 286. See also GRUCHMANN, *Ehegesetz* 73–74 and HOFMEISTER, *Privatrechtsgesetzgebung* 133–134.

<sup>59</sup> BLASIUS, *Ehescheidung* 205.

<sup>60</sup> Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Öster-

## 4.2 The new rules concerning divorce from the Marriage Law of 1938

The final provisions concerning divorce were all largely based on the compromise draft of 1937. As Heß had objected to the inclusion of introductory sections referring to the foundations of marriage in relation to the *Volksgemeinschaft*, the original first section was dropped. Gürtner's preamble was not included either. Only one general introductory provision remained. Section 46 stated that a divorce could only be pronounced by the court, had an *ex nunc* effect and could only be based on the grounds listed in §§ 47–55.

The explanatory memorandum, however, made up for this lack of reference to National Socialism. In its introductory remarks on divorce law it clearly stated that the new divorce regulations were firmly based on the National Socialist notion of the essence of marriage. It continued by explaining the importance of marriage and family for *völkish* community life, stating that the value and existence of the *Volksgemeinschaft* depended on its strength and health. Marriage held the vital power to ensure the eternity of *völkish* life. Therefore, procreation was the main goal of marriage. The National Socialist notion of the essence of marriage differed fundamentally from what was known as the liberal notion of marriage, which considered marriage to be a bond catering for individualistic interests. According to National Socialism, however, the purpose of marriage lay outside the individual interests of the spouses. The purpose of a revision of divorce law therefore should not be simply to facilitate divorce, as this would enable spouses who just did not find full personal happiness together to end their marriage, which would cause a devaluation of the importance and value of marriage. Instead, the revision

aimed to enable the dissolution of marriages which had lost their value to the *Volksgemeinschaft*. However, Gürtner stuck to the casuistic outline of the grounds for divorce that was partly still based on the guilt principle; introducing one general clause allowing for divorce when the marriage was disrupted in such a way that it had lost its value to the *Volksgemeinschaft* would have enabled divorce by sheer mutual consent. Such a provision would have been possible if the vast majority of the German population had been imbued with National Socialism, something which could not be expected after just five years. Introducing the breakdown principle as the sole ground for divorce would mean a “leap in the dark”. Implementing National Socialist principles in divorce law could therefore best be achieved by adapting and expanding the existing grounds for divorce. The final decision whether or not a marriage had lost its value to the *Volksgemeinschaft* was left to the courts.<sup>61</sup>

The grounds for divorce were listed in §§ 47–55. As Gürtner had not wanted to abandon the guilt principle, the list started with a classic ground for divorce: adultery (§ 47). Adultery was considered an absolute ground for divorce,<sup>62</sup> although the notion of “absolute” had somewhat changed. Originally, an absolute ground for divorce had entailed that the appellant had the right to divorce when the facts were proven, without the court having to check whether because of what had happened, the marriage was permanently disrupted. In case of a relative ground for divorce, divorce was only allowed

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reich und im übrigen Reichsgebiet vom 6. Juli 1938, DRGBl. 1938 I S. 807.

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<sup>61</sup> Begründung zu dem Gesetz zur Vereinheitlichung des Rechts der Eheschließung und der Ehescheidung im Lande Österreich und im übrigen Reichsgebiet vom 6. Juli 1938, published in SCHUBERT, Familien- und Erbrecht 154–155. See also BECHERT, WIESELS, Eherecht 46–48; RAMM, Familien- und Jugendrecht im Nationalsozialismus 76; RAMM, Das nationalsozialistische Familien- und Jugendrecht 7.

<sup>62</sup> SCHUBERT, Familien- und Erbrecht 155.

when the marriage was disrupted in such a way that a continuation of the marriage could no longer be expected. The new § 56,<sup>63</sup> however, stated that a guilt-based divorce was not allowed when it followed from the behaviour of the violated partner that he or she had not considered the violation disruptive. In case of adultery the court therefore had to check whether the deceived partner had really experienced the adulterous act as disruptive or whether this ground was just given in order to get a divorce which was desired for entirely different reasons. An absolute ground for divorce was not as absolute as it used to be.<sup>64</sup> According to § 47 (2) divorce was also not allowed when the violated partner had approved of the adulterous act or had made it possible (for example by tempting the other spouse to commit adultery in order to get a divorce).

Adultery as a ground for divorce fit the National Socialist world view perfectly, Gürtner stated in his explanatory memorandum. As loyalty was one of the basic principles of National Socialism, this was equally important for the concept of marriage, which found its sense and value in loyalty.<sup>65</sup>

The new § 48 contained the second absolute ground for divorce and reflected the idea of the main goal of marriage being reproduction and preservation of the race; it introduced continuous refusal to procreate as a ground for divorce.<sup>66</sup> This provision contained two components: 1) refusal to beget children and 2) wrong-

ful use of means which would hinder the birth of a child,<sup>67</sup> such as undergoing an operation which could render the woman barren. Procreation could only legally be refused in a very limited number of cases, such as a severe illness of one of the spouses. Financial reasons could never be used as the sole excuse for a refusal to procreate but only in combination with other reasons. A family with many children (“kinderreich”) in financial trouble, for example, was allowed to refuse to have more children. However, a divorce was only allowed when the partner who filed for divorce had a strong desire to have children. A woman who allowed her husband to use contraceptives did not have a right to divorce.<sup>68</sup> As with adultery the court had to check whether the refusal to procreate as such had indeed permanently disrupted the marriage.<sup>69</sup>

The final ground for divorce based on the guilt principle was a relative one. § 49 was an adaptation of § 1568 BGB, a general provision allowing for divorce in case of other marital misconduct (i.e. something which society judged unacceptable). At the instigation of Heß,<sup>70</sup> Gürtner had chosen not to include the other absolute grounds for divorce from the BGB (§ 1566, crimes against life or cruelty and § 1567, desertion with malicious intent) in separate sections as it was most likely that these acts would lead to a divorce

<sup>63</sup> dRGL. 1938 I S. 807, § 56: “Das Recht auf Scheidung wegen Verschuldens besteht nicht, wenn sich aus dem Verhalten des verletzten Ehegatten ergibt, daß er die Verfehlung des anderen verziehen oder sie als ehezerstörend nicht empfunden hat.”

<sup>64</sup> SCHARNAGL, Ehegesetz 99–100. See also: SCHUBERT, Familien- und Erbrecht 156.

<sup>65</sup> SCHUBERT, Familien- und Erbrecht 155–156.

<sup>66</sup> Ibid. 156. See also PINE, Nazi Family Policy 18; BLASIUS, Ehescheidung 206; HOFMEISTER, Privatrechtsgesetzgebung 134.

<sup>67</sup> dRGL. 1938 I S. 807, § 48: “Ein Ehegatte kann Scheidung begehren, wenn der andere sich ohne triftigen Grund beharrlich weigert Nachkommenchaft zu erzeugen oder zu empfangen, oder wenn er rechtswidrig Mittel zur Verhinderung der Geburt anwendet oder anwenden läßt.”

<sup>68</sup> BECHERT, WIESELS, Eherecht 50–51.

<sup>69</sup> SCHARNAGL, Ehegesetz 104.

<sup>70</sup> Position of the Führer’s deputy with regard to the draft of 3 September 1937 (12 January 1938), published in SCHUBERT, Familien- und Erbrecht 242. See also GRUCHMANN, Ehegesetz 78. The compromise draft of 1937 had still included crimes against life or cruelty (“Lebensnachstellung”) as separate grounds for divorce.

based on § 49 anyway.<sup>71</sup> § 49 was formulated in a general way, stating that a divorce was allowed when the marriage was irretrievably broken down due to a serious case of marital misconduct or dishonourable or immoral behaviour of one of the spouses, in such a way that a restoration of the marital community according to the essence of marriage was not to be expected.<sup>72</sup> This had to be considered in the light of objective criteria, the “human-moral” point of view.<sup>73</sup> This was a deviation from the previous rule, as § 1568 BGB had taken an individualistic approach, stating that divorce was allowed when a continuation of the marriage could no longer be expected from the innocent spouse.<sup>74</sup> The Supreme Court had confirmed in 1921 that the question whether the marriage was irretrievably broken down had to be answered from the subjective point of view of the violated spouse.<sup>75</sup> The new § 49<sup>76</sup> also stated that when the other spouse was guilty of marital misconduct him- or herself, a divorce was not allowed if this was morally unjustified considering a correct evalua-

tion of the essence of marriage.<sup>77</sup> Again, the individual point of view did not matter in this respect.<sup>78</sup>

According to the National Socialist notion of marriage, divorce was no longer something which depended only on the personal interests of the individual spouses, but also on the value the marriage had to the Volksgemeinschaft. Thus, a second category of grounds for divorce was introduced. §§ 50–53 and 55 allowed for divorce when marital cohabitation was no longer possible, that is to say the purpose of marriage (i.e. procreation) could no longer be fulfilled, without one of the partners being guilty of this breakdown. The National Socialist notion of marriage as the germ cell of the nation stands out most clearly in these provisions, with Blasius even calling §§ 50–53 “eugenic” grounds for divorce.<sup>79</sup> These eugenic grounds for divorce can be divided into two subcategories: 1) mental disorders and 2) physical disorders.

Section 50 allowed for divorce in cases of disruptive acts that had been committed by one of the spouses and caused an irretrievable breakdown of the marriage but could not be considered marital misconduct because of a mental disturbance.<sup>80</sup> As disruptive acts caused by a mental disorder could not be imputed to the person suffering from the mental disorder, no divorce had been allowed by the BGB, whilst restoration of the marital community consonant with the essence of marriage was often not possible. The mental disturbance mentioned in § 50

<sup>71</sup> SCHUBERT, Familien- und Erbrecht 156. Gürtner erroneously referred to §§ 1565 and 1566 BGB, instead of §§ 1566 and 1567. § 1565, however, had dealt with adultery, which was included in the Marriage Law, albeit in an adapted form. See also BECHERT, WIESELS, Eherecht 52.

<sup>72</sup> dRGBL. 1938 I S. 807, § 49: “Ein Ehegatte kann Scheidung begehren, wenn der andere durch eine sonstige schwere Eheverfehlung oder durch ehrloses unsittliches Verhalten die Ehe schuldhaft so tief zerrüttet hat, daß die Wiederherstellung einer ihrem Wesen entsprechenden Lebensgemeinschaft nicht erwartet werden kann. [...]”

<sup>73</sup> BECHERT, WIESELS, Eherecht 53.

<sup>74</sup> BLASIUS, Ehescheidung 206.

<sup>75</sup> SCHARNAGL, Ehegesetz 108.

<sup>76</sup> dRGBL. 1938 I S. 807, § 49: “[...] Wer selbst eine Verfehlung begangen hat, kann die Scheidung nicht begehren, wenn nach der Art seiner Verfehlung, insbesondere wegen des Zusammenhangs der Verfehlung des anderen Ehegatten mit seinem eigenen Verschulden sein Scheidungsbegehren bei richtiger Würdigung des Wesens der Ehe sittlich nicht gerechtfertigt ist.”

<sup>77</sup> SCHUBERT, Familien- und Erbrecht 156.

<sup>78</sup> BECHERT, WIESELS, Eherecht 53.

<sup>79</sup> BLASIUS, Ehescheidung 207–208.

<sup>80</sup> dRGBL. 1938 I S. 807, § 50: “Ein Ehegatte kann Scheidung begehren, wenn die Ehe infolge eines Verhaltens des anderen Ehegatten, das nicht als Eheverfehlung betrachtet werden kann, weil es auf einer geistigen Störung beruht, so tief zerrüttet ist, daß die Wiederherstellung einer dem Wesen der Ehe entsprechenden Lebensgemeinschaft nicht erwartet werden kann.”

was considered to be a minor mental illness that did not remove the mental community between the spouses. Therefore, it was not the mental disturbance itself that constituted the ground for divorce, but the disruptive act caused by the mental disturbance.<sup>81</sup>

In case of a mental illness, which was serious enough to remove the mental community between the partners and where it was not likely to be restored, a divorce was justified according to § 51.<sup>82</sup> This provision was not new, but had been largely taken over from § 1569 BGB. Contrary to § 50, irretrievable breakdown of the marriage was not regarded as the decisive factor in this respect; it was sufficient to prove that the marital community between the spouses was indeed removed. The mental community was regarded as everything that fulfilled the “mental lives of the spouses”, including the care for the well-being of the other spouse and the children, and participating in the “political and cultural life of the Volk”.<sup>83</sup> The Supreme Court had originally explained this concept in a less political way by calling it “a similar awareness of common interests and the common will to encourage those interests”.<sup>84</sup> § 51 also deviated from the old § 1569 BGB by the absence of the three-year term § 1569 BGB had required. According to § 51 it was irrelevant when the mental illness had occurred and how long it had already persisted.<sup>85</sup>

<sup>81</sup> SCHARNAGL, Ehegesetz 110–111; BECHERT, WIESELS, Eherecht 58.

<sup>82</sup> dRGBl. 1938 I S. 807, § 51: “Ein Ehegatte kann Scheidung begehren, wenn der andere geisteskrank ist, die Krankheit einen solchen Grad erreicht hat, daß die geistige Gemeinschaft zwischen den Ehegatten aufgehoben ist, und eine Wiederherstellung dieser Gemeinschaft nicht erwartet werden kann.”

<sup>83</sup> BECHERT, WIESELS, Eherecht 59.

<sup>84</sup> Reichsgericht, 30. März 1920. Entscheidungen des Reichsgerichts in Zivilsachen, vol. 98, 295–298, cited in SCHARNAGL, Ehegesetz 112.

<sup>85</sup> SCHUBERT, Familien- und Erbrecht 157; SCHARNAGL, Ehegesetz 112–113.

Physical disorders were dealt with in §§ 52 and 53, respectively, providing grounds for divorce in case of a contagious or revolting disease that was not expected to be cured soon or where the risk of contagion was likely to persist,<sup>86</sup> and premature infertility.<sup>87</sup> Both grounds were new and were introduced because in both cases the marital community was considered to have become impossible, so that the purpose of marriage, procreation, could no longer be fulfilled.<sup>88</sup> Section 52 was in line with the Marriage Health Law of 1935, which prohibited in § 1 a marriage between two persons of whom one was suffering from a contagious disease which could endanger the other spouse or future offspring.<sup>89</sup> As such a disease could also occur after the partners had married, a ground for divorce should be included in addition to the marriage impediment. The purpose was the same, prevention of unhealthy offspring.<sup>90</sup> Tuberculosis as well as venereal diseases were considered to be contagious diseases potentially endangering offspring.<sup>91</sup> However, § 52 was formulated in a broader way, including “revolting” diseases as well. This made the list of diseases that fell within the scope of § 52 considerably longer, including things like facial cancer or having had a colostomy because of rectal cancer that had resulted in a stoma with an attached stoma appli-

<sup>86</sup> dRGBl. 1938 I S. 807, § 52: “Ein Ehegatte kann Scheidung begehren, wenn der andere an einer schweren ansteckenden oder ekelregenden Krankheit leidet und ihre Heilung oder die Beseitigung der Ansteckungsgefahr in absehbarer Zeit nicht erwartet werden kann.”

<sup>87</sup> Ibid., § 53 (1): “Ein Ehegatte kann Scheidung begehren, wenn der andere nach der Eheschließung vorzeitig unfruchtbar geworden ist.”

<sup>88</sup> SCHUBERT, Familien- und Erbrecht 157. See also PINE, Nazi Family Policy 18.

<sup>89</sup> Gesetz zum Schutze der Erbgesundheit des deutschen Volkes vom 18. Oktober 1935, dRGBl. 1935 I S. 1246, § 1.

<sup>90</sup> FREISLER, Ehescheidungsrecht 143–144.

<sup>91</sup> BECHERT, WIESELS, Eherecht 59.

ance.<sup>92</sup> However, if one of the partners had had an accident which had resulted in severe physical disorders, divorce was not justified.<sup>93</sup>

Premature infertility had been accepted as a ground for disputability under § 1333 BGB and as a ground for termination under § 37 of the Marriage Law. § 53 followed this line by allowing for divorce when infertility occurred after the marriage had been concluded.<sup>94</sup> A divorce on the ground of § 53 was only justified when the infertility occurred after the marriage had been concluded, was premature – that is, the woman was under 40 years of age and the man under 60 – and permanent, which had to be established by a physician.<sup>95</sup> Scharnagl also pointed out that although the law only mentioned infertility and not impotence, it was likely that impotence fell within the scope of § 53 as well, as impotence would invariably lead to an infertile marriage.<sup>96</sup> Divorce because of premature infertility was not allowed when the spouses together had (hereditarily) healthy, legitimate children or together had adopted a (hereditarily) healthy child.<sup>97</sup> An adopted child was put on the same footing as biological children as it was considered to be unreasonable harsh on the adopted child to lose his or her home again, just because one of the adoptive parents was infertile, something the spouses apparently had resigned themselves to since they had moved on

and had adopted a child instead.<sup>98</sup> A divorce was also not allowed when the spouse who filed for divorce was infertile himself or herself, or for health reasons was not allowed to enter into a new marriage.<sup>99</sup>

According to § 54, divorce because of mental or physical disorders was in general not allowed when it was “morally unjustified”.<sup>100</sup> The section further explained that this could be the case when a divorce would be unreasonably harsh on the other spouse, considering the duration of the marriage, the age of the spouses and the cause of the illness.<sup>101</sup> The open norm (“Generalklausel”) “morally unjustified” (“sittlich nicht gerechtfertigt”) had to be explained from a völkish-moral point of view.<sup>102</sup> § 54 left the courts a lot of interpretive freedom, which was nevertheless dictated by “sound popular feelings” (“gesundes Volksempfinden”).<sup>103</sup>

§ 55, finally, allowed for divorce when the spouses had not lived together for three consecutive years and a restoration of the marital community consonant with the essence

<sup>92</sup> SCHARNAGL, Ehegesetz 114; BECHERT, WIESELS, Ehe-recht 59.

<sup>93</sup> BECHERT, WIESELS, Ehe-recht 59.

<sup>94</sup> FREISLER, Ehescheidungsrecht 134; SCHARNAGL, Ehegesetz 114–115.

<sup>95</sup> BECHERT, WIESELS, Ehe-recht 59; SCHARNAGL, Ehegesetz 116.

<sup>96</sup> SCHARNAGL, Ehegesetz 116–117.

<sup>97</sup> dRGL. 1938 I S. 807, § 53 (2): “Die Scheidung ist ausgeschlossen, wenn die Ehegatten miteinander erbgesunde eheliche Nachkommenschaft oder ein gemeinschaftlich an Kindes Statt angenommenes erbgesundes Kind haben.”

<sup>98</sup> SCHUBERT, Familien- und Erbrecht 157; BECHERT, WIESELS, Ehe-recht 60; SCHARNAGL, Ehegesetz 117.

<sup>99</sup> dRGL. 1938 I S. 807, § 53 (3): “Wer selbst unfruchtbar ist, hat kein Recht auf Scheidung. Das gleiche gilt für den Ehegatten, der eine neue Ehe aus gesundheitlichen Gründen nicht würde eingehen dürfen oder dem das Gesundheitsamt hiervon abraten müßte.” See also SCHUBERT, Familien- und Erbrecht 157; BECHERT, WIESELS, Ehe-recht 60; SCHARNAGL, Ehegesetz 117.

<sup>100</sup> dRGL. 1938 I S. 807, § 54: “In den Fällen der §§ 50 bis 53 darf die Ehe nicht geschieden werden, wenn das Scheidungsbegehren sittlich nicht gerechtfertigt ist. [...]”

<sup>101</sup> Ibid.: “[...] Dies ist in der Regel dann anzunehmen, wenn die Auflösung der Ehe den anderen Ehegatten außergewöhnlich hart treffen würde. Ob dies der Fall ist, richtet sich nach den Umständen, namentlich auch nach der Dauer der Ehe, dem Lebensalter der Ehegatten und dem Anlaß der Erkrankung oder der Unfruchtbarkeit.”

<sup>102</sup> FRANTZ, Richtung und Grundgedanken 1030; BECHERT, WIESELS, Ehe-recht 60.

<sup>103</sup> SCHUBERT, Familien- und Erbrecht 157–158.

of marriage was not to be expected due to an irretrievable breakdown of the marriage: “If the domestic community of the partners has been discontinued for three consecutive years and if a restoration of the marital community consonant with the essence of marriage is not to be expected because of a fundamental, irretrievable disruption of the marital relation, both spouses can file for divorce.”<sup>104</sup>

This provision, apart from being the core of the compromise between the Ministry of Justice and the Academy for German Law, can be regarded the key provision of National Socialist divorce law. Firstly, it seemed to introduce the general breakdown principle into German divorce law, although it stuck to the three-year term. Furthermore, this irretrievable breakdown of the marriage had to be established objectively by the court.<sup>105</sup> However, this general breakdown principle was mitigated in sub-section 2, which, if the partner who had filed for divorce was (largely) responsible for the disruption of the marriage, granted the right to contest the divorce to the other spouse.<sup>106</sup> The rationale behind this mitigation was described in evocative language by Gürtner, who stated in the explanatory memorandum that the repudiation of a woman by her husband, who had found a younger and more charming woman, had to be prevented.<sup>107</sup> However, this provision particularly shows both conservatism and a fear of an unlimited increase in the

number of divorces and of a loss of control. Therefore, the breakdown principle had to go hand in hand with the guilt principle.

This right to contest the divorce, however, was not absolute. Sub-section 2 also stated that the contestation would not be taken into account when a continuation of the marriage was morally unjustified in the light of a correct evaluation of the essence of marriage and the behaviour of both spouses. “[...] The contestation will not be taken into account if a continuation of the marriage is morally unjustified in the light of a correct evaluation of the essence of marriage and the collective behaviour of both spouses.”<sup>108</sup>

Despite the attempt to mitigate the breakdown principle, the true sting of National Socialism was found here. This one sentence provision consisted of two so-called open norms (Generalklauseln): the “essence of marriage” (“Wesen der Ehe”) and “morally unjustified” (“sittlich nicht gerechtfertigt”). As we have seen, both phrases appeared in other provisions as well, in particular §§ 49, 50 and 54. Both phrases can be interpreted in several ways; no legal definition was given. As we have seen, the open norm “morally unjustified” had to be explained from a völkish-moral point of view. The Supreme Court had defined *sittlich* (morally) as what was appropriate according to National Socialism.<sup>109</sup> According to Rütters this definition of morality led to a form of population policy utilitarianism; a way of thinking completely focussed on ethnology and biology. The question whether a marriage should be continued or could be dissolved always had to be answered in the light of the völkish interests

<sup>104</sup> dRGBL. 1938 I S. 807, § 55 (1): “Ist die häusliche Gemeinschaft der Ehegatten seit drei Jahren aufgehoben und infolge einer tiefgreifenden unheilbaren Zerrüttung des ehelichen Verhältnisses die Wiederherstellung einer dem Wesen der Ehe entsprechenden Lebensgemeinschaft nicht zu erwarten, so kann jeder Ehegatte die Scheidung begehren.”

<sup>105</sup> SCHARNAGL, Ehegesetz 121.

<sup>106</sup> dRGBL. 1938 I S. 807, § 55 (2): “Hat der Ehegatte, der die Scheidung begehrt, die Zerrüttung ganz oder überwiegend verschuldet, so kann der andere der Scheidung widersprechen.”

<sup>107</sup> SCHUBERT, Familien- und Erbrecht 158.

<sup>108</sup> dRGBL. 1938 I S. 807, § 55 (2): “[...] Der Widerspruch ist nicht zu beachten, wenn die Aufrechterhaltung der Ehe bei richtiger Würdigung des Wesens der Ehe und des gesamten Verhaltens beider Ehegatten sittlich nicht gerechtfertigt ist.”

<sup>109</sup> FRANTZ, Richtung und Grundgedanken 1030.



of the community. The court had to check whether the community would benefit or suffer from a marriage, in which case a new marriage could be desirable from the community's point of view.<sup>110</sup> The open norm "essence of marriage" had to be explained along the same lines. The essence of marriage was to be found in its value to the Volksgemeinschaft. The main purpose of the marriage was giving the Volksgemeinschaft healthy, Aryan children. A marriage in which such procreation was not possible or did not happen did not meet the essential criteria to be called a marriage in the true sense of the word.<sup>111</sup> Since the effect of § 55 depended on the interpretation of the open norms given by the court and since both open norms were interpreted in a National Socialist way, albeit formulated neutrally, the provision became a tool for realising National Socialist racial beliefs, while the personal beliefs of the spouses on the quality of the marriage could be brushed aside entirely.<sup>112</sup>

The importance of the Marriage Law for the National Socialist population policy also appeared from the rules concerning the expiration of the term in which one could file for divorce. § 57 (2) determined that divorce should be requested within ten years after the ground

for divorce had occurred, unless it concerned a form of adultery prohibited by § 2 of the Blood Protection Law,<sup>113</sup> which prohibited extramarital intercourse between Jews and persons of German or kindred blood. Race defilement apparently should always be a reason for divorce.

### 4.3 Exceptional and transitional provisions for Austria

The exceptional provisions of chapter four have been the most significant for Austria, especially in the first months after the incorporation.<sup>114</sup> According to the explanatory memorandum, these exceptional provisions for Austria tried to tackle the most pressing problems of Austrian matrimonial law: 1) the lack of a uniform, civil marriage and therefore the lack of state control with regard to the conclusion of marriages, 2) the prohibition of divorce for Roman Catholics, which had led to the concept of separation from bed and board, which was not in line with the National Socialist population policy, and 3) the Dispensehe as a solution for the lack of divorce possibilities, which was undesirable from the perspective of legal certainty.<sup>115</sup>

Since in Austria marriages were generally not concluded before a registrar and therefore not entered in the Registry of Births, Deaths and Marriages, and since the German Law on the Registry of Births, Deaths and Marriages of 1937<sup>116</sup> would not come into force in Austria until 1 January 1939, a transitional provision was necessary to regulate the conclusion of civil

<sup>110</sup> RÜTHERS, *Auslegung* 419. See also Reichsgericht, 13. Februar 1939, *Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 159, Nr. 46, 305–311; RG, 13. März 1939, *ibid.*, vol. 160, Nr. 4, 15–19; RG, 17. April 1939, *ibid.*, Nr. 29, 144–148; RG, 6. November 1939, *ibid.*, vol. 162, Nr. 10, 44–47; RG, 15. März 1941, *ibid.*, vol. 166, Nr. 25, 188–192; RG, 8. März 1941, *ibid.*, Nr. 28, 209–215; RG, 5. November 1941, *ibid.*, vol. 168, Nr. 5, 38–39.

<sup>111</sup> RÜTHERS, *Auslegung* 408–409. See also RG, 12. Jänner 1939, *Entscheidungen*, vol. 159, Nr. 19, 111–114; RG, 13. Februar 1939, *ibid.*, Nr. 46, 305–311; RG, 13. März 1939, *ibid.*, vol. 160, Nr. 4, 15–19; RG, 17. April 1939, *ibid.*, Nr. 29, 144–148; RG, 6. November 1939, in: *Deutsches Recht* 10 (1940) Nr. 3, 242–243; RG, 18. November 1939, in: *Deutsches Recht* 10 (1940) Nr. 2, 242.

<sup>112</sup> HOFMEISTER, *Privatrechtsgesetzgebung* 135.

<sup>113</sup> dRGBL. 1938 I S. 807, § 57 (2): "Die Scheidung ist nicht mehr zulässig, wenn seit dem Eintritt des Scheidungsgrundes zehn Jahre verstrichen sind. Die Scheidung bleibt jedoch zulässig, wenn ihr Grund ein nach § 2 des Gesetzes zum Schutze des deutschen Blutes und der deutschen Ehre verbotener Ehebruch ist."

<sup>114</sup> HOFMEISTER, *Privatrechtsgesetzgebung* 134.

<sup>115</sup> SCHUBERT, *Familien- und Erbrecht* 165–166.

<sup>116</sup> *Personenstandsgesetz vom 3. November 1937*, dRGBL. 1937 I S. 1146.

marriages in the interim. Section 99 of the Marriage Law declared the district heads to be authorised to act as registrars.<sup>117</sup> In Burgenland this task was assigned to the registry clerks,<sup>118</sup> who had already carried out this task from 1894 to 1934.<sup>119</sup> Furthermore, § 100 stated that the penalty for letting the religious ceremony regarding the conclusion of marriage precede the civil ceremony was 10,000 Reichsmark or up to five years' imprisonment.<sup>120</sup>

The effect of existing separations from bed and board, a concept unfamiliar to German law, remained unaffected according to § 114.<sup>121</sup> However, as stated in § 115 (1),<sup>122</sup> existing separations from bed and board could be converted into a full divorce at the request of

(one of) the spouses.<sup>123</sup> This was only allowed in case the spouses had not yet reconciled.<sup>124</sup>

The Dispensehe, finally, was legalised in § 121,<sup>125</sup> which stated that marriages concluded after a dispensation from the impediment of an already existing marital bond were considered to be valid marriages from the start, unless it was established by the court before 1 January 1939 that the spouses had not lived as spouses after 1 April 1938. In this case the marriage would be annulled. As it would have been impossible to check whether all second marriages still existed on 1 April 1938 or whether the spouses had returned to their original spouses, it was decided to automatically legalise all Dispensehen, unless nullity was invoked before 1 January 1939. This could only be done by the spouse who had entered a Dispensehe and the former spouse, respectively. These terms were kept short on purpose in order to legalise as many Dispensehen as possible.<sup>126</sup> In the event the Dispensehe was not annulled before 1 January 1939, the previous marriage was considered divorced from the date of the second marriage.<sup>127</sup>

<sup>117</sup> dRGBL. 1938 I S. 807, § 99 (1): "Standesbeamte im Sinne dieses Gesetzes sind im Lande Österreich außerhalb des Burgenlands der Bezirkshauptmann oder der mit seiner Vertretung in diesen Angelegenheiten Beauftragte, in Wien und in den landesunmittelbaren Städten der Bürgermeister oder der mit seiner Vertretung in diesen Angelegenheiten Beauftragte. [...]"

<sup>118</sup> Ibid., § 99 (2): "Im Burgenland sind Standesbeamte im Sinne dieses Gesetzes die staatlichen Matrikelführer. [...]"

<sup>119</sup> SCHUBERT, Familien- und Erbrecht 166; SCHARNAGL, Ehegesetz 151.

<sup>120</sup> dRGBL. 1938 I S. 807, § 100 (1): "Wer die religiösen Feierlichkeiten einer Eheschließung vornimmt, bevor die Ehe vor den staatlichen Trauungsorganen geschlossen ist, wird wegen Vergehens an Geld bis zehntausend Reichsmark oder mit strengem Arrest bis zu fünf Jahren bestraft."

<sup>121</sup> Ibid., § 114: "Die Wirkung der Scheidung einer Ehe von Tisch und Bett wird durch das Inkrafttreten dieses Gesetzes nicht berührt. [...]" See also SCHARNAGL, Ehegesetz 159.

<sup>122</sup> dRGBL. 1938 I S. 807, § 115 (1): "Jeder Ehegatte einer von Tisch und Bett geschiedenen Ehe kann den Antrag stellen, daß die Scheidung der Ehe im Sinne dieses Gesetzes ausgesprochen werde. [...]"

<sup>123</sup> SCHUBERT, Familien- und Erbrecht 166; BLASIUS, Ehescheidung 205; HOFMEISTER, Privatrechtsgesetzgebung 134; SCHARNAGL, Ehegesetz 159–160.

<sup>124</sup> dRGBL. 1938 I S. 807, § 115 (2): "[...] Dem Antrag ist stattzugeben, wenn feststeht, daß die Ehegatten sich nicht wieder vereinigt haben. [...]"

<sup>125</sup> Ibid., § 121 (1): "Eine mit Nachsicht vom Ehehindernis des Ehebandes geschlossene und nicht bereits rechtskräftig für ungültig erklärte Ehe gilt als eine von Anfang an gültige Ehe, es sei denn, daß auf Grund eines vor dem 1. Jänner 1939 gestellten Antrags gerichtlich festgestellt wird, daß die Ehegatten am 1. April 1938 nicht mehr als Ehegatten miteinander gelebt haben. In diesem Falle ist die Ehe für nichtig zu erklären. [...]"

<sup>126</sup> SCHUBERT, Familien- und Erbrecht 166–167; SCHARNAGL, Ehegesetz 166–167; HOFMEISTER, Privatrechtsgesetzgebung 134; BLASIUS, Ehescheidung 205.

<sup>127</sup> dRGBL. 1938 I S. 807, § 122 (1): "Wir in der Frist des § 121 ein Antrag nicht gestellt oder wird er rechtskräftig abgewiesen, so gilt die frühere Ehe, von deren

#### 4.4 Final provisions

Apart from some exceptional provisions for Austria, the Marriage Law came into force on 1 August 1938.<sup>128</sup>

### 5. Divorce law in the Netherlands

#### 5.1 Dutch rules concerning divorce before 1940

In 1809, the Netherlands, which had become the Kingdom of Holland in 1806, adopted the “Wetboek Napoleon, ingerigt voor het Koninkrijk Holland”, which for the first time introduced civil marriage and which explicitly prohibited divorce by mutual consent.<sup>129</sup> Shortly thereafter, in 1811, when the Kingdom of Holland was annexed by Napoleon Bonaparte, the Wetboek Napoleon was replaced by the Code Civil, which was abolished in 1838, when the new Dutch Civil Code came into force. The subject of divorce had caused quite a stir during the lawmaking process, as the mainly Roman Catholic jurists in the Southern Netherlands wanted the Dutch Civil Code to be written in the tradition of the French Civil Code and to secure the canonical views on marriage and divorce, whilst the mainly Protestant jurists in the Northern Netherlands preferred a more traditional Dutch kind of legislation. The Civil Code of 1838 was a compromise between the two views in many respects.<sup>130</sup>

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Bande Nachsicht erteilt wurde, mit der Eingehung der späteren Ehe als im Sinne dieses Gesetzes geschieden.“ See also SCHUBERT, Familien- und Erbrecht 167; SCHARNAGL, Ehegesetz 166–167.

<sup>128</sup> dRGBL 1938 I S. 807, § 129.

<sup>129</sup> Wetboek Napoleon, ingerigt voor het Koninkrijk Holland (1809) Art. 218: “Echtscheiding mag geen plaats hebben dan om wettige redenen; in het bijzonder is de enkele wederzijdsche overeenkomst der echtgenooten daartoe ongenoegzaam.”

<sup>130</sup> HUUSSSEN, Discussion 313–315.

Whether or not a marriage could be dissolved by divorce has been an agelong discussion, dominated by mostly religious arguments. The general opinion on divorce was that it should certainly not be encouraged. Nevertheless, divorce was a necessary evil, which had to prevent worse. As in Germany, divorce was grounded on the guilt principle, meaning that divorce could only be pronounced if the summoned partner had committed some wrong. Article 264 of the Civil Code of 1838 contained four grounds for divorce: “adultery”, “desertion with malicious intent”, “a sentence to a degrading punishment”, which was changed in 1884 to “a sentence to a minimum of four years’ imprisonment”,<sup>131</sup> and “ill-treatment or serious injuries inflicted by one of the spouses on the other, causing a threat to life”.<sup>132</sup> Besides the exhaustive account in Article 264, Article 263 explicitly prohibited divorce by mutual consent.<sup>133</sup>

#### 5.2 Separation from bed and board

In a society in which marriage was considered an indissoluble bond, separation from bed and board provided a reasonable alternative for those couples for whom living together had become impossible, as it left the marriage intact. The Civil Code of 1838, however, created the

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<sup>131</sup> Wet van 26 April 1884, houdende wijzigingen in het Burgerlijk Wetboek, 26 April 1884, Staatsblad (1884) No. 93, Art. 264 (3): “Veroordeling wegens misdrijf tot eene vrijheidsstraf van vier jaren of langer, na het huwelijk uitgesproken.”

<sup>132</sup> Art. 264 BW: “De gronden, welke eene echtscheiding kunnen ten gevolge hebben, bestaan alleen in de navolgende: 1) Overspel; 2) Kwaadwillige verlating; 3) Veroordeeling tot eene onteerende straf, na het huwelijk uitgesproken; 4) Zware verwondingen, of zoodanige mishandelingen, door den eenen echtgenoot jegens den anderen gepleegd, waardoor diens leven wordt in gevaar gebracht, of waardoor hem gevaarlijke verwondingen zijn toegebracht.”

<sup>133</sup> Art. 263 BW: “Echtscheiding kan nimmer door onderlinge toestemming plaats hebben.”

opportunity to dissolve the marriage after a separation from bed and board, a novelty in the Netherlands. More importantly, indirectly it allowed for the dissolution of marriage by mutual consent, even when divorce by mutual consent was strictly prohibited.

Separation from bed and board was allowed on the same grounds as was divorce,<sup>134</sup> and was allowed in case of excesses, ill-treatment and serious insults by one spouse towards the other,<sup>135</sup> although any one of these acts was sufficient to request a separation from bed and board.<sup>136</sup> Finally, according to Article 291 BW, separation from bed and board could also be pronounced at mutual request, without the partners' having to give a ground for such a request. This, however, could only be done after at least two years of marriage.<sup>137</sup>

Article 255 BW stated that after five years of separation from bed and board, and if no reconciliation had taken place, the partners could individually request a dissolution.<sup>138</sup> Dissolution was done by judicial decision, which

<sup>134</sup> See Art. 288 (1) BW: "In de gevallen, welke grond tot echtscheiding opleveren, zal het aan de echtgenooten vrijstaan om de scheiding van tafel en bed in regten te vragen."

<sup>135</sup> Art. 288 (2) BW: "Die regtsvordering zal ook kunnen worden aangevangen, ter zake van buitensporigheden, mishandelingen, en grove beledigingen, door den eenen echtgenoot jegens den anderen begaan."

<sup>136</sup> VEEGENS, *Burgerlijk Recht* 182.

<sup>137</sup> Art. 291 BW: "Scheiding van tafel en bed kan ook door den regter worden uitgesproken, op het verzoek, door de beide echtgenooten te zamen gedaan, zonder dat deze gehouden zijn eene bepaalde oorzaak op te geven. Zoodanige scheiding zal niet kunnen worden toegestaan, ten zij de echtgenooten gedurende den tijd van twee jaren zijn getrouwd geweest."

<sup>138</sup> Art. 255 BW: "Wanneer echtgenooten van tafel en bed zijn gescheiden, het zij uit hoofde van eene der redenen bij artikel 288 vermeld, het zij op beider verzoek, en de scheiding gedurende vijf volle jaren, zonder verzoening der partijen, heeft stand gehouden, zal het aan ieder hunner vrijstaan om den anderen in regten op te roepen, en te eischen dat het huwelijk worde ontbonden."

had to be entered into the register of births, deaths and marriages.<sup>139</sup> If this was omitted, the judgment expired after six months, after which a dissolution of marriage could no longer be requested on the same ground.<sup>140</sup> This rule was included in the Civil Code in 1915,<sup>141</sup> although before that date the necessity of registration was often assumed. Nevertheless, the real meaning of registration had been unclear up to then.<sup>142</sup>

Although this procedure indirectly enabled a dissolution of marriage by mutual consent,<sup>143</sup> according to Diephuis it was not at odds with the prohibition of divorce by mutual consent as stated in Article 263 BW. Divorce ended a marriage which still existed in full, whilst dissolution after separation from bed and board ended a marriage which was formally intact, but from which many legal effects had already been removed. Furthermore, dissolution after separation from bed and board occurred gradually, compared to the instant dissolution by divorce.<sup>144</sup>

In the second half of the nineteenth century a discussion arose as to whether the grounds for divorce should be expanded, and a draft revision was presented in 1886. Although not deviating from the guilt principle, the commission did come up with some elaborate changes in their draft revision. However, this

<sup>139</sup> Art. 260 (1) BW: "Het huwelijk wordt ontbonden door het vonnis en de inschrijving van de daarbij uitgesproken ontbinding in de registers van den burgerlijken stand."

<sup>140</sup> Art. 276 (5) BW: "Indien de inschrijving binnen dien termijn niet is geschied, vervalt daardoor de kracht van het vonnis, waarbij de echtscheiding is uitgesproken, en kan die om dezelfde redenen niet opnieuw worden geëischt."

<sup>141</sup> 27 March 1915, *Staatsblad* (1915) No. 172.

<sup>142</sup> VEEGENS, *Burgerlijk Recht* 205.

<sup>143</sup> ASSER, *Familierecht* 239; VEEGENS, *Burgerlijk Recht* 200–201.

<sup>144</sup> DIEPHUIS, *Familierecht* 493–494.

proposal did not pass, and the original grounds remained unchanged.<sup>145</sup>

### 5.3 The Big Lie

Nevertheless, case law widened the grounds for divorce. On 22 June 1883, the Dutch Supreme Court ruled that for a divorce the normal provisions regarding default and confessions as set in Article 1962 of the Civil Code were applicable, which stated that a judicial confession provided full evidence,<sup>146</sup> and Article 76 of the Code of Civil Procedure, which stated that if the defendant went by default, the applicant's claim was sustained.<sup>147</sup> This meant that when the defendant confessed to the allegation of adultery or let the proceedings go by default and did not contest the allegation, this had to be taken as evidence and his adulterous act was regarded as proven.<sup>148</sup> Advocate General Van Maanen advised against this judgment, as according to him this implicitly cleared the way for divorce by mutual consent. Divorce on the ground of adultery, only proven by a confession or simply by the defendant going by default and not contesting the allegation, was too sensitive to fraud, as spouses who wanted to divorce could simply agree that one of them would confess to adultery or not contest the allegation, after which the divorce would be granted. According to Van Maanen, the allegation that the legislator had not provided for an exception in Article

1962 of the Civil Code in case of divorce was not true, as Article 263, which prohibited divorce by mutual consent, could be regarded as this exception. By sticking to the verbatim text of Article 1962 without considering the significance of Article 263, the grounds for divorce would be significantly widened, which was not the position of the Supreme Court. Marriage was a matter of public interest, in which the courts were obliged to request further factual evidence in addition to a confession in case of alleged adultery. Van Maanen pointed out that the only possibility to divorce with mutual consent was given by the legislator, which was in the roundabout way through separation from bed and board upon request of both spouses, without the obligation to provide a reason, as stated in Article 291, followed by dissolution of the marriage after five years as described in Article 255, as we saw before. Therefore, confession to adultery should never be allowed as the only and full evidence of adultery. The fact that Article 822 of the Code of Civil Procedure stated that cases of divorce should be treated in the same way as normal legal claims did not alter that.<sup>149</sup>

Nevertheless, the Supreme Court decided that the general rule of Articles 1903 and 1962 of the Civil Code did not provide exceptions for cases of divorce. According to the Court this was indicated by Article 810 of the Code of Civil Procedure, which excluded a single confession as evidence in case of separation of property. Clearly, the legislator had developed exceptions to the general rules of evidence in civil cases and obviously he had considered it unnecessary to formulate one in case of divorce. Courts were therefore not allowed to extend this prohibition to divorce. Furthermore, Article 263 was not eluded by a divorce granted when the only evidence was a confession of adultery as this

<sup>145</sup> HUUSSSEN, Discussion 320.

<sup>146</sup> Art. 1962 BW: "De geregtelijke bekentenis levert een volledig bewijs op tegen dengenen die dezelve, het zij in persoon, het zij bij eenen bijzonderen daartoe gevolmagtigde, heeft afgelegd."

<sup>147</sup> Art. 76 Rv: "Indien de gedaagde niet verschijnt, en de voorgeschreven termijnen en formaliteiten in acht genomen zijn, zal er tegen hem verstek verleend worden, en de conclusien van den eischer zullen toegevoezen worden, ten ware zij den regter onregtmatic of ongegrond voorkomen."

<sup>148</sup> Hoge Raad, 22 June 1883, Weekblad van het Regt 4924 (1883).

<sup>149</sup> Advocate General Van Maanen in *ibid.*

confession provided the legal grounds for divorce: adultery as set in Article 264 (1) Civil Code. If you looked at it from this angle, the divorce was not based on mutual consent, and therefore did not result in a violation of Article 263.<sup>150</sup>

The Court's judgment was strongly criticised and the procedure was soon referred to as the "the Big Lie" ("de Groote Leugen"). Although some authors were in favour of expanding the grounds for divorce, one considered this to be a task of the legislator.<sup>151</sup> According to Scholten this decision had to result in accepting a confession as full evidence in other matters as well, such as the annulment of marriages, denial of the legitimacy of a child, application for a wardship order or deprivation of parental rights, which was inexpedient.<sup>152</sup> Not everyone condemned the Supreme Court's decision. Van Brakel argued that the general wording of Article 1962 BW was applicable to all civil matters.<sup>153</sup> He supported this statement by pointing to Asser, who had stated that the Dutch Civil Code was an improvement of the French Code Civil as it placed the concept of evidence in a separate section of the Civil Code, thus making it generally applicable instead of being applicable only to contracts. According to Asser, the Code Napoléon had missed that evidence could be relevant in other matters as well, such as marriages and adultery, as a means of supporting a request for divorce.<sup>154</sup> Scholten disagreed with this historical interpretation by pointing out Article 422 of the 1820 draft of J.M.

Kemper,<sup>155</sup> which stated that courts had to take care that no marriages were dissolved because of covert contracts between the spouses.<sup>156</sup> According to Scholten this regulation was only omitted from the 1838 Civil Code because it was apparently considered redundant.<sup>157</sup>

Some lower courts refused to cooperate and requested additional evidence. However, this only resulted in an appeal in which the decision of the Supreme Court was followed, after which the lower courts in general gave up their resistance, not counting exceptions.<sup>158</sup> In an article in the "Nederlandsche Juristenblad" in 1926, Briët, who wanted to raise the issue again, pointed out a decision from the Amsterdam District Court which declared a contract to divorce with mutual consent void because of unlawful content.<sup>159</sup> According to Briët this decision showed that in general one acted as if Article 263 BW no longer existed. Briët therefore praised the Amsterdam District Court for bringing Article 263 BW back to attention.<sup>160</sup>

Nevertheless, even the strongest opponents accepted this judgment as case law, inciting the legislator to come up with changes,<sup>161</sup> although some feared that the legislator preferred the status quo, being torn between the necessity of cleaning up the procedure and the aversion by many members of parliament to expand the grounds for divorce. For such a proposal it was unlikely a majority in parliament would be

<sup>150</sup> Ibid.

<sup>151</sup> BRIËT, *Groote leugen* 214–216; ASSER, *Familierecht* 249.

<sup>152</sup> ASSER, *Familierecht* 249–250.

<sup>153</sup> BRAKEL, *Rechten* 77–79.

<sup>154</sup> ASSER, *Wetboek Napoleon* 14, 589. See also BRAKEL, *Rechten* 77–79.

<sup>155</sup> See about Kemper and his attempts to draft a new Civil Code LOKIN, *ZWALVE*, *Codificatiegeschiedenis* 301–304.

<sup>156</sup> *Ontwerp van het Burgerlijk Wetboek voor het Koninkrijk der Nederlanden, 1820, Art. 422*: "[...] De regters moeten toezien dat geene huwelijken ontbonden worden uit versierde oorzaken, of door bedekte overeenkomsten der partijen."

<sup>157</sup> ASSER, *Familierecht* 251.

<sup>158</sup> LIMBURG, *Familierecht* 361.

<sup>159</sup> Arrondissementsrechtbank Amsterdam, 8 February 1926, *Nederlandsche Jurisprudentie* (1926) 256.

<sup>160</sup> BRIËT, *Groote leugen* 214–216.

<sup>161</sup> Ibid.; ASSER, *Familierecht* 249–251.

gained, whilst when the Civil Code was changed so as to exclude confession as full evidence, in practice other solutions would be found.<sup>162</sup> Despite all criticism, this procedure remained the standard procedure until the revision of 1971.<sup>163</sup>

With the start of a new century, new attempts at amendments concerning divorce law were made. In 1910 Minister of Justice Nelissen tried to solve the problem of “the Big Lie” without a broad discussion about expanding the grounds for divorce.<sup>164</sup> However, he met with too many objections in parliament and the draft was withdrawn in 1912.<sup>165</sup> In 1912, Nelissen’s successor Regout tried again,<sup>166</sup> but this proposal was repealed in October 1913.<sup>167</sup> In 1938, Minister of Justice Goseling came with another draft proposal to alter the Civil Code and solve the problem of “the Big Lie”.<sup>168</sup> However, as Germany occupied the Netherlands in May 1940, this proposal was never enacted.<sup>169</sup> A last attempt to revise Dutch matrimonial law before the Netherlands became occupied territory came from the Committee for common Action to Reform our Matrimonial Law (Comité voor eene

gemeenschappelijke Actie tot Hervorming onzer Huwelijkswetgeving) in 1939.<sup>170</sup> As with the 1938 Goseling draft, this proposal was shelved after the German invasion in 1940.

#### 5.4 The German occupation of the Netherlands

During the occupation the question concerning the extension of grounds for divorce came up again, albeit for different reasons. The German occupiers were concerned about the many mixed marriages in the Netherlands and sought a way to legally dissolve those. However, as we have seen before, the grounds for divorce were limited in the Netherlands. Divorce on the mere ground that the other partner was Jewish was legally not possible. Implementing forced divorce by legislation had been considered several times.<sup>171</sup> It was discussed as a possible solution during the Wannsee Conference and the subsequent meetings of a commission (“Arbeitskreis”) which had been set up during the conference.<sup>172</sup> However, as Herzberg correctly points out, forced divorce would also have affected a considerable part of the non-Jewish population. Furthermore, it would not even have been in keeping with a pretended upholding of the Dutch Civil Code.<sup>173</sup> An

<sup>162</sup> LIMBURG, *Familierecht* 362.

<sup>163</sup> HUUSSEN, Discussion 320; LIMBURG, *Familierecht* 361.

<sup>164</sup> *Handelingen der Staten-Generaal (Tweede Kamer), bijlagen 1909–1910, no. 208. See also Handelingen der Staten-Generaal (Tweede Kamer), bijlagen 1909–1910, bijlage A, hoofdstuk 4, 2. IV. 13 (p. 5) and 2. IV. 14 (p. 24).*

<sup>165</sup> See also *Handelingen der Staten-Generaal (Tweede Kamer), zitting 1968–1969, no. 10213.3, Memorie van Toelichting, p. 11.*

<sup>166</sup> *Handelingen der Staten-Generaal (Tweede Kamer), bijlagen 1911–1912, no. 306.*

<sup>167</sup> HUUSSEN, Discussion 324. See also *Handelingen der Staten-Generaal (Tweede Kamer), zitting 1968–1969, Nr. 10213.3, Memorie van Toelichting, p. 11.*

<sup>168</sup> *Handelingen der Staten-Generaal (Tweede Kamer), bijlagen 1938–1939, Nr. 257.*

<sup>169</sup> See *Handelingen der Staten-Generaal (Tweede Kamer), zitting 1968–1969, Nr. 10213.3, Memorie van Toelichting, p. 11.*

<sup>170</sup> HUUSSEN, Discussion 327.

<sup>171</sup> PRESSER, *Ondergang* 2, 91.

<sup>172</sup> STULDREHER, *Legale Rest* 149, 155. See also: *Besprechungsprotokoll der Wannsee-Konferenz*, published in PÄTZOLD, SCHWARZ, *Tagesordnung: Judenmord* 111.

<sup>173</sup> HERZBERG, *Jodenvervolging* 127. According to Art. 43 of the Regulations Respecting the Laws and Customs of War on Land from 1907 an occupant was obliged to “take all measures in his power to restore, and ensure, as far as possible, public order and civil life, while respecting, unless absolutely prevented, the laws in force in the country.” See for the German version: IV. *Haager Abkommen, betreffend die Gesetze und Gebräuche des Landkriegs vom 18. 10. 1907, Ordnung der Gesetze und Gebräuche des Landkriegs*, dRGBI. 1910 S. 107.

attempt to prohibit non-Jews from living in the same house as Jews, which automatically would have led to a ground for divorce in case of mixed-married couples, had already been rejected by Carl Stüler, staff member at the “Generalkommissariat für Verwaltung und Justiz”, in 1940.<sup>174</sup>

According to Stuldreher<sup>175</sup> the problem was that Dutch divorce law did not include the legal concept of “Aufhebung” of the marriage, a concept which was adopted in Germany by § 37 of the Marriage Law of 1938.<sup>176</sup> *Aufhebung* is difficult to translate. Literally it means “termination” or “abolition”. Stuldreher uses the term “annulment” (“nietigverklaring”),<sup>177</sup> but this is not correct, as *Aufhebung* had the same legal effect as divorce, namely no retroactive effect.<sup>178</sup> In the following, the word “termination” will be used. § 37 of the Marriage Law stated that a marriage could be terminated in case of error concerning personal circumstances of the other spouse, which – if known beforehand and with a true understanding of the essence of marriage – would have dissuaded the erring person to enter into the marriage.<sup>179</sup> According to an undated memorandum concerning the dissolution of mixed marriages,<sup>180</sup>

being Jewish was considered a personal circumstance which could lead to termination, although according to Bechert and Wiesels, § 37 was only applicable if one of the partners was a halfblood and not a ‘full-Jew’.<sup>181</sup> The request for termination had to be filed within a year after discovery of the error.<sup>182</sup> Although the Marriage Law makes no mention of it, apparently the date of commencement of the Nuremberg Laws was accepted as the latest moment of discovery.<sup>183</sup> This however, would imply that an appeal to this section was not only not possible anymore with regard to an error concerning race, but had never been possible in the first place as the Marriage Law stems from 1938, almost three years after the Nuremberg Laws were promulgated. It seems more likely that in Germany mixed marriages could either be annulled or dissolved by appealing to § 20<sup>184</sup> or § 55.<sup>185</sup>

Secretary-general of Justice Jaap Schrieke had drafted an article allowing for annulment of existing mixed marriages within a year of commencement. This article was included in several

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betr. Trennung von Mischehen (25 October 1943): NIOD, acc. no. 020, inv. no. 286.

<sup>181</sup> BECHERT, WIESELS, *Eherecht* 35.

<sup>182</sup> dRGBL. 1938 I S. 807, § 40: “(1) Die Aufhebungsklage kann nur binnen eines Jahres erhoben werden. (2) Die Frist beginnt [...] in den Fällen der §§ 36 bis 38 mit dem Zeitpunkt, in welchem der Ehegatte den Irrtum oder die Täuschung entdeckt [...].”

<sup>183</sup> Vermerk betr. Auflösung von Mischehen: NIOD, acc. no. 020, inv. no. 286.

<sup>184</sup> dRGBL. 1938 I S. 807, § 20: “Eine Ehe ist nur in den Fällen nichtig, in denen dies im Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre, im Gesetz zum Schutze der Erbgesundheit des deutschen Volkes (Ehegesundheitsgesetz) oder in den §§ 21 bis 26 dieses Gesetzes bestimmt ist.”

<sup>185</sup> *Ibid.*, § 55 (1): “Ist die häusliche Gemeinschaft der Ehegatten seit drei Jahren aufgehoben und infolge einer tiefgreifenden unheilbaren Zerrüttung des ehelichen Verhältnisses die Wiederherstellung einer dem Wesen der Ehe entsprechenden Lebensgemeinschaft nicht zu erwarten, so kann jeder Ehegatte die Scheidung begehren.”

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<sup>174</sup> STULDREHER, *Legale Rest* 49.

<sup>175</sup> *Ibid.* 363.

<sup>176</sup> dRGBL. 1938 I S. 807, § 37.

<sup>177</sup> STULDREHER, *Legale Rest* 363.

<sup>178</sup> BECHERT, WIESELS, *Eherecht* 39; SCHARNAGL, *Ehegesetz* 93–94.

<sup>179</sup> dRGBL. 1938 I S. 807, § 37 (1): “Ein Ehegatte kann Aufhebung der Ehe begehren, wenn er sich bei der Eheschließung über solche die Person des anderen Ehegatten betreffende Umstände geirrt hat, die ihn bei Kenntnis der Sachlage und bei richtiger Würdigung des Wesens der Ehe von der Eingehung der Ehe abgehalten hätten.”

<sup>180</sup> Vermerk betr. Auflösung von Mischehen: NIOD archives, access no. 020, inventory no. 286 and 2413 (partially). Part of this memorandum is copied by Wimmer in a letter to Rauter about the dissolution of mixed marriages. See letter from Wimmer to Rauter,



draft regulations<sup>186</sup> on the implementation of the Nuremberg Laws, in particular the Blood Protection Law, which, however, were never enacted.

Finally, a solution could probably be found in an extension of the Dutch grounds for divorce. In 1944, Hans Georg Calmeyer, head of the “Abteilung Innere Verwaltung”, still referred to this possibility in a letter to Friedrich Wimmer, “Generalkommissar für Verwaltung und Justiz”.<sup>187</sup> From 1942 on Schrieke attempted to revise Dutch divorce law in general, amongst other things expanding the grounds for divorce.

### 5.5 Schrieke’s attempts to revise Dutch divorce law

Over the course of two years Schrieke presented two draft revisions of Dutch divorce law, the first in 1942, the second in 1944, after having obtained reactions to his first draft from the “Rechtsfront”<sup>188</sup> and the Institute for Judicial Reform (“Instituut voor Rechtsvernieuwing”),<sup>189</sup>

<sup>186</sup> See Verordnung des Reichskommissars für die besetzten niederländischen Gebiete über das Verbot der Eheschliessung und des ausserhehlichen Verkehrs mit Juden, April 1944: NIOD, acc. no. 020, inv. no. 2413 and 1507 and Verordnung des Reichskommissar für die besetzten niederländischen Gebiete über das Verbot der Eheschliessung und des ausserhehlichen Geschlechtsverkehrs mit Personen jüdischen Blutes, Erste Fassung, 3 August 1944: NIOD, acc. no. 020, inv. no. 2413 and 1507.

<sup>187</sup> Letter from Calmeyer to Wimmer (29 February 1944): NIOD, acc. no. 020, inv. no. 2413.

<sup>188</sup> The Rechtsfront was founded by NSB leader Anton Mussert on 2 August 1940 and was aimed at the development of National Socialist views with respect to several fields of law. All activities of the *Rechtsfront* were therefore directed at the construction of a National Socialist nation state. See for more information on the Rechtsfront: VENEMA, *Rechters* 50–54, and MEIHUIZEN, *Smalle Marges* 293–298.

<sup>189</sup> The “Instituut voor Rechtsvernieuwing” (Institute for Judicial Reform) was founded by Henry Mary Fruin in 1942. It can be regarded as the Dutch equivalent of the “Akademie für Deutsches Recht” and its purpose was to reform Dutch law according to the National Socialist ideology. The Institute consisted of

the Court of Appeal of The Hague, the major denominations and the Supreme Court. He sent this second draft to Ministerialrat Karl N. Krug, head of the “Hauptabteilung Justiz”, on 8 June 1944. He enclosed the responses<sup>190</sup> and a new explanatory memorandum, designed for the press, after promulgation of the revision. The underlying idea of this new draft was exactly the same as for the previous one: the existing reprehensible divorce practices caused by the Supreme Court’s judgment of 1883 which made Article 263 BW – prohibiting divorce by mutual consent – a dead letter, while additionally, the Dutch grounds for divorce were too confined, especially compared to other European countries. According to Schrieke it should be possible to get a divorce when a marriage had broken down in such a way that a restoration of the marital community could no longer be expected.<sup>191</sup> This second draft was more detailed than the previous one, although the majority of the proposed revisions concerned administrative changes.

several departments, of which only the Department of Civil Law, headed by S.A. van Lunteren, functioned to a certain extent. This section drafted, among other things, a revision of Dutch civil procedural law, titled “Hoofdlijnen van een nieuw Burgerlijk Procesrecht”. See for more information on the “Instituut voor Rechtsvernieuwing” VENEMA, *Rechters* 54–55, 108–109; JANSEN, VENEMA, *Hoge Raad* 180, 305; JANSEN, *Doorgaan of stoppen?* 14–15.

<sup>190</sup> Schrieke neatly listed all bodies to which the first draft had been sent, subsequently stating that he enclosed all received approbations which he had taken into account when revising his draft proposal. Since the majority of the reactions given by the bodies to which the draft had been sent was hardly positive, something can be said against these approbations. See letter from Schrieke to Krug, (8 June 1944): NIOD, acc. no. 020, inv. no. 2414.

<sup>191</sup> J.J. Schrieke, *Toelichting* (explanatory memorandum belonging to the second draft) 1944, 1: NIOD, acc. no. 020, inv. no. 2414. See also letter from Schrieke to Krug, (8 June 1944): NIOD, acc. no. 020, inv. no. 2414.

What changes did Schrieke propose?<sup>192</sup> To the four existing grounds for divorce, stated in Article 264, Schrieke added five new ones.<sup>193</sup> The original text from the existing third ground, “sentence to four years or more of imprisonment because of a crime”, was replaced by “sentence because of a degrading crime”.<sup>194</sup> The discussion about how to interpret the existing ground four was ended by simplifying the text, which read in the proposal: “crime against life or grievous bodily harm, committed by one of the spouses against the other spouse.”<sup>195</sup> The fifth ground would become the refusal, without a reasonable ground, to beget or receive offspring.<sup>196</sup> The sixth ground became insanity, formulated as “mental disorder of one of the spouses, which has abolished every mental community between the spouses, while recovery is not expected to be possible”.<sup>197</sup> Ground seven became a contagious or revolting disease of one of the spouses, which was not expected to be cured nor was the danger of contagion expected to diminish within

a measurable time.<sup>198</sup> Premature infertility of one of the spouses became the eighth ground for divorce, provided that no children had yet been born within the marriage.<sup>199</sup> Notwithstanding the negative responses of the denominations and the Supreme Court with regard to the grounds of contagious or revolting disease and premature infertility, Schrieke decided to keep these provisions, as in all these cases he considered the marriage to have broken down. Continuation would not only be iniquitous, but would also cause a lot of suffering.<sup>200</sup> Besides, the court could always decide otherwise,<sup>201</sup> which was completely in accordance with German law.<sup>202</sup> The final ground became some

<sup>192</sup> To discuss the draft revision in its entirety would fall beyond the scope of this article. The following will therefore only deal with the proposed amendments concerning the grounds for divorce and separation from bed and board.

<sup>193</sup> J.J. Schrieke, *Verordnung des Generalsekretärs im Ministerium für Justiz über die Ehescheidung, die Trennung von Tisch und Bett und einige einschlägige Sachgegenstände 1944*: NIOD, acc. no. 020, inv. no. 2414.

<sup>194</sup> *Ibid.*, Art. 1, I: “[...] 3) veroordeeling [...] wegens een onteerend misdrijf; [...]”

<sup>195</sup> *Ibid.*, Art. 1, I: “[...] 4) misdrijf tegen het leven of zware mishandeling, door den eenen echtgenoot begaan jegens den anderen; [...]”

<sup>196</sup> *Ibid.*, Art. 1, I: “[...] 5) voortgezette weigering om tot het verwekken of ontvangen van kinderen mede te werken, zonder dat hiervoor een redelijke grond aanwezig is; [...]”

<sup>197</sup> *Ibid.*, Art. 1, I: “[...] 6) storing der geestvermogens bij een der echtgenoten, waardoor iedere geestelijke gemeenschap opgeheven is, terwijl herstel uitgesloten moet worden geacht; [...]”

<sup>198</sup> *Ibid.*, Art. 1, I: “[...] 7) ernstige besmettelijke of afschuwwekkende ziekte bij een der echtgenooten, terwijl de genezing der ziekte of het verdwijnen van het besmettingsgevaar binnen afzienbaren tijd niet kan worden verwacht [...]”

<sup>199</sup> *Ibid.*, Art. 1, I: “[...] 8) voortijdige onvruchtbaarheid van een der echtgenooten, mits uit het huwelijk geen kind is geboren.”

<sup>200</sup> Schrieke, *Toelichting 1944*, 2: NIOD, acc. no. 020, inv. no. 2414.

<sup>201</sup> The new draft still included the provision which allowed the court to deny a claim for divorce, which was submitted on ground six, seven, eight or nine, in case the other spouse would be disproportionately affected by a divorce, or in case the court considered a divorce not justified from a moral point of view. The duration of the marriage, the respective age of the spouses and the cause of the disease, infertility or breakdown had to be taken into account in this respect. See Schrieke, *Verordnung 1944*: NIOD, acc. no. 020, inv. no. 2414, Art. 1, I: “[...] In de gevallen, onder 6o.-9o. vermeld, zal de rechter de vordering tot echtscheiding afwijzen, wanneer de andere echtgenoot door echtscheiding onevenredig hard zou worden getroffen of de vordering anderszins uit zedelijk oogpunt niet gerechtvaardigd is. Bij de beoordeling hiervan zal met de begeleidende omstandigheden als den duur van het huwelijk, den leeftijd der echtgenooten en de oorzaak van de ziekte, de onvruchtbaarheid of de ontwrichting rekening moeten worden gehouden.”

<sup>202</sup> dRGBL. 1938 I S. 807, § 54: “In den Fällen der §§ 50 bis 53 darf die Ehe nicht geschieden werden, wenn das Scheidungsbegehren sittlich nicht gerechtfertigt

sort of residual category, described as other serious facts, which had caused a permanent breakdown of the marriage that was beyond repair and therefore would render a community according to the essence of marriage impossible, i.e. it would no longer lead to offspring.<sup>203</sup>

Although in his letter to Krug Schrieke had explained that he had sought conformity with the German Marriage Law, he had nevertheless held on to the legal concept of separation from bed and board, although this did not exist in the German Marriage Law. In the Netherlands, Schrieke explained, this concept was deeply rooted in national custom. However, the nature of the concept was changed in this draft revision. Originally, separation from bed and board had been intended as an independent legal concept, a full alternative to divorce. In the new set-up separation from bed and board would merely serve as some sort of pre-phase, as a build-up to a full divorce. Therefore, separation from bed and board had to meet the same requirements as divorce, but could more easily be converted into a full divorce.<sup>204</sup>

As in the previous draft, this draft revision proposed to abolish Article 288 (2) BW, which allowed for separation from bed and board in case of excesses, ill-treatment and serious insults

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ist. Dies ist in der Regel dann anzunehmen, wenn die Auflösung der Ehe den anderen Ehegatten außergewöhnlich hart treffen würde. Ob dies der Fall ist, richtet sich nach den Umständen, namentlich auch nach der Dauer der Ehe, dem Lebensalter der Ehegatten und dem Anlaß der Erkrankung oder der Unfruchtbarkeit.“

<sup>203</sup> Schrieke, Verordnung 1944: NIOD, acc. no. 020, inv. no. 2414, Art. 1, I: „[...] 9) andere ernstige feiten, welke tot een zoodanige ontwrichting van het huwelijk hebben geleid, dat dit tot in zijn grondslagen is aangetast en het herstel eener met het wezen van het huwelijk overeenstemmende levensgemeenschap niet kan worden verwacht.“

<sup>204</sup> Letter from Schrieke to Krug, (8 June 1944), point III: NIOD, acc. no. 020, inv. no. 2414.

by one spouse towards the other.<sup>205</sup> Furthermore, the procedure which had to be followed in order to obtain a separation from bed and board was simplified by abolishing Articles 291 to 296 BW, effectively abolishing the possibility of separation from bed and board by mutual consent.<sup>206</sup>

Dissolution after separation from bed and board was simplified as well, by shortening the minimum term of separation before divorce could be requested from five to three years.<sup>207</sup> Furthermore, the draft revision again proposed to abolish Article 256, dismissing the possibility of having a dissolution after separation from bed and board being obstructed by an unwilling spouse.<sup>208</sup> All these revisions had already been suggested by the first draft. Additionally, this draft proposed to simplify the reconciliation procedure,<sup>209</sup> although the term “reconciliation” was replaced by “reunification”.<sup>210</sup>

To what extent had Schrieke, by drafting his revision of Dutch divorce law, been influenced by National Socialism? It is safe to say that Schrieke had to a large extent been inspired by the German Marriage Law of 1938. The fifth up to and including the ninth ground for divorce were all, more or less, taken from the German Marriage Law. All these new grounds aimed to promote healthy, strong offspring, whilst eliminating the weaker in society. The essence of marriage was to serve the community. Children, therefore, always remained the first goal of marriage. If a marriage had lost its value to the community, it should be discontinued. In his explanatory memorandum Schrieke presented his second draft also as a solution to the judicial

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<sup>205</sup> Schrieke, Verordnung 1944: NIOD, acc. no. 020, inv. no. 2414, Art. 2, I.

<sup>206</sup> *Ibid.*, Art. 2 III.

<sup>207</sup> *Ibid.*, Art. 3 I.

<sup>208</sup> *Ibid.*, Art. 3 II.

<sup>209</sup> *Ibid.*, Art. 3 III–V.

<sup>210</sup> See e.g. *ibid.*, Art. 2 V.

monstrosity of “the Big Lie”.<sup>211</sup> However, both in his letter to Krug and in his explanatory memorandum Schrieke admitted that he had sought conformity with the new German Marriage Law<sup>212</sup> and this clearly appears from the draft. Before the war Dutch lawyers had already pleaded for the inclusion of insanity as a ground for divorce. Schrieke adopted this point of view, but added several extra grounds which had not been discussed in the Netherlands before in such an extensive way. The Christian notion of marriage as an eternal bond between two persons through fair and foul was brushed aside by Schrieke. He stood his ground that one of the prime foundations of marriage – its natural purpose – was procreation.<sup>213</sup> In his explanatory memorandum belonging to the first draft Schrieke had already stated that in a healthy Volksgemeinschaft it should be possible to get a divorce when one of the partners refused to procreate. When a marriage had lost its value to the community, divorce would be the only option.<sup>214</sup> From his letter to Krug it appears that Schrieke considered adapting Dutch matrimonial law along the lines of National Socialism inevitable. He even indicated that he took courage from the idea that, despite objections raised at the time, many would be grateful for all the work already finished when the time came for the redevelopment of the Netherlands under the “New Order”.<sup>215</sup>

<sup>211</sup> Schrieke, Toelichting 1944, 1–2: NIOD, acc. no. 020, inv. no. 2414.

<sup>212</sup> Letter from Schrieke to Krug, (8 June 1944), point II: NIOD, acc. no. 020, inv. no. 2414; Schrieke, Toelichting 1944, 3: NIOD, acc. no. 020, inv. no. 2414.

<sup>213</sup> Schrieke, Toelichting 1944, 2: NIOD, acc. no. 020, inv. no. 2414; Schrieke, Erläuterung des Verordnungsentwurfs, 1942, 4: NIOD, acc. no. 020, inv. no. 2414.

<sup>214</sup> Schrieke, Erläuterung des Verordnungsentwurfs, 1942, 3–4: NIOD, acc. no. 020, inv. no. 2414.

<sup>215</sup> Letter from Schrieke to Krug, (8 June 1944), point X: NIOD, acc. no. 020, inv. no. 2414.

However, whether the nazification of divorce law was the starting point of his draft revisions remains to be seen. The need for a revision of Dutch divorce law was evident, both to proponents and to opponents of divorce. Although the timing was definitely off, Schrieke’s considerations are to a certain extent not that unreasonable, in particular not in the light of the last failed attempt of 1938. To some extent Schrieke just picked up the thread where it had been dropped by Goseling. This impression is strengthened by the fact that none of Schrieke’s drafts made any mention of mixed marriages, nor did they seem to provide for the possibility to dissolve mixed marriages through indirect ways. Contrary to the German Marriage Law<sup>216</sup> Schrieke’s drafts did not contain an article which allowed for divorce because of a permanent breakdown of the marriage due to unspecified reasons. On the contrary, divorce remained an exception, judging by the fact that Schrieke did not touch the prohibition of divorce by mutual consent.

However, although perhaps not the starting point, with his draft revision Schrieke nevertheless would have provided the occupying forces with a strong tool to restructure Dutch family life according to National Socialist principles. With a view to a possible annexation of the Dutch brother nation to the Aryan Third Reich, the need for this restructuring was evident.

On 12 January 1945 Schrieke’s proposal was forwarded to Ministerialdirektor (deputy secretary at the Reich Ministry of Justice) Josef

<sup>216</sup> See dRGBI. 1938 I S. 807, § 55 (1): “Ist die häusliche Gemeinschaft der Ehegatten seit drei Jahren aufgehoben und infolge einer tiefgreifenden unheilbaren Zerrüttung des ehelichen Verhältnisses die Wiederherstellung einer dem Wesen der Ehe entsprechenden Lebensgemeinschaft nicht zu erwarten, so kann jeder Ehegatte die Scheidung begehren.”

Altstötter, with the request to study the draft.<sup>217</sup> However, Germany's position in the war rapidly deteriorated in 1945, which left the proposal lying on the desks. On Friday 4 May 1945 at the Lueneburg Heath, Admiral Von Friedeburg signed the capitulation of the German troops in North-West Europe including the Netherlands.<sup>218</sup> General Blaskowitz signed the elaborate conditions for capitulation on Sunday 6 May 1945.<sup>219</sup> Schrieke's proposal for the revision of Dutch divorce law has therefore never been enacted.

## 5.6 Divorce cases during the occupation

As the grounds for divorce were not changed during the occupation, a legal way to dissolve mixed marriages did not exist. The occupants did try to convince the Aryan partners to file for divorce, but with limited results, as being married to a non-Jew to a certain extent protected the Jewish partner from deportation. People were therefore reluctant to file for divorce, as the consequences might have been severe.<sup>220</sup> The pressure for the Aryan counterpart to file for divorce was high though; De Jong describes a case in which a mixed-married Jewish man (who had even been sterilised) was arrested. When his Aryan wife applied to *Sturmscharführer* (Sergeant Major) Fischer, she was told she would be granted sixty Dutch guilders a week if she filed for divorce. She refused and her husband was deported to Auschwitz.<sup>221</sup>

With regard to marriages between a "full-Jew" (someone with three or four Jewish grandparents) and a "half-Jew" (someone with only two

Jewish grandparents) the number of divorce requests however did increase. According to the definition of a Jew given in a regulation from Reichskommissar Seyss-Inquart of 22 October 1940<sup>222</sup> a "half-Jew" was put on the same footing as a "full-Jew" if he or she was married to a Jew on 9 May 1940 or married a Jew after that date. Divorce could therefore significantly "improve" the status of the "half-Jew".<sup>223</sup>

We must bear in mind though that if someone decided to file for divorce in order to end a mixed marriage, this had to be done on the basis of one of the existing grounds. The options were therefore extremely limited. The only "open ground" Dutch divorce law offered, albeit unintentionally and very reluctant,<sup>224</sup> was the practice of "the Big Lie". Dutch judicial practice concerning divorces therefore did not change substantially during the occupation. On the contrary, the discussion about the possible extension of the grounds for divorce continued in the literature in the same fashion as before the occupation.<sup>225</sup>

In one way though the grounds for divorce were somewhat widened during the occupation, because of a reinterpretation by the Supreme Court of the third ground for divorce. As said, until 1884 this ground had read as "a sentence to

<sup>222</sup> Verordnung des Reichskommissars für die besetzten niederländischen Gebiete über die Anmeldung von Unternehmen vom 22. Oktober 1940, *Verordnungsblatt für die besetzten niederländischen Gebiete* (1940), 546.

<sup>223</sup> ASSER, *Natuurlijke personen* 1169.

<sup>224</sup> Despite this reluctance the Dutch Supreme Court did decide that the fact that an adulterous act committed by one spouse had been abetted by the other was irrelevant for the question whether or not the divorce was granted. See Hoge Raad, 2 January 1941, *Nederlandsche Jurisprudentie* (1941) no. 479.

<sup>225</sup> See in this respect a polemic between J. van NES and G.J.H. KUIJK in the *Nederlandsch Juristenblad* in 1944: NES, *Het echtscheidingsvraagstuk* 21–22; KUIJK, *Het echtscheidingsvraagstuk* 37; NES, *Naar den Censor* 70–72; KUIJK, *De censor voor echtscheidingen* 101.

<sup>217</sup> Letter from Krug to Altstötter, (12 January 1945): NIOD, acc. no. 020, inv. no. 2414.

<sup>218</sup> JONG, *Koninkrijk der Nederlanden* 10b, 1331.

<sup>219</sup> *Ibid.*, 1359. The full text of the conditions for capitulation is published in the report of the *Enquêtecommissie Regeringsbeleid 1940–1945, Verslag houdende de uitkomsten van het onderzoek* 581–583.

<sup>220</sup> ASSER, *Natuurlijke personen* 1169.

<sup>221</sup> JONG, *Koninkrijk der Nederlanden* 7, 394.

a degrading punishment". In 1884 this was changed to "a sentence to a minimum of four years' imprisonment". Before the revision, the Supreme Court had ruled in its judgment of 2 October 1851<sup>226</sup> that this ground could only be applied to Dutch criminal sentences, as it would be impossible to come to a uniform interpretation of the phrase "degrading punishment" with regard to sentences pronounced abroad. Therefore, a foreign conviction could never serve as ground for divorce. However, because of the 1884 revision the Supreme Court decided the opposite in 1943, in a case concerning a man who had been sentenced to life imprisonment by a German "Feldkriegsgericht" on charges of espionage. Since the phrase "a minimum of four years' imprisonment" was objectively measurable, the Court considered that by this revision the legislator had had the explicit intention to make the provision applicable to foreign convictions as well.<sup>227</sup>

## 6. Conclusion

Was divorce law in Austria and the Netherlands influenced by National Socialism? To answer this question, again, we first have to look at Germany.

The influence of National Socialism on German divorce law is beyond dispute. All new grounds for divorce that were introduced in the Marriage Law were focussed on protecting the Volksgemeinschaft, that is, when offspring was no longer to be expected, divorce should be granted. Although these changes were presented as being introduced out of compassion for the unfortunate healthy spouse, the main reason was to assure procreation. For that purpose, the weaker

partner could be abandoned. Hitler had already stated in "Mein Kampf" that the world "belongs only to the forceful 'whole' man and not to the weak 'half' man".<sup>228</sup>

However, it would be going too far to unequivocally conclude that German divorce law was completely "nazified". It is important to realise that the amended grounds for divorce still departed from the guilt principle. § 55 of the Marriage Law seemed to introduce the breakdown principle, but was mitigated by the guilt principle. Divorce on the mere ground that the marriage was permanently disrupted, whatever the cause might be, so that offspring was not to be expected, was not allowed. The general breakdown principle was never accepted by the National Socialists due to conservatism, a fear for an unlimited increase in the number of divorces and a loss of control. Apart from that, introducing the breakdown principle, albeit in a mitigated form, did not turn the law into a Nazi law. Divorce regulations in Germany were rather obsolete and in need of replacement. Most likely the breakdown principle would have been introduced at a certain point anyway.<sup>229</sup> On the other hand we have to remark that the breakdown principle as introduced by the National Socialists started from the National Socialist way of thinking; it was not up to individuals to decide whether their marriage was over; instead, the value of the marriage for the Volksgemeinschaft was the decisive factor.

The sting was in the so-called Generalklauseln, the open norms. The existence of these open norms, instead of concrete provisions, however, allows for reinterpretation and application in a different way than originally intended, without altering a single word in the provisions themselves. This is what the National Socialists had

<sup>226</sup> Hoge Raad, 2 October 1851, *Nederlandsche Regtspraak*, vol. 40 (1852) 1–3.

<sup>227</sup> Hoge Raad, 5 March 1943, *Nederlandsche Jurisprudentie* (1943) no. 203.

<sup>228</sup> HITLER, *Mein Kampf* 282. "[Sie] gehört nur dem kraftvollem 'Ganzen' und nicht dem schwachen 'Halben'". Translation by MANHEIM 257.

<sup>229</sup> See in this respect also GRUCHMANN, *Ehegesetz* 79.

done with the open norms that had existed in the Civil Code of 1900 before legislation that incorporated National Socialist principles came into force, and this is also what happened after the fall of National Socialism. We discussed the two open norms found in the Marriage Law of 1938: *Wesen der Ehe* (essence of marriage) and *sittlich nicht gerechtfertigt* (morally unjustified), which were interpreted according to National Socialism until May 1945. In 1946, the allied “Kontrollrat” (Control Council) largely took up the 1938 Marriage Law.<sup>230</sup> Only the sections that referred to either the Blood Protection Law or the Marriage Health Law<sup>231</sup> and the sections that were focussed too much on either the purity<sup>232</sup> or the expansion<sup>233</sup> of the Aryan race were deleted, leaving the greater part of the Marriage Law as it was, including the open norms. However, it was exactly because of these open norms that the greater part of the Marriage Law remained. Rütters explains that based on Kontrollratsgesetz No. 16 of 1946 a new interpretation of the open norms “essence of marriage” and “morally unjustified” was given by the German Supreme Court (Bundesgerichtshof). According to the Supreme Court, marriage should never be regarded as having to serve an ideological principle or an anonymous collective (like the state, race or community), nor an abstract idea of duty with regard to this anonymous collective.<sup>234</sup> Marriage was again regarded as a bond for life, according to the Christian notion of marriage as an institution.<sup>235</sup>

The continuity of the Marriage Law of 1938 is also clearly visible in Austria. It is safe to say that in Austria this law has had an even greater impact than in Germany, as it introduced obligatory civil marriage for all Austrians irrespective of their religious background, and it allowed for divorce, again for all Austrians irrespective of their religious background. The Marriage Law of 1938 forms the basis of Austrian matrimonial law even to this day, although it has been amended several times. The first major changes were made in 1945, right after the fall of National Socialism, when laws from the Nazi period were continuously being repealed. The Nuremberg Laws, for example, were already repealed on 13 May 1945.<sup>236</sup> A month later it was decided to keep the Marriage Law, although all references to the Nuremberg Laws and the Marriage Health Law were repealed. The Marriage Health Law was repealed at the same time.<sup>237</sup> Because of this continuity, we can conclude that the National Socialists have influenced Austrian matrimonial law to a large extent. However, it is not so much National Socialism as the National Socialists that have influenced Austrian matrimonial law, as the German authorities simply developed the Marriage Law from the basis of German matrimonial law, which had already recognised obligatory civil marriage and divorce for all citizens. The shift in the landscape with regard to Austrian marriage and divorce law therefore should not be considered in the light of National Socialism as such, but as a highly necessary modernisation, made possible through the absolute power of the National Socialists.

<sup>230</sup> Kontrollratsgesetz Nr. 16 (Ehegesetz) vom 20. 2. 1946, Amtsblatt des Kontrollrats in Deutschland (1946) 77.

<sup>231</sup> In that respect the following sections were deleted: § 4, § 5, § 20, § 28 (1) and § 29.

<sup>232</sup> In that respect § 13 was deleted.

<sup>233</sup> In that respect § 48 and § 53 were deleted.

<sup>234</sup> RÜTTERS, Auslegung 413.

<sup>235</sup> GRUCHMANN, Ehegesetz 82–83; RÜTTERS, Auslegung 412–416, 420–429.

<sup>236</sup> Kundmachung der Provisorischen Staatsregierung vom 13. Mai 1945 über die Aufhebung der Nürnberger Rassengesetze (1. Kundmachung über die Aufhebung von Rechtsvorschriften des Deutschen Reiches), StGBI. 14/1945.

<sup>237</sup> Gesetz vom 26. Juni 1945 über Maßnahmen auf dem Gebiete des Ehegesetzes, des Personenstandsrechtes und des Erbgesundheitsrechtes, StGBI. 31/1945.

Even though divorce law was effectively not amended in the Netherlands during the German occupation, the same line of reasoning can be applied here. In the Netherlands it had been decided long before the German invasion that a revision of divorce law was needed. The 1883 “Big Lie” judgment of the Supreme Court had created an inexpedient leeway with regard to the use of “adultery” as a ground for divorce, in practice allowing for divorce by mutual consent. Like in Germany, expanding the grounds for divorce from the guilt principle to the breakdown principle, in particular including incurable insanity as a ground for divorce, had been discussed extensively before. We have seen that Schrieke’s attempts to revise Dutch divorce law were largely motivated by his desire to end “the Big Lie”. This does not alter the fact that the German Marriage Law served as an example when Schrieke drafted his revision, but it would be going too far to call his draft National Socialist. It is more likely that Schrieke wanted to kill two birds with one stone, while ending “the Big Lie” remaining his primary concern.

Revisions of marriage and divorce law and especially divorce law seem to be primarily inspired by slowly changing social standards, an expression of “O Tempora, O Mores”, rather than an explosive rise of an extreme “ideology”. Religion has long been the main factor of influence on divorce law. When the influence of religion declined – especially since the 1960s – the rules regarding divorce became less stringent. This is clearly visible in the Netherlands where the grounds for divorce were not widened until 1971, almost 30 years after the end of the Second World War. Apparently, it had not been considered fully socially acceptable before. It is likely that the grounds for divorce would have been expanded anyway, both in Germany and in the Netherlands. The National Socialists used drafts and arguments that already existed, and used their position of absolute power to push those drafts, slightly adapted to their own ideas,

though. “Polderen”, solving problems through dialogue, is not necessary for a dictator.

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## Abbreviations:

BW     Burgerlijk Wetboek (Dutch Civil Code)  
 NIOD   Netherlands Institute for  
           War Documentation  
 Rv     Wetboek van Burgerlijke Rechtsvordering  
           (Dutch Code of Civil Procedure)

Siehe auch das allgemeine Abkürzungsverzeichnis:  
 [<http://www.rechtsgeschichte.at/files/abk.pdf>]



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