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### *The Beginnings of the Secularisation of Marriage in Poland*

#### *The Introduction of Civil Marriages and Divorces in Cracow (1810–1818)*

*The incorporation, under the Treaty of Tilsit of 1807, of part of the Polish lands of the Prussian partition into the Grand Empire of Napoleon as the Duchy of Warsaw, opened the way to the implementation of the post-revolutionary provisions of marriage law of the Napoleonic Code in Poland. In 1810, this code was introduced in the lands of the Austrian partition annexed to the Duchy of Warsaw, with its centre in Cracow. The French secular model of marriage, although contradictory to the centuries-old Polish legal culture and the Catholic religion professed by the vast majority of the city's inhabitants, was nevertheless accepted by the political and legal elites of the time. Not only did it survive the fall of Napoleon, but under the autonomy of the Free City of Cracow it was maintained in 1818 and functioned until 1852, i.e. until the Austrians restored their mixed marriage model regulated by the ABGB.*

**Keywords:** *civil marriage, divorce, Napoleonic Code, Duchy of Warsaw, Free City of Cracow*

#### **1. The introduction of the marriage law of the Napoleonic Code in the Duchy of Warsaw (1808–1810)**

The defeat of Prussia in France's war with the Fourth Coalition (1806–1807) brought the "Polish question" back into the arena of European politics. The Peace of Tilsit, concluded by *Napoleon I* with *Alexander I* on 7 July and with *Frederick William III* on 9 July 1807, resolved to create from the lands of the Second and Third Prussian Partitions (excluding Gdańsk) the autonomous Polish state of the Duchy of Warsaw, politically part of Napoleon's *le Grand Empire*. On 22 July 1807, in Dresden, *Napoleon* approved the Constitutional Law of the Duchy of Warsaw "given to us in effect of the 5<sup>th</sup> article of the Treaty of Tilsit".<sup>1</sup> Its Article 69 provided that "the Napoleonic Code, shall be the civil law of the Duchy of Warsaw".<sup>2</sup> This provision was implemented by a decree of the Saxon King and Grand Duke of Warsaw, *Frederick August*, dated 27 January 1808, with effect from 1 May 1808,<sup>3</sup> and extended to the territories of the Third Austrian Partition incorporated into the Duchy of Warsaw in 1809, together with Cracow, on 15 August 1810.<sup>4</sup>

In this way, the French Code began its nearly one and a half century existence in Poland, as it was finally repealed on 1 January 1947.<sup>5</sup> However, in the field of marriage law, the history of

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<sup>1</sup> Dziennik Praw Księstwa Warszawskiego (vol. 1) II, XLIV–XLVI.

<sup>2</sup> Dziennik Praw Księstwa Warszawskiego (vol. 1) XXXV.

<sup>3</sup> Dziennik Praw Księstwa Warszawskiego (vol. 1) 46–47.

<sup>4</sup> Under the Decree of *Frederick Augustus* of 9 June 1810, Dziennik Praw Księstwa Warszawskiego (vol. 2) 220–221.

<sup>5</sup> Article 13 § 1 of the Decree of 12 November 1946, General Provisions of Civil Law (Dz.U.1946.67.369).

the applicability of the Napoleonic Code in the Polish lands is much shorter. On most of the territory of the Duchy of Warsaw, which was transformed into the Kingdom of Poland by the decision of the Congress of Vienna in 1815, the Napoleonic Code was in force in this respect only until the end of 1825, when it was replaced by the Polish Civil Code of the Kingdom of Poland.<sup>6</sup> In the territories incorporated back into Prussia by decision of the Congress, the provisions of the Civil Code were replaced by the regulations of the Prussian *Landrecht* of 1794 as early as in 1817.<sup>7</sup> Only in the small area of Cracow and its environs, i.e. the Free City of Cracow, did French marriage law become firmly established, until 1852. At that time, the Austrians, who had annexed the Free City in 1846, reinstated in Cracow their mixed marriage model regulated by the Civil Code of 1811 (ABGB).<sup>8</sup>

However, before the marriage law of the Napoleonic Code was actually implemented, the government of the Duchy of Warsaw had to meet the administrative requirements of implementing the new regulations. These provided for the operation of a state clerical and judicial apparatus prepared to apply the institution of civil marriage, marriage certificates, divorce judgments and acts of the proclamation of a divorce.<sup>9</sup> Meanwhile, until the establishment of the Duchy of Warsaw on the territory of the Second and Third Prussian Partitions of Poland, the religious system in force in the First Republic, in which the obligatory form of marriage and registration of marriage was a church wedding performed before a clergyman of a given religion, was maintained.<sup>10</sup> For Catholics, by virtue of the constitution of the Piotrków Sejm of 1577, it was subject to the regulations of the *Tametsi* Decree of 1563, and for other denominations and religions to their confessional norms.<sup>11</sup> The question of dissolution of marriage was also subject to the law and jurisdiction of the individual churches. The exception was the situation of Catholics, who constituted the majority of the inhabitants of the Duchy of Warsaw, for whom divorce before a church court was not allowed, but could be obtained before a State court under the provisions of the Prussian *Landrecht* of 1794.<sup>12</sup>

In the territory of the Third Austrian Partition including Cracow, a different legal state was in force. From 1 January 1798, the confessional system of the First Republic was replaced there by the Austrian mixed marriage law model of the West Galician Code of 1797 (WGC).<sup>13</sup> In practice, however, the differences were not significant. The obligatory form of marriage for all denominations was still the church wedding. In addition, the Austrian authorities left the registration of baptisms, marriages and deaths to the discretion of the Christian clergy, which had already been carried out by parish priests in parish books from the 16th century. In 1797, only the form of this registration was standardised by introducing the obligation to keep it on official printed forms in accordance with the Latin-Polish instructions, in separate books for baptisms, marriages and deaths.<sup>14</sup> Jews were also obliged to keep their own records, and were subject to the provisions of *Joseph II's* Patent of Toleration of 1789.<sup>15</sup> In the Austrian partition there was also the institution

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<sup>6</sup> Article 1 of the Act of 1 June 1825, Transitory Law (Dz.P.K.P.1825.10.41.291).

<sup>7</sup> POMIANOWSKI, *Rozwód w XIX wieku na centralnych ziemiach polskich* 69.

<sup>8</sup> Under the imperial patent of *Franz Joseph I* of 23 March 1852.

<sup>9</sup> See below, subchapter 2.

<sup>10</sup> PŁAZA, *Historia Prawa w Polsce* 47.

<sup>11</sup> KARABOWICZ, *Rewolucja w prawie osobowym małżeńskim* 175.

<sup>12</sup> POMIANOWSKI, *Rozwód w XIX wieku na centralnych ziemiach polskich* 63–65.

<sup>13</sup> DZIADZIO, *Powszechna historia prawa* 159.

<sup>14</sup> SZPAK, *Inwentaryzacja metryk parafialnych Cracowa* 54–58.

<sup>15</sup> MICHALIK, *Consent to a Jewish Marriage* 102.

of divorce pronounced by the state courts, but according to § 102, Part I of the WGC, it was inadmissible for Catholics, who could only obtain a declaration of separation (§ 103, Part I of the WGC). Thus, Austrian regulations, although adopting a secularised conception of marriage as a purely civil contract from the time of *Joseph II's Ehepatent* of 1783, were more conservative in this respect than Prussian regulations.

The common denominator of the Prussian and Austrian, and earlier Polish, orders was therefore to base the operation of marriage law on the ecclesiastical apparatus. This was contrary to the assumptions of the post-revolutionary French regulations, which provided for placing all matrimonial jurisdiction in the hands of secular State officers. Formally, such an assumption was followed by the government of the Duchy of Warsaw, but the actual state of affairs allowed for only a partial implementation, masked under the administrative slogan of ‘temporariness’. Such was the nature, formally, of the Instrument of Civil Act Officers in the Duchy of Warsaw issued by the Council of Ministers on 21 April 1808. It appointed city mayors and their deputies as civil registrars. However, such qualified personnel were no longer available in the villages, where generally the function of “*civil records clerks*” was entrusted to Catholic parish priests. Only in villages with a significant proportion of non-Catholics, especially Jews, was it suggested that this function be entrusted to a lay person, such as an organist.<sup>16</sup>

The temporary state of the civil service corps was quite quickly transformed into a permanent state, i.e. one that remained in force until the end of the Duchy of Warsaw.<sup>17</sup> Under the Saxon King’s decree of 23 February 1809 on the fees of civil registrars, the clergy of the various denominations, mainly Catholic by virtue of the number of their followers, became these registrars. However, the Catholic clergy was formally exempted from declaring divorces and granting civil weddings to divorcees. Moreover, the same Decree also established the order of the activities of a clerical registrar in such a way that he was first obliged to perform a civil wedding and only after the civil marriage certificate had been drawn up did he perform the ecclesiastical wedding of his denomination.<sup>18</sup> Although the Decree also applied to rabbis, due to the suspension of Jews from political rights,<sup>19</sup> they were not allowed to act as civil registrars. Consequently, civil records, announcements and weddings for the Jewish faith were conducted either by clergymen of other denominations or by lay civil registrars or their deputies.<sup>20</sup>

In parallel with the organisation of the administration, the government of the Duchy of Warsaw also adapted the provisions of Title II of Book One of the Napoleonic Code “*Of acts before the civil authorities*” (Articles 34-101) to local conditions. This was done by a resolution of the Chamber of Deputies promulgated by the Royal Decree of 18 March 1809, which amended Articles 41, 43–45, 49, 53, 70–72 of the Napoleonic Code, with effect from 18 March 1809.<sup>21</sup> The provisions of Title V “*Of marriage*” (Articles 144–228) and Title VI “*Of divorce*” (Articles 229–311) were left unchanged. The process of implementing the *Code civil* in Poland culminated in *Frederick August* issuing the Decree of 10 October 1809, a transitional law to the Napoleonic Code, which had

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<sup>16</sup> POMIANOWSKI, Funkcjonowanie francuskiego modelu rejestracji stanu cywilnego 104.

<sup>17</sup> And for a longer time in the Free City of Cracow. See below (p. 92).

<sup>18</sup> Dziennik Praw Księstwa Warszawskiego (vol. 1) 195–196.

<sup>19</sup> Under the Royal Decrees of 7 September and 17 October 1808. See BARTEL – KOSIM – ROSTOCKI, Ustawodawstwo Księstwa Warszawskiego (vol. 1) 142 i 148.

<sup>20</sup> See below (p. 92).

<sup>21</sup> Dziennik Praw Księstwa Warszawskiego (vol. 1) 231–236.

already been in force in the Duchy for over a year. It ruled *expressis verbis* that the French Code applied exclusively to all matrimonial acts occurring in the Duchy of Warsaw from 1 May 1808, and consequently for the territories annexed to the Austrian partition in 1809 from 15 August 1810.<sup>22</sup>

## 2. Civil weddings and divorces in Cracow between 1810 and 1818

Pursuant to Article 1 of the Royal Decree of 23 February 1809, as of mid-August 1810, the clergy of the eleven Cracow Catholic parishes: Holy Virgin Mary, Corpus Christi, Most Holy Salvador Holy Cross, St Anne, St Florian, St Nicolas, St Stanislaus, St Wenceslas, St Stephen and All Saints began making premarital announcements and performing civil weddings as civil registrars. In accordance with Article 40 of the Napoleonic Code each parish kept a “*register*”, i.e. a civil registry book in which the marriage certificates drawn up in a given year and the announcements made were entered. The book was drawn up in two copies, one of which remained in the and the other was deposited in the archives of the Court of the Peace (Article 43 of the Napoleonic Code). The most of the latter are preserved in the National Archives in Cracow and cover the entire period in which the marriage law of the Napoleonic Code was in force, i.e. from 1810 to 1852.<sup>23</sup> There are also books kept in 1818–1845 and 1851 by the clergy of the Evangelical-Augsburg parish of St Martin’s, performing weddings for Cracow’s Protestants.<sup>24</sup>

The civil registry records of the Cracow parishes show that the clergy generally carried out their duties as “*civil registrar*” or “*deputy civil registrar*” correctly. Civil weddings were celebrated in the “*registrar’s house*” or the “*communal house*” i.e. the vicarage, after the two announcements required by articles 63 and 64 of the Napoleonic Code had been made.<sup>25</sup> The clergyman, after the presentation by the prospective spouses before him of the “*birth certificates*” required by Article 70 of the Napoleonic Code, established on the basis of these that they were of the appropriate age for marriage.<sup>26</sup> In the practice of the years 1810–1818, these were obviously not birth certificates drawn up in accordance with the provisions of the *Code civil*. They were mainly replaced by extracts from parish baptismal registers drawn up under canon law and Austrian law,<sup>27</sup> as well as acts of knowing (in Polish, *akty znania*) issued by sub-judges and justices of the peace “*to replace the birth certificate*”, as provided for in Articles 70–72 of the Napoleonic Code.<sup>28</sup> In the event that the prospective spouses were not of age,<sup>29</sup> the clergyman recorded the consents of the parents or relatives who were their guardians to the marriage (Article 73 of the Napoleonic Code). He also mentioned the absence of

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<sup>22</sup> Dziennik Praw Księstwa Warszawskiego (vol. 2) 84–90.

<sup>23</sup> Fonds of acts from individual parishes are held in the National Archives in Cracow (hereinafter: NAC): 29/328/0, 29/324/0, 29/334/0, 29/327/0, 29/323/0, 29/326/0, 29/329/0, 29/330/0, 29/333/0, 29/331/0, 29/332/0. See table 1.

<sup>24</sup> ANK, 29/325/0. See table 1.

<sup>25</sup> ANK, 29/328/2 10–11.

<sup>26</sup> Marital capacity was set by the Napoleonic Code at 15 years for a woman and 18 for a man (Article 144 of the Napoleonic Code).

<sup>27</sup> See above (p. 88).

<sup>28</sup> ANK, 29/328/9 23; ANK, 29/328/25 1.

<sup>29</sup> The age of majority for marriage, i.e. the possibility to marry independently, had, according to Article 148 of the Napoleonic Code, persons who had reached the age of 25 (men) and 21 (women) respectively.

acts of opposition (Article 69 of the Napoleonic Code) and recorded respectful acts made in various forms (Article 76(5) of the Napoleonic Code).<sup>30</sup>

Then, according to the further guidelines of Article 75 of the Napoleonic Code, the clergyman proceeded to collect from the prospective spouses the declaration of intent to marry and drew up the marriage certificate. The formula established therein, first used in Cracow on 5 September 1810 by the vicar of the parish of the Blessed Virgin Mary, *Walenty Grabowski*, read: *“having read all the above-mentioned papers and section six in the title of the Napoleonic Code on Marriage, we asked the future spouses whether they wished to unite with each other by marriage. When each of them separately answered that it is their will, we declare in the name of the law that Joachim Wocicki, bachelor, and Miss Agnieszka Karwacka are joined to each other by the bond of marriage. We wrote down the act in the presence of”* four witnesses, whose names, age, estate and place of residence, as well as kinship and affinity to the parties were stated by the clergyman in the marriage certificate (Article 76(9) of the Napoleonic Code). Finally, in accordance with Article 38 of the Napoleonic Code, the prepared certificate was read out and the spouses, the witnesses and the registrar signed it. It was not uncommon for the only the clergyman to sign it, making a note of the lack of writing skills of the others present (Article 39 of the Napoleonic Code).<sup>31</sup> The absence of any of these elements was formally a defect in the act, but in practice they occurred very rarely and were treated as *“mistakes”*.<sup>32</sup>

parish/civil registrar	1811 weddings	1816 weddings	1811 divorces	1816 divorces
Holy Virgin Mary	74 <sup>33</sup>	92	0	0
Corpus Christi	8	12	0	0
Most Holy Salvador	18	38	0	0
Holy Cross	7	11	0	0
St Anne	14	18	0	0
St Florian	15	19	0	0
St Nicolas	15	30	0	0
St Stanislaus	0	0	0	0
St Wenceslas	4	3	0	0
St Stephen	32	63	0	0
All Saints	32	34	0	0
St Martin [Evangelical]	no data	2 <sup>34</sup>	0	0
clerical civil registrars in total	219	322	0	0
lay civil registrars for Christians in total	2	14	4	31
civil registrars for Christians in total	221	336	4	31
lay civil registrars for Jews	23	23 <sup>35</sup>	0	0
lay civil registrars in total	25	37	4	31
all civil registrars	244	359	4	31

Table 1. Civil weddings and divorces in Cracow in 1811 and 1816<sup>36</sup>

<sup>30</sup> ANK, 29/328/5 29.

<sup>31</sup> ANK, 29/328/2 7–8. Cf. e.g. ANK, 29/326/2 4–5; ANK, 29/331/62 3–4.

<sup>32</sup> ANK, 29/329/5 24.

<sup>33</sup> Due to the lack of preservation of the book of 1811, data from 1812 was used.

<sup>34</sup> Due to the lack of surviving earlier records, data from 1818 was used.

<sup>35</sup> Due to the fact that from 1816 only entries for the last 3 months have survived, data from 1817 was used.

<sup>36</sup> Author's own compilation based on: ANK, 29/328/8, 29/328/24, 29/324/6, 29/324/26, 29/334/10, 29/334/45, 29/327/6, 29/327/26, 29/323/6, 29/323/26, 29/326/6, 29/326/26, 29/329/5, 29/329/32, 29/330/5, 29/330/15,

In parallel to the twelve clerical officials, two lay officials also performed their duties of civil registrars in Cracow from August 1810. The first was the mayor of the city, or his deputy, who was “the civil officer of the County and City of Cracow, for declaring and recording, according to the law, civil divorces, also for making announcements and receiving marriage certificates between civilly divorced persons”.<sup>37</sup> The need for his appointment arose indirectly from Article 4 of the Decree of 23 February 1809, which exempted Catholic clergymen acting as civil registrars from performing these duties, and was directly confirmed by a rescript of the Minister of Justice of the Duchy of Warsaw of 6 September 1811.<sup>38</sup> This function was first performed in Cracow between 1810 and 1815 by President *Stanisław Kostka Zarzecki* and his deputy *Walenty Bartsch*. The latter drew up the first secular civil status act in Cracow, which was the announcement of the divorce of *Kajetan Wytyszkiewicz* and *Józefa Wytyszkiewiczowa*, née *Sobienionska*, on 13 December 1810 on the basis of Article 258 of the Napoleonic Code.<sup>39</sup> The first purely secular, i.e. not before a clergyman and not preceding a church wedding, civil wedding of Christians was conducted and the marriage certificate drawn up by *Stanisław Zarzecki* on 6 October 1811.<sup>40</sup>

The second of the lay clerks in Cracow was, also appointed on the basis of a Decree of 23 February 1809, a civil registrar “in the municipality of the town of *Kazimierz* near Cracow for persons of Jewish faith established in the District and Department of Cracow”.<sup>41</sup> Formally, he acted in place of a rabbi of the Jewish community, but as he himself was a Christian and performed his duties strictly on the basis of the Code civil, the civil status records performed by him were of a purely secular nature. In the years 1810–1822, this function was performed in Cracow (or more accurately in *Kazimierz*) by *Stanisław Dudzicz* of the Habdank coat of arms, and it was he who performed the first exclusively secular civil wedding in Cracow, of *Chaim Moses Glasshut* and *Gitel Weiskerz* on 17 January 1811.<sup>42</sup> The *Civil Status Records of the Jewish Registration District in Cracow*, kept by *Stanisław Dudzicz* and his successors, have been preserved complete for the years 1810–1852<sup>43</sup>, as have the Divorce Records of the Municipalities, County and City of Cracow, kept by his colleagues for divorced Christians.<sup>44</sup>

The fall of *Napoleon* and the dissolution of the Duchy of Warsaw did not end French marriage law in Cracow. Between 1813 and 1815, all civil registrars, both clerical and lay, continued to exercise their functions under the existing laws. Their validity was confirmed in 1815 by the Organising Commission, which on behalf of the victorious powers of Austria, Russia and Prussia established the Free City of Cracow.<sup>45</sup> The new government also maintained the status quo in 1816, only transforming the post of lay “civil registrar of the County and City of Cracow” into “civil registrar of the

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29/333/5, 29/333/23, 29/331/63, 29/331/68, 29/332/6, 29/332/26, 29/325/1, 29/336/2, 29/336/17, 29/336/1, 29/336/16, 29/1472/6, 29/1472/52.

<sup>37</sup> ANK, 29/336/2 1.

<sup>38</sup> ANK, 29/336/17 1.

<sup>39</sup> ANK, 29/336/1 1.

<sup>40</sup> ANK, 29/336/2 1. The spouses were *Kajetan Wytyszkiewicz*, a divorcee, and *Marianna Toryania*, a widow.

<sup>41</sup> ANK, 29/1472/6 3.

<sup>42</sup> ANK, 29/1472/6 3.

<sup>43</sup> ANK, 29/1472/0.

<sup>44</sup> ANK, 29/336/0.

<sup>45</sup> The so-called Additional Treaty on Cracow concluded by Austria, Prussia and Russia, see TOKARZ, *Pomniki prawa Rzeczypospolitej Cracowskiej* 3-9; Provisional instrument for the judicial authorities of the Free City of Cracow of 5 December 1815, *Dziennik Rozporządzeń Rządowych* 1816 95.

*City of Free Cracow*”, which was entrusted to *Wojciech Kucieński*.<sup>46</sup> These political and legal decisions were reflected in everyday practice. A comparison of Cracovian vital records for the years 1811 and 1816 clearly shows that the new institutions of the marriage law, i.e. civil marriage and divorce, were effectively implemented for the Christian population of Cracow.<sup>47</sup> Although its vast majority, i.e. 99% in 1811 and 96% in 1816, still married before a clergyman, i.e. in a de facto confessional form, the number of civil weddings before a secular official increased from 2 in 1811 to 14 in 1816, i.e. by as much as 600% (with a 54% increase in the number of all weddings). Similarly, the number of divorces increased by as much as 675%.<sup>48</sup>

### 3. The upholding of marriage law of the Napoleonic Code in the Free City of Cracow at the Legislative Sejm of 1818

As in the case of the Duchy of Warsaw, the entrusting of the functions of civil registrars to clergymen, the maintenance of French law in the Free City of Cracow was intended as a temporary solution. According to Article XII of the Constitution of the Republic of Cracow of 3 May 1815, which imposed by the victorious protective powers, the Assembly of Representatives, which was the republic’s legislature, was to take charge of establishing new codes, also replacing the code of the defeated *Napoleon*.<sup>49</sup> To this end, the Assembly set up a special Legislative Committee in 1816, whose original task was to prepare drafts of individual codes. However, both the powers and the course of the Committee’s work in 1816-1817 were subject to oversight and modification by the Organising Commission, which eventually, together with the Committee, prepared a catalogue of legal principles for the future codes of the Free City of Cracow. This catalogue, in the form of a set of 297 legal questions, including 130 for the Civil Code, was submitted to the Assembly of Representatives sitting in an extraordinary legislative session from 7 January to 3 March 1818 for resolution. (the so-called Legislative Sejm).<sup>50</sup>

Among the questions submitted, those relating to the principles of matrimonial law, grouped under Title II “*On marital rights*”, together with the related questions on civil status registration from Title I “*On rights related to personal qualities*”, occupied a special place.<sup>51</sup> In response to the latter, the Assembly was to decide whether “*Civil status records will be accepted by clerks deliberately appointed to do so, or not*” (question 7) and whether “*Civil registrars will be clerical or secular*” (question 8). These raised doubts among deputies as to whether their intention was not to abolish the French solutions introduced in Cracow in 1810. This was supported by an objection raised during the debate on 13 January 1818 by Priest Professor *Feliks Jaroński* to the retention of civil status records, who “*in a voluminous speech argued that they were unnecessary*”. However, this objection was decisively rejected by the deputies in favour of maintaining the status quo (34 votes against 3) and the Assembly passed a resolution that “*Civil status records will be prepared by officials deliberately appointed for*

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<sup>46</sup> Resolution of the Ruling Senate of 21 August 1816, *Dziennik Rządowy* 1816, no. 5 20; ANK, 29/336/16 32–33.

<sup>47</sup> The situation was different with regard to the Jewish community, where the implementation of the provisions of the Napoleonic Code encountered strong resistance as part of an assimilation policy rejected by the majority of this community. For more, see MICHALIK, Consent to a Jewish Marriage 102–109.

<sup>48</sup> See above, table 1.

<sup>49</sup> TOKARZ, Pomniki prawa Rzeczypospolitej Cracowskiej 12.

<sup>50</sup> For more, see MICHALIK, Wstrząsające wspomnienie uzurpacji Bonapartego 13–23.

<sup>51</sup> 29/200/200 671 i 673.

*this purpose*” (rule 7) and that “*Civil registry officials will in general be clergymen and secular persons only in special cases*” (rule 8).<sup>52</sup>

This controversy was only a prelude to the stormy debate of the following day, i.e. 14 January 1818, in which the Legislative Assembly was to answer eight legal questions on marriage law. The importance attached to this session is evidenced not only by the account of the sources of the time, but by the unique form of the first 4 questions of Title II in the entire catalogue. Unlike the others, which always dealt with a specific institution of a particular branch of the law, these questions required the Legislative Assembly to choose between different models of marriage law, which we classify today as mixed or secular.<sup>53</sup> The first model was contained in the provisions of the codes then in force in the Polish lands, i.e. the ABGB in the Austrian partition (question 1),<sup>54</sup> the *Landrecht* of 1794 in the Prussian partition (question 2), and the proposed Polish Code, which was to replace the Napoleonic Code still in force in the Kingdom of Poland<sup>55</sup> (question 3). In contrast, the lay model was only contained in the French code “*still in force in Cracovian legislation*” (question 4).<sup>56</sup> It is significant that the question of the restoration of the pre-partition Polish law containing a religious model of marriage law in Cracow was not debated and resolved at all.

The speech by *Feliks Słotwiński*, Professor of natural and Roman law at the Jagiellonian University, was the best and, as it turned out, also in line with the majority opinion of the 14 January debate. In the first place, he accurately captured the essence of the dispute, concentrating on the most controversial issue, i.e. the admissibility of divorce in predominantly Catholic Cracow<sup>57</sup>. Being himself a Catholic, but at the same time a supporter of allowing divorce, he polemicised against the key legal argument of its opponents, i.e. the Roman confession of the Republic of Cracow guaranteed by Article I of the Constitution.<sup>58</sup> Aware of the unambiguous position of canon law on the sacramental indissolubility of marriage, as expressed, among other things, in the canons of the Council of Trent of 1563, he focused on the argument about the Catholic conception of marriage, concluding that “*it follows from what has been said that marriage should be considered in two respects: as a contract between spouses, that is, as a marriage contract, and as a sacrament*”.<sup>59</sup>

However, *Słotwiński* did not oppose this dualistic character of marriage, because, colloquially speaking, he did not have to knock down the already opened door. In line with the Enlightenment jurisdictionalism, he left the issue of the sacramentality of marriage in the hands of the Church, while his contractualism came under the jurisdiction of the state, which in his opinion should be guided by rationalism and utilitarianism. At the same time, he demanded that any conflicts in this respect should always be resolved in favour of the State, because “*whatever is allowed by reason, cannot be forbidden by religion – because the sacraments are superior only to reason; but they cannot be opposed to it*”.<sup>60</sup> Making this assumption, in the following part of the argument *Słotwiński* extensively discusses the rationality of the divorce grounds of the Napoleonic Code, i.e. adultery, rape and

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<sup>52</sup> *Gazeta Cracowska* 1818, no. 6 64; 29/200/201 63–64.

<sup>53</sup> DZIADZIO, *Powszechna historia prawa* 321.

<sup>54</sup> “*So the principles of the Austrian code are to be preserved in Cracovian legislation as far as the rules on marriage, obstacles and divorce are concerned?*” 29/200/200 673.

<sup>55</sup> Patrz wyżej, przypis 6.

<sup>56</sup> 29/200/200 673.

<sup>57</sup> *Gazeta Cracowska* 1818, no. 7 73.

<sup>58</sup> “*The apostolic Roman Catholic religion is maintained as the religion of the country.*” See TOKARZ, *Pomniki prawa Rzeczypospolitej Cracowskiej* 10.

<sup>59</sup> *Gazeta Cracowska* 1818, no. 7 74.

<sup>60</sup> *Gazeta Cracowska* 1818, no. 7 74.

grave insults of articles 229–231 of the Napoleonic Code. He finally concluded that the Code civil divorce law was permissible and applicable in the Free City, excluding, however, the possibility to pronounce divorce solely on the basis of the agreement of the parties (Article 233 of the Napoleonic Code): “*If marriage is a contract, then it should be considered according to the rules of all contracts. – If not only pure reason but the public and private good (the sole aim of the Government) requires that spouses who cannot live together for the reasons expressed above should be divorced. – If a spouse is only as worthy of the sacrament of matrimony as long as he or she fulfils his or her duties. – If the Church is subordinate to the Government in all that is required for the public good, I therefore request that when the code in force up to now regards marriage in terms of contract, as every legislator should regard it - «so the principles of this code should be upheld»*”.<sup>61</sup>

*Slotwiński's* argument was supported by speeches by other deputies, such as Judge *Jakub Małkowski*<sup>62</sup> or Count *Antoni Stadnicki*.<sup>63</sup> There were dissenting voices, both from the clergy, such as Priest Professor *Feliks Jaroński*,<sup>64</sup> and from the laity, such as Judge *Franciszek Piekarski*.<sup>65</sup> As anticipated by *Slotwiński*, the arguments of the latter were based primarily on the incompatibility of the provisions of the Napoleonic Code with the doctrine and law of the Catholic Church, which was not only the religion of the State, but also of the majority of the inhabitants of the Free City of Cracow. However, in a secret ballot, the Legislative Sejm, by a large majority (30 to 8), resolved that “*the principles of the code hitherto in force shall be maintained with regard to the rules governing marriages, obstacles and divorce in the Cracovian legislation*” (principle 4).<sup>66</sup> At the same time, the Assembly in principles 1-3 rejected the Austrian<sup>67</sup> and Prussian regulations,<sup>68</sup> as well as the drafted Civil Code of the Kingdom of Poland, rightly pointing out that it does not yet exist.<sup>69</sup>

The will of the Legislative Sejm to maintain the validity of French law in Cracow was further supported by the resolution of the remaining questions in Title II, in the form of four further principles of marriage law. In the first, the age of matrimonial capacity as adopted in Article 144 of the Napoleonic Code was confirmed (principle 5).<sup>70</sup> In the second, following Article 145 of the Napoleonic Code, a dispensation was allowed: “*for valid reasons as long as the physical capacity to marry exists*” (principle 6).<sup>71</sup> In the third, in accordance with Article 331 of the Napoleonic Code, the canonical principle on the legitimacy of illegitimate children *ipso jure* by the subsequent marriage of the parents is maintained, provided that the latter “*recognise them (the children – P. M.) legally before their marriage or in the very act of celebration of the marriage*” (principle 7)<sup>72</sup>. It is significant that this principle was also adopted on the basis of the provisions of the Napoleonic Code, and not of the West Galician Code previously in force in Cracow, or of the Austrian ABGB then in force in Galicia, which adopted the more favourable construction of *legitimatio per subsequens matrimonium* for

<sup>61</sup> Gazeta Cracowska 1818, no. 7 76.

<sup>62</sup> Gazeta Cracowska 1818, no. 8 86–88.

<sup>63</sup> Gazeta Cracowska 1818, no. 9 97–100.

<sup>64</sup> Gazeta Cracowska 1818, no. 8 85-86 i no. 9 100-101.

<sup>65</sup> Gazeta Cracowska 1818, no. 10 109–110.

<sup>66</sup> Gazeta Cracowska 1818, no. 10 110; 29/200/201 64.

<sup>67</sup> “*The principles of the Austrian code will not be preserved in Cracovian legislation as regards the rules on marriage, obstacles and divorce*” (principle 1). 29/200/201 64.

<sup>68</sup> “*The principles of the Prussian code concerning the rules on marriage, obstacles and divorce will not be adopted*” (principle 2). 29/200/201 64.

<sup>69</sup> 29/200/201 64.

<sup>70</sup> 29/200/201 64. See above, footnote 27.

<sup>71</sup> 29/200/201 64.

<sup>72</sup> 29/200/201 64.

illegitimate child without the requirement of prior recognition (§ 161 of the ABGB). Similarly, principle 8, the last of the title “*On the matrimonial rights*”, rejected the possibility, provided for in section 162 of the ABGB, to legitimise an illegitimate child by a monarchical rescript.<sup>73</sup>

#### 4. Conclusion

The principles of law enacted by the Legislative Sejm of 1818 ultimately did not become the basis for the Civil Code of the Free City of Cracow. The codification work carried out by the Legislative Committee was de facto suspended later that year, after the residents of the protective powers supervising it from the Organisational Commission left the city.<sup>74</sup> For the functioning of civil weddings and divorces in Cracow, however, this was of no importance. For the abandonment of the concept of an own civil code meant that the Code civil remained in force. Moreover, the clear will of the Legislative Sejm to preserve the institutions of French marriage law also ruled out the need to modify them. As a consequence, they were in force and applied until the end of the Republic of Cracow, and even a few years longer – until 1852.<sup>75</sup> However, it was 1818 that finally closed the eight-year period of the introduction of the Code civil marriage law in Cracow. In this relatively short period of time, it occurred both at the legislative level and at the level of law application. From the analysis presented in this article, it is clear that the French solutions were accepted on the Vistula River.<sup>76</sup> Prima facie this may come as a surprise, as formally the introduction of civil marriages and divorces in Cracow in 1810 was revolutionary, as it went against centuries of Polish legal culture and Catholic doctrine. In reality, however, the success of the new arrangements consisted of several key circumstances that greatly mitigated the revolutionary nature of the changes.

First, it should be pointed out that these changes were part of the turbulent period of the Napoleonic wars bringing political and economic destabilisation, which, however, aroused hopes of rebuilding Polish statehood after the catastrophe of the partitions of 1772, 1793 and 1795. It resulted in an openness of Polish society to new ideas and institutions, the embodiment of which was the Napoleonic Empire, victorious in wars with the partitioners, with its civil code. Second, Cracow’s elites of the time were shaped in the spirit of the philosophy and legal thought of the Enlightenment. They were therefore ready for changes in the law expressed primarily in the implementation of the idea of its codification, of which the Civil Code was the fullest expression. These same ideas also shaped the ground for the secularisation of the institution of marriage, which, incidentally, had already been initiated by the Austrians in Cracow. Here, too, priority was given to the French Code, which was the only one to introduce a fully secularised, i.e. lay, marriage.

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<sup>73</sup> “*The legitimisation of children by a rescript of the [Governing – P. M.] Senate cannot take place*”. 29/200/201 64.

<sup>74</sup> MICHALIK, *Wstrząsające wspomnienie uzurpacji Bonapartego* 22–23, 33.

<sup>75</sup> See above, footnote 9. As an aside, one may ask what would have happened to Polish marriage law had the Civil Code of the Free City been created? It is almost certain that it would not have survived the incorporation of Cracow into Austria in 1846, and its lay solutions taken from the Napoleonic Code would have been replaced by the provisions of the ABGB anyway. At the same time, the very existence of the Code would certainly have been an argument in the discussion on the model of marriage law in the Second Republic, but this too would most likely not have affected the earlier introduction of Professor *Karol Lutostański*’s 1929 secular model throughout Poland. See: DZIADZIO, *Powszechna historia prawa* 260–261.

<sup>76</sup> With a reservation concerning the Jewish community, see above, footnote 48.

Third, and most importantly from the point of view of the practice of applying the new regulations, a very significant element in the implementation of the new solutions was the way they were carried out in the Duchy of Warsaw, and then maintained in the Free City of Cracow. Entrusting the functions of civil registrars to the clergy of individual Christian denominations, the vast majority of them Catholic priests, made it possible, de facto, to preserve the religious character of a civil wedding. The vast majority (96% in 1816) of Cracovian prospective spouses continued to get married civilly before the same clergyman and at almost the same place and time as the subsequent church wedding. From the perspective of the newlyweds and their families, the civil wedding was in fact a legal registration of the marriage being contracted, which did not necessarily mean its laicisation or even secularisation.<sup>77</sup> At the same time, clerical registrars were exempt from granting civil weddings to divorced persons not in accordance with the doctrine of their religion. The small percentage of the latter weddings (4% in 1816), performed by an exceptionally acting secular official in this capacity, certainly also upheld in public opinion the prevailing religious nature of marriage.

In an apt way, this phenomenon was expressed from a social perspective by the main opponent of the secularisation of marriage at the Legislative Sejm of 1818, Father Professor *Jaroński*. In a rhetorical speech, he appealed that “*we should return to the wonderful national way of thinking of our forefathers, who wrote the laws on marriage in a Catholic way, and if anyone wants to civil marriage contracts, let them return to the true national betrothal, because even now no Catholic maiden will go from her parental home to her husband's until he has sworn to her Catholic duties in the presence of the Church*”.<sup>78</sup> Agreeing with Father *Jaroński's* argumentation, *à rebours*, it can be pointed out that the Catholic clergy made a valuable contribution to the successful introduction of marriage law of the Napoleonic Code in Poland by exemplarily fulfilling their duties as civil registrars.

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<sup>77</sup> A similar phenomenon was observed by *Rebecca Probert* in relation to civil weddings performed in England during the first two decades of the validity of the Marriage Act 1836. See PROBERT, *Tying the Knot* 71–76, 91–99.

<sup>78</sup> *Gazeta Cracowska* 1818, no. 9 101.

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