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Consent to a Jewish Marriage in Legislation of the Free City of Cracow (1815–1846)*

Piotr Michalik**

Abstract

The aim of this paper is to present an analysis of the legislation of the Free City of Cracow (1815-1846) concerning an institution of a consent to a Jewish marriage. From the analysis it occurs that the so-called emancipation of Jews, introduced in Cracow with the enlightened reform of Austrian rulers after the third partition of Poland in 1795, was continued under the autonomous government of the Free City. The process was significantly supported in 1810 by the introduction of the Napoleonic Code in Cracow, then a part of the Duchy of Warsaw. The implementation of civil marriage and civil registry required by the Code was also conducted against the Jews, which was underlined in the Statute of organizing Orthodox Jews of 1817. Due to the resistance of the most of the Jewish community, the act of 1821 made performing an exclusively religious marriage a crime, and legitimization of illegitimate children born of such a marriage inadmissible. However, these and other strict measures introduced by the subsequent acts of 1838 and 1844 did not fulfil their aim up to the end of the existence of the Free City in 1846.

Keywords: Jewish marriage; consent to marriage; legislation of the Free City of Cracow; legal status of Jews; Poland.

1. Introduction

Together with the incorporation of Cracow and its vicinity into Austria within the third partition of Poland in 1795, Jews residing there were subject to the regulations of the Austrian Law. It meant the inclusion of the previously autonomous Jewish community¹ in Maria Theresa's and Joseph II's emancipation reforms.² Among numerous regulations issued by Vienna there were also the regulations concerning Jewish marriages. For instance, in 1773 in order to limit their number, concluding marriage depended on obtaining a special permit from the government authorities and paying a marriage fee.³ However, these rules were not complied, and Jews concluded marriage exclusively in the religious form (the so-called ritual one).⁴ After next legislative changes, finally in Joseph II's Patent of Toleration of

1789, the previous limitations were lifted and Jewish marriages were subject to common civil law.⁵ Simultaneously, the obligation was introduced to use a fixed surname by all heads of family and keep Jewish birth, marriage and deaths certificates by chiefs of communes together with rabbi.⁶ These changes were also met with resistance which led to further compromises, for example, kinship impediments were adjusted to Jewish law and limitations of Jewish divorces to the procedure of the divorce letter in the circular of 1791.⁷

The aforesaid legal status was upheld after the implementation of the west-Galician civil code in Cracow in 1797, which similarly to the previous civil code of Joseph II of 1786 did not include particular regulations concerning Jewish marriages.⁸ Napoleonic wars brought changes to it, which resulted in the

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¹ Until 1795 the political system of the autonomous commune of Cracow had been regulated by the statute of 1595 – JAKIMISZYN, A., *The Jewish Community in Cracow – analysis based on the Cracow Community Charter of 1535 and supplements*. In: *Scripta Judaica Cracoviensia*, vol. 3, 2005, pp. 41-49.

² See GRODZISKI, S., *Stanowisko prawne Żydów w Galicji: reformy Marii Teresy i Józefa II (1772-1790)*. In: GRODZISKI, S., *Studia Galicyjskie. Rozprawy i przyczynki do historii ustroju Galicji*, Kraków, 2007, pp. 73-85. Regarding the 18th-19th century emancipation of Jews in Central and Eastern Europe see EISENBACH, A., *Emancypacja Żydów na ziemiach polskich 1785-1870 na tle europejskim*. Warszawa, 1988.

³ *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1794, no. 1, p. 4.

⁴ GRODZISKI, p. 77.

⁵ *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1789, no. 44, p. 105.

⁶ *Ibidem*, p. 106. Certificates should have been written in German. Till the present day the Jewish certificates from the Kazimierz district from the years 1798-1809 have been preserved written in Latin and German. See, for example: *Geburtsbuch für der kasimierer Judengem 1798.-ANNO-1809*. In: *Akta stanu cywilnego Izraelickiego Okręgu Metrykalnego w Krakowie* (hereafter *Akta IOM*), Archiwum Państwowe w Krakowie (hereafter APwK), reference no. 29/1472/0/1/1, <https://szukajwarchiwach.pl/29/1472/0/1/1#tabJednostka> (access 25. 11. 2019).

⁷ *Continuatio Edictorum et Mandatorum Universalium in Regnis Galiciae et Lodomeriae*. PILLER, T. (Ed.), Lwów, 1791, no. 13, pp. 29-30.

⁸ DZIADZIO, A., *Powszechna Historia Prawa*. Warszawa, 2008, p. 157.

inclusion of Cracow to the Duchy of Warsaw pursuant to the peace of Schönbrunn of the 14th of October 1809. It also meant the inclusion of the Jewish population in the new governing law, the framework of which was marked by the constitution of the Duchy of the 22nd of July 1807 octroyed by Napoleon. Formally, it implemented equality of all citizens before the law in art. 4.⁹ Nonetheless, in practice under the royal decrees of the 7th of September and the 17th of October 1808, this regulation in the scope of political laws was suspended regarding Jews for 10 years, “hoping that they will destroy in themselves characteristics which distinguish them so much from other inhabitants”.¹⁰ But the above restriction did not concern civil law which was regulated in the Duchy by the Napoleonic Code since the 1st of May 1808, commonly introducing the secular model of marriage.¹¹ Therefore, formally the latter was implemented against the Jews of Cracow on the 15th of August 1810.¹²

The implementation of the Napoleonic Code in the Duchy of Warsaw was connected with the necessity to appoint registrars authorised to draw up vital records required by the code. According to the French model, they should be laypersons. The government of the Duchy tried to execute this principle, but the administrative reality of the Duchy required entrusting this function also to clergymen. Initially, they were Catholic rectors exclusively who were to perform duties of registrars in the country.¹³ However, pursuant to § 24 of the decree of the 9th of May 1808 on conscription, “priests of the Greek Catholic rite, pastors of Evangelic religions [and] Rabbis” were made responsible to “keep books of certificates” *expressis verbis*.¹⁴ This rule was confirmed by art. 1 of the decree on the 23rd of February 1809 on fees for registrars, claiming that “The registrars are to be Clergymen performing parish duties”.¹⁵ However, owing to the suspension of Jews in the political rights, the regulations of this decree did not apply to Jewish rabbis.¹⁶ Consequently, the civil

registry for the followers of Judaism were probably drawn up by either clergymen of other religions or lay officials.¹⁷ The regulation adopted in the Duchy started to be applied in Cracow from August 1810, and the function of the registrars was performed mainly by Catholic clergymen.¹⁸ Yet, the separate vital records for Jews were kept by appointed officials of the city hall.¹⁹

Although the government of the Duchy of Warsaw worked to regulate Jewish persons’ legal status comprehensively which was to be based on the solutions already adopted in the Prussian Partition,²⁰ they were not introduced to the end of the existence of the Duchy.²¹ Instead, numerous partial administrative and legal regulations were implemented, restricting the rights of the Jewish population. For example, they were: decrees restricting civil rights such as the decree of the 19th November 1808 on depriving Jews temporarily of the right to purchase land property,²² decrees restricting freedom of residence such as the decree of the 16th of March 1809 on prohibition of Jewish people’s residence in some streets in Warsaw,²³ or decrees imposing special taxes on the population of Judaism such as the decree of the 25th of March 1809 on the kosher tax.²⁴ Together with the incorporation of Cracow into the Duchy, the “Jewish” regulations binding in it replaced the previous Austrian regulations,²⁵ but some of the latter were maintained in force, for instance, the Jewish family tax made effective pursuant to the patent of the 20th of August 1806.²⁶ Additionally, the rules of Jewish residence in the territory of Cracow and Kazimierz were regulated pursuant to the decree of the 19th of March 1812.²⁷

Napoleon’s defeat also finished the existence of the Duchy of Warsaw, and consequently, Cracow changed the political belonging for the third time during the generation. Under the treaty between Russian, Austria and Prussia of the 3rd of May 1815, attached to the final act of the Congress of Vienna signed

⁹ *Ustawa Konstytucyjna Księstwa Warszawskiego*. In: *Dziennik Praw Księstwa Warszawskiego*, Warszawa, 1810 (hereafter *DPKW*), vol. 1, p. II.

¹⁰ *Ustawodawstwo Księstwa Warszawskiego. Akty normatywne władzy najwyższej*. BARTEL, W., KOSIM, J., ROSTOCKI, W. (Eds.), Warszawa, 1964-1969 (hereafter *Ustawodawstwo KW*), vol. 1, pp. 142 and 148.

¹¹ *Dekret z 27 stycznia 1808 r.* In: *DPKW*, vol. 1, pp. 46-47.

¹² Binding force of the Napoleonic Code was extended to the areas taken from Austria in 1809 (including Cracow) since the 15th of August 1810 – *Dekret z 9 kwietnia 1810 r.* In: *DPKW*, vol. 2, pp. 220-221.

¹³ POMIANOWSKI, P. Z., *Funkcjonowanie francuskiego modelu rejestracji stanu cywilnego w Polsce*. In: *Czasopismo Prawno-Historyczne*, vol. 67, no. 1, 2015, pp. 95-97.

¹⁴ *DPKW*, vol. 1, p. 54.

¹⁵ *Ibidem*, vol. 1, pp. 195-196.

¹⁶ POMIANOWSKI, p. 100.

¹⁷ The issue is still waiting to be studied comprehensively.

¹⁸ SZPAK, J., *Inwentaryzacja metryk parafialnych Krakowa z XVI-XIX w. oraz ksiąg stanu cywilnego z pierwszej połowy XIX w.* In: *Studia Historyczne*, vol. 16, no. 1, 1973, p. 60.

¹⁹ See, for example: [Akta] *Urodzin Wyznania Mojżeszowego 1812 R.* In: *Akta IOM*, APwK, reference no. 29/1472/0/1/10, <https://szukajwarchiwach.pl/29/1472/0/1/10/#tabJednostka> (access 25. 11. 2019).

²⁰ Exactly on *Generalnym Urzędzeniu Żydów w prowincjach Prus Południowych i Nowo-Wschodnich* of the 17th of April 1797.

²¹ FILIPIAK, Z., *Projekt urzędzenia ogólnego ludności żydowskiej w Księstwie Warszawskim z 1809 r.* In: *Czasopismo Prawno-Historyczne*, vol. 68, no. 2, 2016, pp. 147-149.

²² *Ustawodawstwo KW*, vol. 1, p. 159.

²³ *Ibidem*, vol. 2, pp. 26-30.

²⁴ *DPKW*, vol. 2, pp. 34-36.

²⁵ *Dekret z 22 maja 1810 r. wprowadzający podatek od mięsa koszernego w departamentach „galicjskich” i dotyczący środków na umorzenie długów kahalnych*. In: *DPKW*, vol. 2, pp. 189-192.

²⁶ *Ibidem; Dekret z 14 czerwca 1810 r. ustalający na rok 1810 zasady uiszczania rozmaitych podatków w nowo do Księstwa Warszawskiego wcielonych departamentach galicjskich*. In: *Ustawodawstwo KW*, vol. 4, pp. 179-181.

²⁷ *Dekret zezwalającym Żydom krakowskim na zamieszkanie zarówno na Kazimierzu żydowskim, jak i katolickim*. In: *Ustawodawstwo KW*, vol. 3, pp. 235-237.

on the 9th of June 1815, Cracow together with its territory received the status of a free, independent and strictly neutral city protected by three partitioning powers.²⁸ Under the treaty, the initial political and legal framework of the Free City of Cracow was established by the constitution also of the 3rd of May 1815 attached to it.²⁹ Its decisions were to be specified by the Organizational Committee constituted by the protective powers on the 4th of July 1815.³⁰ It happened through the declaration of the new developed constitution on the 11th of September 1818.³¹ It was binding until 1833 when the Reorganizational Committee appointed by the protective powers prepared the text of the new third constitution of the Free City, announced on the 11th of September that year.³² The constitution of 1833, amended many times, was binding until the 6th of November 1846 when the protective powers annulled the decisions of the treaty of the 3rd of May 1815, ending the existence of the Free City of Cracow, the territory of which was incorporated into Austria on the 16th of November 1846.³³

2. Statute of organizing Orthodox Jews³⁴

Like the constitution of the Duchy of Warsaw, article III of the constitution of 1815 guaranteed equality of all citizens and legal protection for tolerated religions. This norm was confirmed by art. III of the constitution of 1818 and art. VI and III of the constitution of 1833. The latter *expressis verbis* granted legal protection for Judaism.³⁵ However, at the same time the constitutions of the Free City of Cracow excluded Jewish people from equality of “the use of civil and political rights,” to which only Christians were entitled.³⁶ In consequence, the constitution of 1818 in art. VII deprived Jews of franchise until “they acquire political rights,” and the constitution of 1833 upheld it solely in art. X.³⁷ Furthermore, it simply excluded Orthodox Jews from holding offices of a senator, judge, representative and

head of a commune in art. XII and XXI. It meant that on the strength of the constitution only, unlike the ruler’s decree in the Duchy of Warsaw, Jews were second-class citizens in the Free City.

The above constitutional regulations made up only the framework for reshaping of a legal status of Jews in Cracow, especially that they did not establish the scope of the use of civil rights by them. Based on Josephinism’s reforms and the attainment from the times of the Duchy of Warsaw, Cracovian political elites believed that such an establishment has to be provided for within the continuation of the emancipation process of Orthodox Jews. For this purpose as early as the end of 1815, the Senate of the Free City started work to prepare a complex regulation of rights and obligations of the Jewish community subordinate to it. The effect of almost-one-year-long work was the preparation of two projects which were delivered to the Organizational Committee after being approved by the Senate. Within the Committee, the final project of the regulation was drawn up by Józef Sweerts-Spork, its Austrian member, entitled *Rapport sur le système futur de Juifs*.³⁸ In April 1817 it was finally accepted by the other members of the Committee and made public by the Senate in the Official Gazette of Government Regulations as *The Statute of organizing Orthodox Jews in the Free City of Cracow and its Territory*, with the effect from the 1st of June 1817.³⁹

As it was indirectly indicated in the complex preamble and § 23 of the act, the implementation of its regulations was to lead to the gradual “civilization” of Jewish population which should happen by accepting “general customs” by them.⁴⁰ In the long term, they were to obtain complete civil and political rights. The latter *de lege lata* were only for the group of individuals who were the most “useful” for society. For instance, they were eminent artists and significant merchants, but on condition that they had already assimilated with the Christian

²⁸ *Traktat tzw. dodatkowy, dotyczący Krakowa zawarty przez Austrię, Prusy i Rosję*. In: *Pomniki prawa Rzeczypospolitej Krakowskiej 1815-1818*. TOKARZ, W. (Ed.), Kraków, 1932 (hereafter *Pomniki*), pp. 3-9.

²⁹ *Konstytucja Wolnego Miasta Krakowa*. In: *Pomniki*, pp. 10-15.

³⁰ *Instrukcja trzech mocarstw opiekuńczych dla Komisji organizacyjnej*. In: *Pomniki*, pp. 15-22. The Committee consisted of three representatives of powers and three citizens of the Free City of Cracow, but only in an advisory capacity.

³¹ *Konstytucja Wolnego Miasta Krakowa i Jego Okręgu*. In: *Historia ustroju i prawa w Polsce 1772/1775-1918, wybór źródeł*. KALLAS, M., KRZYMKOWSKI, M. (Eds.), Warszawa, 2006, pp. 183-190.

³² *Konstytucja Wolnego Miasta Krakowa i Jego Okręgu*. In: *Dziennik Praw (Wolnego Miasta Krakowa)*. Kraków, 1833-1846, <https://jbc.bj.uj.edu.pl/dlibra/publication/125635#description>; access 25. 11. 2019; (hereafter *Dziennik Praw*), 1833, no. 4711.

³³ See GOCLON, J. A., *Konstytucje Wolnego Miasta Krakowa z 1815, 1818 i 1833 r.* Warszawa, 1990. On the political system and law of the Free City of Cracow see BARTEL, W. M., *Ustrój i prawo Wolnego Miasta Krakowa (1815-1846)*. Kraków, 1976; MACIEJEWSKI, T., *Ustrój konstytucyjny Wolnych Miast (Państw, Terytoriów) Europy w latach 1806-1954. Studium prawnohistoryczno-porównawcze*. Warszawa, 2018; CICHON, P., *O rządach prawa w Wolnym Mieście Krakowie uwag kilka*. In: *Krakowskie Studia z Historii Państwa i Prawa*, vol. 5, no. 3, 2012, pp. 241-254.

³⁴ The terms *Orthodox Jew*, *Orthodox Jews* were used for Jewish people in Polish official documents of the Free City of Cracow.

³⁵ „La loi protège les Cultes tolérés, au nombre desquels est compris celui des Israélites”.

³⁶ Art. IV of the Constitution of 1833: „La différence des Cultes Chrétiens n’en établit aucune dans la jouissance des droits civils et politiquep.” Art. II of the constitution of 1815 and 1833 refers to social laws (*les droits sociaux*).

³⁷ „Ne jouissent pas du droit politique d’élection, même lorsqu’ils posséderaient d’ailleurs les qualités prescrites [...] Les individus professant des religions seulement tolérées, tels que les Juifs et autres non-chrétiens, avant d’avoir acquis les droits politiques.”

³⁸ JAKIMYSZYN, A., *Żydzi krakowscy w dobie Rzeczypospolitej Krakowskiej. Status prawny. Przeobrażenia gminy. System edukacyjny*. Kraków - Budapeszt, 2008 (hereafter JAKIMYSZYN), pp. 63-67.

³⁹ *Statut urządzający starozakonnych w Wolnym Mieście Krakowie i Jego Okręgu* (hereafter the Statute). In: *Dziennik Rozporządzeń Rządowych Wolnego Miasta Krakowa i Jego Okręgu*. Kraków, 1816-1822, <https://jbc.bj.uj.edu.pl/dlibra/publication/117530#description>; access 25. 11. 2019; (hereafter *Dziennik Rozporządzeń*), 1817, no. 1358. The date of the entry into force of the regulations of the Statute was established by the Senate in the decision of the 28th of May 1817 – *Dziennik Rozporządzeń*, 1817, no. 20.

⁴⁰ The Statute, the preamble; § 23.

society.⁴¹ In order to accelerate the process of assimilation, the Statute abolished a number of civil and administrative separations, which so far the Jewish population had been subject to. Firstly, it liquidated the qahal, reintroduced in the period of the Duchy of Warsaw, submitting Jews to “the power and surveillance” of head of communes.⁴² The cases “strictly religious” were only excluded from the competences of the heads of communes, which still were subject to rabbis. Among them, the rabbi’s right and obligation to record “any Religious acts, done in the Commune owing to Births, Marriages, Divorces or Deaths”⁴³ and issue religious verdicts were retained. However, with the stipulation that they should also be recorded in Polish (as authentic) and sent to the Senate every month.⁴⁴

Similarly to the case of the qahal, the Statute also reintroduced the obligation that each Jew has to have “a permanent family surname, inherited from Father to Son”.⁴⁵ In order to meet this obligation, the act called for conducting the census of the Jewish population, in which each family was to be ascribed *ex officio* a defined surname, but families with the surnames given in Austrian times kept them.⁴⁶ The possession of such a surname was the basis to obtain a certificate of “local-nationality” by the family head or an unmarried person, including “the description of a person, age, profession, status or employment.” According to the act, the certificate made up an elementary identity document of a holder, confirming the status of the resident of the Free City of Cracow and entitling to handle any administrative issues. However, the lack of the certificate was an offence which carried a penalty of 15-day arrest, and in case of persistence even a crime.⁴⁷

Continuing the legal status during the time of the Duchy of Warsaw, the Statute obliged registrars to keep separate records of Jewish birth, marriage, divorce and death.⁴⁸ These records were to be kept subject to the general conditions, i.e. in accordance with the appropriate regulations of title II of the first book

of the Napoleonic Code *On civil registry* (art. 34-101). Some of them, specifically art. 41, 43-45, 49, 53, 70-72, were changed in order to adjust them to the reality of the Duchy of Warsaw, becoming legally effective from the 18th of March 1809.⁴⁹ In accordance with art. 57 of the Napoleonic Code, in the birth certificate there were inscribed the date, hour and place of birth of a child, his sex and first names as well as parents’ and two witnesses’ first names, surnames, status of life (a job) and residence. Moreover, a registrar also recorded a date of notification and data of an informant if it was not a child’s father.⁵⁰ According to art. 76 of the Napoleonic Code, in the marriage certificate apart from the data of future spouses including first names, surnames, age, status of life (a marital status and possibly a job) as well as a place of birth and residence confirmed by birth certificates, parents’ and 4 witnesses’ analogous data were provided. In case of an underage bride or an underage groom, an official was obliged to affirm in the marriage certificate that parents gave their permission to it.⁵¹ Moreover, the notice of reported opposites, their abolition or lack, as well as dates of announcing 2 banns and a declaration on concluding marriage itself were entered into the records.⁵² While in case of death certificates, in accordance with art. 79 of the Napoleonic Code, a date of death, data of a deceased person, their spouse and witnesses, including an informant’s data were given.⁵³ The entries in vital records were provided in the continuous way, keeping numbering of next certificates.

Regardless of still a common obligation of civil registration, § 17 of the Statute also imposed an obligation to obtain a special permission of a head of a commune by Jewish spouses-to-be wanting to conclude marriage.⁵⁴ This permission could be issued on condition of meeting three cumulative prerequisites. The first one was having a marriage capacity according to the Napoleonic Code and meeting other prerequisites of civil law.⁵⁵ Secondly, “the Spouse-to-be should present a secure way

⁴¹ *Ibidem*, § 28. The confirmation of assimilation were to be residing (with the previous consent) in the Christian part of Cracow, the conduct of Polish or German, wearing Christian clothes and sending children to public schools (pursuant to § 13 Jewish public schools in the Free City of Cracow were liquidated).

⁴² *Ibidem*, § 1.

⁴³ *Ibidem*, § 3.

⁴⁴ *Ibidem*, § 7.

⁴⁵ *Ibidem*, § 16.

⁴⁶ In accordance with the Statute the census was conducted as early as 1817, and in 1818 the issuance of the certificates started – JAKIMISZYN, p. 76.

⁴⁷ The Statute, § 16 and 20.

⁴⁸ *Ibidem*, § 17.

⁴⁹ *Dekret z 18 marca 1809 r. dotyczący zastosowania przepisów Kodeksu Napoleona w sprawie aktów stanu cywilnego*, DPKW, vol. 1, pp. 231-236.

⁵⁰ See, for example: *Xięga I. Akt Stanu Cywilnego obejmująca Akta Urodzenia Przyznania i przysposobienia Osob Starozakomnych w Gminie VI. X i XI. Miasta Wolnego Krakowa zamieszkałych na Rok 1820*. In: *Akta IOM*, APwK, reference no. 29/1472/0/1/66, <https://szukajwarchiwach.pl/29/1472/0/1/66#tabJednostka> (access 25. 11. 2019).

⁵¹ In accordance with art. 144 of the Napoleonic Code, the age of a marriage capacity was respectively 18 for men and 15 for women. However, the persons of legal age had a possibility to get married independently as defined in provisions of art. 148 of the Napoleonic Code, i.e. those who turned respectively 25 and 21. Furthermore, art. 151 of the Napoleonic Code ordered the prospective spouses of legal age to turn to their parents before concluding marriage with the act of respect, i.e. a request for advice as for the concluded marriage. The mention of the act of respect should have been entered in the marriage certificate.

⁵² See, for example: *Akta Stanu Cywilnego Księga I. Akt Stanu Cywilnego obejmująca. Akta Zapowiedzi Małżeństw i Rozwodów między Osobami Starozakonnymi Gminy VI. X. i XI. Miasta Wolnego Krakowa. na 1820. Rok*. In: *Akta IOM*, APwK, reference no. 29/1472/0/2/68, <https://szukajwarchiwach.pl/29/1472/0/2/68#tabJednostka> (access 25. 11. 2019).

⁵³ See, for example: *Xięga I. Akt Stanu Cywilnego obejmująca Akta Zycia Osob Starozakomnych w Gminie VI. X. i XI. Miasta Wolnego Krakowa zamieszkałych na Rok 1820*. In: *Akta IOM*, APwK, reference no. 29/1472/0/3/71, <https://szukajwarchiwach.pl/29/1472/0/3/71#tabJednostka> (access 25. 11. 2019).

⁵⁴ The Statute, § 17.

⁵⁵ *Ibidem*, letter a). See footnote 53. JAKIMISZYN wrongly indicates the age of a marriage capacity as 21 for women and 30 for men (p. 81).

of living, for instance: that he owns land entered in the land registry, he deals with craft, he is a merchant, he is a son of a wealthy capitalist (a Rentier) or finally he earns a living as a farmer or a handicraftsman (Main d'Oeuvre).⁵⁶ Thirdly, postponed for six years from the announcement of the Statute, each “young man” was required to be able to read and write in Polish or German and know “first beginnings of arithmetic”, which should be confirmed by “the certificate issued by Superiors over schools”.⁵⁷ Formally, the consent of the head of the commune was not required for the marriage conclusion, but to conclude a prenuptial agreement (an engagement). Nonetheless, a sanction of an official deposition introduced in the same regulation for “permitting unlawful marriages” unambiguously indicates that it functionally referred to the marriage conclusion itself.⁵⁸ It is also confirmed by later regulations referring to this institution, which was named “a consent to conclude marriage”.⁵⁹

3. Act of 1821

The aim of the introduction of the consent was not only to control if Jews followed the regulations and to stimulate their assimilation, but first of all, to limit the number of marriages, and consequently the growth of the Jewish population as it had already been under the Austrian rule.⁶⁰ Yet, it occurred quickly that this goal would not be reached. It was already indicated in the preamble of the act dated on the 20th of December 1821 that “Orthodox Jews concluding Religious Marriages secretly and frequently overusing benefits of law, allowing to substitute evidence of their age with Acts of Notoriety,⁶¹ are trying to frustrate an intended aim in this way set up in the regulations of Civil Acts and the Statute of organizing Orthodox Jews”.⁶² Consequently, the regulations of the Statute were not observed as Jews either did not conclude civil marriages at all⁶³ or evaded the law with the use of doubtful testimonies of relatives and acquaintances. Furthermore, because of the fact that the term of “a wealthy capitalist”, whose son could get permission to conclude marriage, was indeterminate by § 17 letter b of the act

as well as a sanction provided for the head of the commune for granting it against the regulations of the Statute, the consents were issued for unauthorized persons.⁶⁴

To counteract “similar abuses”, the act of 1821, obligatory from the 1st of February 1822, stipulated a lot of sanctions for breaking the rules regulating Jewish civil marriages. Firstly, it modified the institution of act of notoriety in relation to Orthodox Jews.⁶⁵ It was to exclude bypassing civil prerequisites, and especially the age of capacity to marry. According to the amendment, the witness statements given for the needs of drawing up the act of notoriety were to be made under oath and in a prospective spouse’s presence for whom the testimony was given. Moreover, giving or trying to give a false testimony was qualified as a crime pursuant to § 178 of the first part of the penal code (the so-called *Franciszkana*), and in case “if it occurred that another person was substituted for the proper Person in order to circumvent the law” as a perjury pursuant to § 183 of this code.⁶⁶ The range of punishment for these crimes was very wide as it was from 6 months to a year of imprisonment in the basic type (§ 178 in relation to § 188 of the penal code) to life sentence in severe prison in the qualified type (§ 183).⁶⁷ However, the type of criminal offence itself, i.e. a crime and an amount of a potential sanction proves a highly preventive character of this regulation.

Not according to the penal code, but pursuant to art. 5 of the act of 1821, “Orthodox Jews concluding marriage in the Religious way, openly or secretly, not having concluded earlier a Marriage Agreement in the Civil way before the competent Registrar” were to be punished.⁶⁸ A financial penalty at the amount of one thousand Polish zloty, half of which was paid for an informer,⁶⁹ was imposed by the court on not only prospective spouses but also the clergy and witnesses assisting the religious ceremony. In case of the failure to pay it, which would concern most of the prospective spouses due to the amount of the financial penalty,⁷⁰ the court changed it into reformatory arrest at the amount of five days for each thirty Polish

⁵⁶ The Statute, § 17 letter b).

⁵⁷ Ibidem.

⁵⁸ Ibidem, *in fine*.

⁵⁹ *Dziennik Rozporządzeń*, 1822, no. 4831.

⁶⁰ See above, p. 2.

⁶¹ The institution of an act of notoriety was stipulated in art. 70 of the Napoleonic Code in case when the prospective spouses were not able to submit the birth certificate required to conclude marriage. The act of notoriety was made by the mayor or the head of a commune of the birthplace or residence (in the original text of the Napoleonic Code the local Justice of the Peace). In accordance with art. 71 of the Napoleonic Code, the act included the signed statements of two witnesses (in the original text seven) as to the personal data of the prospective spouse. Having made the act of notoriety, it was to be submitted before the justice of the peace court (in the original text the tribunal of the first instance), which having heard the file writer appearing then as a prosecutor (in the original text a prosecutor) approved of or refused to approve of the act (art. 72).

⁶² *Prawo o zapobieżeniu nadużyciom starozakonnych*. In: *Dziennik Rozporządzeń*, 1822, no. 4831 (hereafter Act of 1821).

⁶³ For instance in 1819 Cracow’s Jews making up about 29% of the population of the city, concluded only 47 civil marriages, but Christians as many as 1161 – JAKIMYSZYN, pp. 56 and 85.

⁶⁴ Act of 1821, the preamble.

⁶⁵ See above, footnote 63.

⁶⁶ Act of 1821, art. 3.

⁶⁷ *Księga ustaw na zbrodnie i ciężkie policyjne przestępstwa, cz. 1: O zbrodniach, cz. 2: Księga ustaw o ciężkich przestępstwach policyjnych i o sposobie z temiż postępowania*. Kraków, 1804 (hereafter *Franciszkana*). The Austrian penal law was in force in the Free City of Cracow. See PAULI, L., *Austriacki kodeks karny z 1803 r. w Wolnym Mieście Krakowie (1815–1833)*, cz. 1 i 2. In: *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace Prawnicze*, vol. 40, 1968 and vol. 46, 1970.

⁶⁸ Act of 1821, art. 5.

⁶⁹ Whose surname was to be classified.

⁷⁰ CICHON, P., *Z orzecznictwa Dyrekcji Policji Wolnego Miasta Krakowa – casus Oszyków*. In: *Studia Iuridica Lublinensia*, vol. 25, no. 3, 2016 (hereafter CICHON), p. 182.

złoty of the unpaid financial penalty. The additional sanction stipulated by art. 5 was an inadmissibility of legitimization of illegitimate children born in an exclusively religious marriage, both *per subsequens matrimonium* and by adoption. Consequently, the registrar who would write a legitimate descent in the birth certificate of such a child would also be subject to a financial penalty at the amount of five hundred Polish zloty, and in case of the second offence also a deposition.⁷¹

This last regulation was an element of specifying the range of clerical criminal offence “permission of unlawful marriages” in § 17 of the Statute postulated in the preamble of the act.⁷² Unlike this regulation which stipulated indeterminate punishment of vacating an office, the act of 1821 introduces a wide range of individuated sanctions against officials breaking its provisions. Furthermore, in order to decrease room left for possible abuses, a term of a wealthy capitalist from § 17 letter b of the Statute was specified.⁷³ Pursuant to art. 1 of the act of 1821, this was a person proving free of debt property at the amount of minimum twenty-five thousand Polish zloty. The son of such a capitalist had a right to claim a consent on condition of receiving “a gained fund” from his father at the amount of minimum five thousand Polish zloty.⁷⁴ Consequently, art. 2 of the act stipulated a financial penalty for heads of communes at the amount of one thousand Polish zloty and even a suspension or vacating an office if “they dared to issue a consent to conclude Marriage to Orthodox Jews who did not possess Qualifications under the Statute [...] and transcribed by this Act”.⁷⁵ Similarly, art. 4 of the act penalizes registrars for writing a Jewish marriage certificate earlier than after expiration of 30 days from the issuance of the consent by a head of a commune, but a financial penalty amounted to two hundred Polish zloty and vacating an office was permissible only after the third offence.⁷⁶

The amendments implemented by the act of 1821 to the regulation of § 17 of the Statute ultimately constituted the institution of a consent about marriage conclusion by Orthodox Jews in the Free City of Cracow. According to the act, the agreement was already issued not to conclude the prenuptial agreement but directly to conclude marriage. Additionally, obtaining a consent was a civil prerequisite of marriage validity, and in

the result its lack determined its invalidity. *Expressis verbis* art. 5 establishing children procreated in “the invalid marriage with respect to Civil regulations”,⁷⁷ and art. 4 implementing a sanction “under pain of nullity of the Act” for issuing a marriage certificate earlier than after expiration of 30 days from the issuance of the consent by a head of a commune.⁷⁸ The restrictions of statutory prerequisites to obtain a consent proved the importance of the amendments implemented by the act of 1821, and especially the penal sanctions established in it, the severity of which expressly indicates the preventive purpose. The additional formal requirements to issue an act of notoriety had an analogical aim, especially because of the fact that in practice it was a fundamental document confirming a marriage capability of prospective spouses.⁷⁹

4. Act of 1838 and its amendments

Similarly to the regulations of the Statute, the regulations of 1821 also did not produce the expected result. The majority of Jewish marriages were still concluded exclusively in the religious form.⁸⁰ In spite of that the authorities of the Free City of Cracow maintained the previous regulations. In addition, in connection with the expiry of 6-year binding force of the Statute on the 31st of May 1823, the obligation to confirm elementary Christian education by a groom stipulated in § 17 “was reminded” by the regulation of the Senate of the 15th of September 1824.⁸¹ The verification procedure of this prerequisite was also established in this regulation.⁸² The Assembly of Representatives decided to change regulations governing the institution of a consent after over 16 years, the 30th of January 1838.⁸³ The preamble of the new act admitted that the act of 1821 “was not sufficient to restrain Orthodox Jews from concluding Marriages secretly in the religious way, without the previous Certificate issued by registrars.” However, it also admitted that the reason of that state of affairs was the lack of “some rules to constitute evidence to convince of the Marriage concluded secretly” and that “the pain of penalty defined by this act [...] was not appropriate”.⁸⁴ Whereas in light of the content of this act, the last statement should have been understood as the conviction that the sanctions previously stipulated were too lenient.

⁷¹ Act of 1821, art. 5.

⁷² See above, footnote 60.

⁷³ See above, footnote 58.

⁷⁴ Act of 1821, art. 1.

⁷⁵ *Ibidem*, art. 2. If there were any doubts with regard to fulfilment of the requirements of the act by the prospective spouses, the head of a commune was obliged to put forward a request to the Governing Senate for a decision binding for him.

⁷⁶ *Ibidem*, art. 4.

⁷⁷ *Ibidem*, art. 5.

⁷⁸ *Ibidem*, art. 4.

⁷⁹ See, for instance: [*Alegata do akt małżeństw z 1820 r.*]. In: *Akta IOM*, APwK, reference no. 29/1472/0/2/70, <https://szukajwarchiwach.pl/29/1472/0/2/70#tabJednostka> (access 25. 11. 2019). The issue of the application of the provisions concerning the consent, in spite of the preserved archives, has not been studied comprehensively so far.

⁸⁰ In 1822 the Jews concluded only 31, and in 1823 only 44 legal marriages in Cracow – JAKIMYSZYŃ, p. 87.

⁸¹ See above, p. 8.

⁸² In: *Dziennik Rządowy Wolnego Miasta Krakowa i Jego Okręgu*. Kraków, 1816-1846, <https://jbc.bj.uj.edu.pl/dlibra/publication/124812#structure>; access 25. 11. 2019; (hereafter *Dziennik Rządowy*), 1824, no. 41-42. Also see *ibidem*, 1830, no. 36-37.

⁸³ In: *Dziennik Praw*, 1838, no. 539 (hereafter Act of 1838). JAKIMYSZYŃ does not mention this act, and CICHÓN gives the date of passing it by mistake on the 9th of March 1838 (p. 183).

⁸⁴ Act of 1838, the preamble.

Art. 1 of the new act stipulated that the fine would remain as a penalty for concluding a public or secret religious marriage without the previous conclusion of “the Marriage Agreement” before the registrar, but its amount was doubled up to the amount of one thousand Polish zloty from each prospective spouse.⁸⁵ Similarly, the length of the reformatory arrest penalty was increased up to 6 months for each prospective spouse. Yet, the penalties for the clergy and witnesses assisting the religious ceremony were not sharpened, stipulating it at the amount equal to the one stipulated for one of prospective spouses.⁸⁶ What is more, the new legal procedural measures were introduced in art. 2, which was by its nature legal evidence of the fact of the conclusion of an illegal religious marriage. Because the act provided that “legal evidence of this type of infringement in the light of lack of defendants’ own confession or evidence obtained from Witnesses or accessories, will also be two coincidences happening together with shared life. a) Upbringing offsprings. b) Cutting hair by a Woman, and c) the use of the Tallis (Tallith) by a Man”.⁸⁷

According to the will of the legislator, the regulations of the new act, being in force from the 1st of April 1838, substituted art. 5 of the act of 1821 overturned in whole. It meant that the authorities of the Free City of Cracow did not intend to amend the other regulations of the institution of the consent, and thus their previous policy towards Jewish marriages. However, the preamble of the act of 1838 itself indicated that the abolition of art. 5 of the act of 1821 resulted in an essential change in the status of the children coming from the religious marriages concluded without the consent. For “undeserved succession” which was a ban on legitimization of these children both *subsequens matrimonium* and adopted was abolished. The sanctions imposed on the registrars for entering such children as legal into birth certificates were also derogated.⁸⁸

The next amendments of the regulations concerning the consent were quite frequent, and their cause was still an effective resistance of Orthodox Jews to conclusion of civil marriages. Pursuant to the regulation of the Senate of the 9th of April 1839 announced on the 30th of April 1839, the competences to issue the consents were transferred to the Department of Interior and the Police,⁸⁹ to which the applications should be applied

through the medium of the Police Directorate in Cracow or the district superintendents in the District.⁹⁰ The regulation also ordered to submit prospective spouses the certificate of “local nationality” and allowed to substitute a birth certificate with an act of notoriety exclusively after submitting a registrar’s appropriate certificate about lack of the first one.⁹¹ Besides, the groom’s qualifying prerequisites from § 17 letter b of the Statute were tightened successively both in this regulation and next ones of: the 28th of December 1839 (announced on the 12th of February 1840),⁹² the 10th of December 1841 (announced on the 31st of December 1841)⁹³ and the 23rd of June 1843 (announced on the 15th of July 1843).⁹⁴ The new regulations required, for example, the confirmation of owned real property with a mortgage register or a notarial deed, and a performance of a job with the status of a guild foreman, suitable permits or payment of taxes or reliable witnesses’ testimonies. Additionally, the regulation of the 10th of December 1841 refused “to accept in this country” a wife of a citizen of the Free City of Cracow who married her abroad without the previously obtained consent.⁹⁵

5. The act of 1844

The numerous amendments of the regulations concerning the consent over the period of 1838-1843, similarly to the previous status quo in the years 1822-1838, also did not result in the increase in the number of Jewish civil marriages.⁹⁶ The reason for this was traditionally seen in “insufficiency” of adopted solutions as well as the lack of unification of the binding regulations. According to the preamble for the act of the Assembly of the Representatives of the 3rd of July 1844, this problem was to be finally solved by the new complex regulation, fully substituting § 17 letter b of the Statute and the acts of 1821 and 1838.⁹⁷ The new act, in force from the 1st of August 1844, maintained the institution of “permit to conclude marriages” issued Orthodox Jews by the Department of Interior and the Police in the Governing Senate.⁹⁸ The prerequisites necessary to obtain the consent were listed enumeratively in the comprehensive art. 1 of the act on the basis of the previous solutions, starting from lodging “certificates of the ability to read, write in Polish or German and the first beginnings of arithmetic”.⁹⁹

⁸⁵ The abolition of the provision referring to the transfer of half of the financial penalty for the informer probably indicates inefficiency of this means against cohesion of the Jewish community.

⁸⁶ Act of 1838, art. 1.

⁸⁷ *Ibidem*, art. 2.

⁸⁸ *Ibidem*, the preamble *in fine*. Also see above, pp. 9-10.

⁸⁹ Having abolished the organ of the head of a commune on the 1st of December 1838, his competences considering Jews, including the issuance of the consents, were transferred to the city or district superintendents. These organs were subject to the Police Directorate. See more CICHON, P., *Dyrekcja Policji Wolnego Miasta Krakowa 1827-1846. Studium historyczno-prawne*, Kraków, 2014.

⁹⁰ *Dziennik Rządowy*, 1839, no. 25, point 1.

⁹¹ *Ibidem*, point 2.

⁹² *Ibidem*, 1840, no. 6.

⁹³ *Ibidem*, 1841, no. 13.

⁹⁴ *Ibidem*, 1843, no. 93-94.

⁹⁵ *Ibidem*, 1841, no. 13, point 2.

⁹⁶ In 1831 the Jews concluded 50, and in 1834 – 75, and in 1843 only 67 legal marriages - JAKIMYSZYN, pp. 88 and 90.

⁹⁷ In: *Dziennik Praw*, 1844, no. 3106 (hereafter Act of 1844), the preamble and art. 5.

⁹⁸ *Ibidem*, art. 1 *in principio*.

⁹⁹ *Ibidem*, art. 1 points I-III.

Among the regulations accepted in 1844 there were also new ones which tightened or mitigated rigorism of the old ones suitably depending on the age of a groom. Because, on the one hand, in accordance with the act, each “Orthodox Jew who wanted to get married before reaching the age of thirty” was obliged to prove that “he has not differed from Christians in terms of clothes since the day of the announcement of this Act”.¹⁰⁰ On the other hand, “an Orthodox Jew after reaching the age of thirty, in spite of not having certificates of scientific nature” could receive a consent if he proved that “he has any way to earn money”. In this last case, however, on condition that he has not concluded a religious marriage previously and has not been cohabiting with the future wife.¹⁰¹ Additionally, a farmer was not subject to the requirement of fundamental Christian education who “personally has been doing farm work for three years, owned or leased a house and five morgen of ground”, but he was also required to wear Christian clothes before turning thirty.¹⁰²

The abolition of the act of 1821 and 1838 eliminated crimes from the legal system of the Free City of Cracow typified there. Nonetheless, the act of 1844 did not completely resign from the protection of its provisions in criminal matters. According to its art. 2, the conclusion of a religious marriage by Jews openly or secretly, but without the previous civil marriage was still a crime. But unlike under the previous acts, the act of 1844 referred to major police crimes in this respect of § 252 and § 253 part II of the penal code. Consequently, prospective spouses and “all Persons providing help in and enabling this type of marriage” answered for their action as for “the conclusion of marriage without dispensation against law” (§ 252), and their parents and guardians for “forcing their children to get married illegally according to the acts” (§ 253). The close arrest from three to six months was the sanction provided for by the code in both cases.¹⁰³ Although the substitutive penalty of reformatory arrest was similar to the one stipulated by art. 1 of the act of 1838 in terms of the length,¹⁰⁴ this punishment was a stricter penalty because the close arrest as a qualified form was applied with a lot of restrictions, especially with chained legs and a ban on uncontrolled visits.¹⁰⁵

Apart from the next restriction of prospective spouses’ responsibility for concluding the religious marriage, the act of 1844 also

punished them for the failure to report a birth of a child to a registrar in order to issue a birth certificate. The sanction for this action was a fine from 20 to 200 Polish zloty or an arrest from 3 to 20 days.¹⁰⁶ The last punishable act stipulated by the act of 1844 was also in connection with drawing up a child’s birth certificate. Art. 4 of the act ordered his parents to lodge a marriage certificate at the same time, about which a registrar was obliged to make a reference in a birth certificate under the pain of a fine at the amount of 500 Polish zloty. If the marriage certificate was not submitted, the child was registered as natural which like in the act of 1838 did not finish the process of his legitimization.¹⁰⁷ Similarly to substantive law, the act of 1844 also referred to the provisions of § 360 part II of the penal code in the scope of proceedings in the offence of the conclusion of a religious marriage. Consequently, circumstantial evidence indicating the conclusion of such a marriage calculated in art. 2 of the act of 1838¹⁰⁸ was qualified as “circumstances”, “coincidence” of which already constituted complete evidence of committing a crime from § 252 and § 253 part II of the penal code.¹⁰⁹

6. Conclusions

The regulations of the act of 1844 indicate that the purpose of the authorities of the Free City of Cracow was first of all to standardize the regulations governing the consent for the conclusion of marriage by Orthodox Jews. In spite of the abolition of § 17 letter b of the Statute and the acts of 1821 and 1838, the basic form of the institution of the consent was not amended. From the civil law perspective, the consent remained a non-code prerequisite of the validity of marriage, which is proved by the penal regulations of the act of 1844, regarding its failure as an impediment to marriage. Similarly, from the administrative law perspective, it remained to be a means stimulating assimilation of the Jewish community. Due to its preventive and repressive nature, it was the measure highly ineffective, which is proved by the statistics of Orthodox Jews’ civil marriages concluded in Cracow under the presented regulations.¹¹⁰ In spite of this, the Act of 1844 was retained in force after the incorporation of the Free City of Cracow to Austria in 1846.¹¹¹ The wider and more thorough evaluation of the institution of the consent could be made after doing research on practices of applying it, but this issue still awaits to be realized.

¹⁰⁰ Ibidem, art. 1 *in fine*. JAKIMYSZYN (p. 91) interprets this regulation incorrectly as general legitimacy to obtain a consent in the situation when it is an additional requirement in case of a groom under 30.

¹⁰¹ Act of 1844, art. 1 pkt IV. JAKIMYSZYN (p. 91) interprets this regulation incorrectly as the one including the requirement of general non-punishability or not being in the bigamous union in a case when the act only mentions charges of concluding marriage secretly (i.e. religious) or cohabiting.

¹⁰² Act of 1844, art. 1 point V.

¹⁰³ Ibidem, art. 2; *Franciszka*, part II, § 252-253.

¹⁰⁴ See above, pp. 12-13. Act of 1844 did not stipulate a financial penalty at all, which in practice was not applied a lot – CICHON, p. 188.

¹⁰⁵ *Franciszka*, part II, § 12.

¹⁰⁶ Act of 1844, art. 4.

¹⁰⁷ Ibidem.

¹⁰⁸ See above, p. 12.

¹⁰⁹ Act of 1844, art. 3; *Franciszka*, part II, § 360.

¹¹⁰ After the exceptional year of 1844 when Orthodox Jews concluded the record number of civil marriages in in the history of the Free City of Cracow, i.e. 102, the previous tendency did not change. In 1845 the number decreased to 40, and in 1846 to 37 – JAKIMYSZYN, p. 91.

¹¹¹ See MATANIAK, M., *Rada Administracyjna Miasta Krakowa i jego Okręgu (1846-1853)*. Kraków, 2019, p. 338-339.