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MARRIAGE LAW IN THE KINGDOM OF SCS / YUGOSLAVIA: THE STATE OF LEGISLATION AND AN ATTEMPT AT REFORM**

Upon unification, legal particularism was present in Yugoslavia among the six legal territories where pre-war law was in force. The situation was even more complex when it came to marriage law due to the additional legal particularism between the religious marriage laws of the six confessions. This article provides a summary of the condition of the state and religious legislation, focusing particularly on the outdated norms, further discussing the problems of legal insecurity and conflicting laws which stemmed from such a system. Among the professionals in this field, there was a general consensus that the current state of affairs was highly dysfunctional and that reforms were needed; however, there was no agreement on concrete solutions. The point of the argument concerned the extent of the influence that religious communities were to exert in the future system, and depending on that three models were proposed: mandatory church marriage, optional civil or church marriage, or mandatory civil marriage. Finally, the paper provides an overview of the moderate reform found in the Draft Civil Code, along with the reasons why it was never carried out. It analyses in particular the appropriation of foreign laws and the adequacy of the transplanted norms within the local legal system.

Keywords: *Marriage Law. – State-Church Law. – Church Marriage. – Civil Marriage. – Legal Transplants.*

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1. INTRODUCTORY REMARKS

The end of World War I brought about the unification of South Slavs in a new state – the Kingdom of SCS, later on Yugoslavia. When a public proclamation on unification was issued on 1 December 1918, the process of integration and of building the new state was just beginning. Integration was necessary in the field of law as well, and civil law in particular, since there was no unique legal system in Yugoslavia; instead, in different parts of the country different laws applied, the ones that were in force before the war.[1] This kind of legal particularism was highly detrimental to the legal affairs in the new state – the very existence of a large number of different regulations made legal affairs very complicated to resolve, and the contradictory regulations precluded transactions and led to a high number of disputes. This state of affairs required the adoption of uniform legal rules that would, on the one hand, solve the problem of legal particularism, and on the other hand modernize and reform the existing law. The process of unification of law started off quite ambitiously; however, no sooner had it started than it ran into a number of impediments, from the lack of "political will" to the rushed improvising supported by government acts (that garnered a lot of criticism, and rightly so).[2]

In every society, the importance of marriage and family is manifold. It does not only encompass the fulfillment of emotional and reproductive needs of an individual; through marriage, a number of economically relevant legal facts are also established, related to inheritance, mutual aid and support, management of the property held by the spouses, etc. This importance was even more pronounced in the first half of the previous century, when common-law marriage (concubinage) was regarded as unacceptable, and the children born out of those unions held little to no rights in certain legal territories.[3] The unification and reform of marriage law was important not only because civil legal relations needed to be regulated, but also because it was a road to complete equality between

1 The territory of Yugoslavia was divided into six legal territories: the pre-war Serbia, Slovenia and Dalmatia, Croatia and Slavonia, Bosnia and Herzegovina, Montenegro, and Vojvodina. The differing laws that were in force before the war continued to be applied in these areas.

2 See: Marko Pavlović, "Problem izjednačenja zakona u Kraljevini Srba, Hrvata i Slovenaca/Jugoslaviji", *Zbornik Pravnog fakulteta u Zagrebu,* 3–4/2018, 493–523; Gordana Drakić, "Formiranje pravnog sistema u međuratnoj jugoslovenskoj državi", *Zbornik radova Pravnog fakulteta u Novom Sadu*, vol. XLII, 1–2/2008, 645–655; Slobodan Jovanović, "Nestajanje zakona", *Iz istorije i književnosti I,* BIGZ, Beograd 1991, 399–409.

3 See: Simo Ilić, "*Položaj vanbračne dece u prvoj Jugoslaviji*", *Vesnik pravne istorije,* 1/2020, 248–282.

the citizens of the new state, allowing for their connection through family ties as well, helping the new state to become truly a community of all its citizens, instead of a cluster of independent territorial units set wide apart.

Marriage rights in the newly formed kingdom were rather outdated – they were mostly so even in the 19th century, and for the new and altered circumstances of the first half of the 20th century they were downright inappropriate. Regulated mostly by canon law, the rules of marriage were encumbered by rigid ecclesiastic dogmas (such as the insolubility of marriage in the Catholic community), and they ignored the realities of social life. Apart from this, the differences between the confessions and the open confrontations stemming from these spilled over onto the field of marriage law. This made mixed marriages impossible or very difficult for the parties of different confessions, and there was also the problem of conversions with the goal of foiling the law, both tolerated and supported by different religious officials. Finally, there was also the problem of legal insecurity, because the priests and religious officials who judged marriage issues tended to ignore the positive legal rules of the state law, applying the regulations of their church or religious community even when it went against the valid state laws.

This state of affairs in the realm of marriage law, along with all the negative consequences it brought with it, attracted a lot of attention from the professionals in the field, divided into a conservative, progressive, and moderate current. Regardless of the affinity towards any particular current, there was a general consensus that this state of affairs was inadequate and that the regulations of marriage law required a thorough reform. They all agreed also that it was a matter of some urgency, which brought about propositions to adopt special regulations on marriage law even before the adoption of a uniform civil code for the new state. If there were no new, consistent regulations, they pointed out, there had to at least be rules for solving interlocal and interconfessional conflicts of law, so that the legal insecurity that was present at the time could be dealt with, however so slightly. There were also some subjects on which the opinions were divided; the one provoking the most upheaval concerned the form of marriage. Disagreements and conflicts aside, these subjects were thoroughly discussed in the expert literature, as well as in two congresses of lawyers of the Kingdom of Yugoslavia.[4]

4 Already in the first part of the Resolution of the Second Congress of Lawyers it is stated that: "Legal security in the entire country requires that a uniform civil marriage law is adopted, even before the unification of civil law on the whole, stipulating the requirements for the validity of marriage and grounds for divorce for all citizens alike, regardless of their confession." The same demand was repeated in the Resolution of the Sixth Congress of Lawyers, once again in the first part: "that personal material rights and matrimonial property rights be regulated urgently by state law equal

It should be noted that even the view that marriage law was in dire need of reform was not without its opponents. The resistance came from the conservative social groups as well as from clerical intellectual circles, who viewed marriage law as an instrument for controlling the people and reckoning with other, rival religious communities. This resistance, although irrational from the legal technical point of view, held back and precluded the reform of the outdated and inadequate regulations to a considerable degree.

In the following pages we will summarize the regulations pertaining to religious and state laws which dealt with marriage law in individual religious communities and legal territories, and after that we will discuss the problem of clashing laws that inevitably rose from the existing legal particularism. Subsequently, we will analyse the biggest issues of the marriage law regulations and portray the suggested solutions, both those generated by the public discourse and those contained within the official project – the Draft Civil Code for the Kingdom of Yugoslavia. Further on we will examine only the matters related to entering into marriage, the existence of marriage, and divorce, putting the matters of property in marriage aside.[5]

This examination of the state of the legislation and the attempt at reform in the realm of marriage law aims to describe the negative consequences of the outdated marriage laws and of legal particularism on the everyday life of the interwar period, but also the conflicts between the religious communities, between the clerical circles and the legal elite, whose unwillingness to compromise made the attempted reforms all the more difficult. The inefficient reform of such an important branch of law reflects by and large the wider social conflicts and the paralysis of the institutions that was present in the first Yugoslavian state.

2. REGULATIONS ON MARRIAGE IN THE LAWS OF RECOGNIZED[6] RELIGIOUS COMMUNITIES

After the unification, in different legal territories of the new state prewar rules on the recognition of churches and religious communities and

for all citizens". For the full text of the resolutions of the Congress of Lawyers, see f.n. 132

5 I wrote on personal matrimonial law and matrimonial property rights in the first Yugoslavia from a gender perspective in: Simo Ilić, "Pravni položaj žene u Predosnovi građanskog zakonika za Kraljevinu Jugoslaviju", *Vesnik pravne istorije* 2/2020, 194–247.

6 There is some debate in literature on which religious communities were recognized by the Kingdom of SCS and the Kingdom of Yugoslavia. In this paper, the term "rec-

the state's relationship towards them still applied.[7] While the old regulations still applied, the process of "unification" of the relationship of the Yugoslavian state towards churches and religious communities unfolded as well, during which the state regulated its attitude towards individual churches and religious communities by adopting a number of laws.[8] Marriage law held an important place in this relationship between the state and the church, as it was largely considered a religious matter and was left to the religious communities to regulate either completely or to a certain extent. Here we will describe the teachings on marriage and the marriage rules of the most important religious communities in the Kingdom of Yugoslavia.

2.1. Marriage law in the Orthodox Church

The Orthodox Church denotes marriage as a holy sacrament in which two people of opposite sex declare their free will to enter into matrimony, and a priest confirms this union through a church rite.[9] The marriage is formed only when the priest blesses the expressed consent of the spouses,[10] therefore making the said blessing a constituent of the sacrament, without which the marriage cannot be regarded as valid.[11]

Mixed marriages to members of a non-Christian confession were not allowed. Such a marriage, if it did take place, would be considered null and it could only be validated if the non-Christian spouse accepted the Orthodox faith.[12] Entering into matrimony with a member of another Christian denomination was possible, but required that the non-Orthodox party provide a written statement signed before the parish priest and two witnesses, stating that they would not impede the Orthodox party in pro-

ognized religious communities" refers to those religious communities whose marriage laws were applied and recognized by the state.

7 See: Dalibor Đukić, *Interkonfesionalno zakonodavstvo u Jugoslaviji i Srbiji 1919–2006,* Univerzitet u Beogradu – Pravni fakultet, Beograd 2022, 78–88.

8 See: Dragan Novaković, "Versko zakonodavstvo Kraljevine Jugoslavije", *Zbornik Pravnog fakulteta Sveučilišta u Rijeci,* 2/2012, 939–965.

9 Bračna pravila Srpske pravoslavne crkve, Sveti arhijerejski sinod / Srpska manastirska štamparija, Beograd – Sremski Karlovci 1933, Art. 1–2. Theory provides a similar definition: "Marriage is a bond between husband and wife blessed by the Church (as a sacrament), aimed at achieving complete unison in all of life's relations between them, serving to multiply mankind." Čedomilj Mitrović, *Crkveno pravo*, Knjižara Gece Kona, Beograd 1921, 131.

10 Art. 36.

11 For more details on the Christian views on marriage see: Sergije Troicki, *Hrišćanska filozofija braka,* Izdavačka knjižarnica Gece Kona, Beograd 1934.

12 Art. 12, 49.

fessing their faith, nor try to convert them into their own denomination, and that they would baptise and raise their children in the Orthodox faith. The Orthodox party was obliged to bring forth their spouse – through gentle means – to the Orthodox faith. Rites for a mixed marriage could only be performed in an Orthodox temple, before an Orthodox priest, and according to Orthodox rules.[13] If convinced of the gravity of these promises, a parson would ask for absolution and a blessing from the archiereus (the diocesan bishop).[14] Only the rules of the Serbian Orthodox Church were relevant to a mixed marriage. If a mixed marriage in which a spouse belonged to the Orthodox Church were to take place before a priest of a different confession, and the other spouse refused to enter into the Orthodox faith, the Orthodox ecclesiastical court would render the marriage void, either upon request from the Orthodox party or acting upon official duty, due to the impediment of different confessions.[15]

There were two kinds of legal impediments to marriage in the regulations of the Serbian Orthodox Church. The first kind were impediments which prohibited the marriage, and if a marriage took place in spite of them, it would be considered null or voidable. The other kind were marriage prohibitions, circumstances due to which it was not allowed to enter into marriage; however, if a marriage took place in spite of them, it would be valid but incurred consequences in the form of an ecclesiastical punishment. Impediments to marriage were further divided into personal impediments, impediments due to a lack of valid consent, and impediments due to a lack of form.

Personal impediments could be unremovable and removable. The unremovable were: age (males under the age of sixteen, and females under the age of fourteen); consanguinity (in a straight line regardless of the degree of kinship, and in a lateral line up to the fourth degree); kinship by law (up to the third degree); spiritual and civil kinship (up to the second degree); kinship originating in an illegitimate birth (in a straight line regardless of the degree of kinship, and up to the third degree in a lateral line); an existing marriage; four previous marriages of the same person; disparity of cult;[16] excommunication; having been ordained as a priest; having taken monastic vows; a lifelong prohibition of entering into matrimony based on law or a valid verdict. Removable personal impediments were: age (males under the age of eighteen, females under the age of six-

13 Art. 115.

14 Art. 117, 51.

15 Art. 123.

16 A disparity of cult exists if a person who wishes to be married belongs to a religious community that is unfamiliar with the sacrament of baptism, or whose baptism is not ackonwledged as valid. *Ibid*., art. 23.

teen); consanguinity (in a lateral line from the fifth to the seventh degree); kinship by law (fourth to sixth degree); triple kinship[17] (up to the third degree); spiritual and civil kinship (third to seventh degree); a void marriage (until its dissolved or annulled by the court); three previous marriages of the same person; different confessions;[18] adultery between prospective spouses committed at a time when the adulterer still lived with their original spouse; plotting together to murder the spouse of one of the people who wish to be married.

Impediments due to a lack of valid consent were: abnormal mental state (incompetence); coercion (abduction, intimidation, and violence): deceit or fallacy regarding a bride's pregnancy (if the pregnancy comes from a third person); deceit or fallacy regarding the spouses' ability to perform marital duties; deceit or fallacy regarding the fact that one of the spouses had committed a crime before the marriage or that they have not completed a prison sentence of at least three years in duration.[19] The impediments due to a lack of valid consent were removable.

Impediments due to a lack of form were: contracting a marriage without the involvement of the Church (civil marriages also fell within this category); contracting a marriage without an expressed consent from the spouses; contracting a marriage with the expressed consent of the spouses, but without any church rites.[20] The impediments due to a lack of form were unremovable.

According to the canon law of the Serbian Orthodox Church, marriage prohibitions were as follows: women whose previous marriage had been dissolved, divorced or annulled were prohibited from remarrying until the post-marital waiting period of ten months had passed; persons under custody (encompassing parental custody, tutelage, and foster care) were prohibited from marrying without the consent of the custodian; military personnel were prohibited from marrying without the consent of the relevant authorities; persons serving a prison sentence were prohibited from marrying before the sentence was out; a marriage could not take place without a proper pre-marital examination and a public notice; a person who had passed the pre-marital examination was prohibited from marrying a third party before the pre-marital examination was annulled; a marriage could not take place contrary to the rules of the "*Trebnik*" (the breviary); a marriage could not take place at an improper time, in a place

17 Kinship between one spouse (and their relatives) and the in-laws of the other spouse.

18 A difference in confessions exists if a person who wishes to be married belongs to a religious community whose baptism is recognized as valid by the Orthodox Church, but the community itself is not part of the Orthodox Church.

19 Art. 27.

20 Art. 33.

that was not ordained for weddings, or be performed by a priest from a different parish; a marriage could not take place without the necessary number of witnesses, without being entered (or entered incorrectly) into the parish register.[21]

The canon law of the SOC allowed divorce to take place at the request of a spouse. The spouse who was to blame for the divorce could not be the one to ask for it, unless both of the spouses were to blame.[22] The reasons for divorce were: adultery, plotting to murder your spouse, induced abortion, malicious abandonment of your spouse, disappearance of a spouse, physical and mental illness, moral corruption and apostasy of the Orthodox faith.[23]

Due to the possibility of divorce, separation was not widely applied in the canon law of the SOC. Separation upon the mutual understanding of the spouses was allowed only due to illness or treatment, during the novitiate before taking monastic vows, and due to *vis major* or a complete financial ruin of the spouses. Besides this, separation could also be decreed as a temporary measure in lawsuits regarding annulment or divorce.[24]

2.2. Marriage law in the Roman Catholic Church

The teachings of the Catholic Church view marriage as a contract elevated to the level of a sacrament. For a marriage to be valid, the consent of two people of the opposite sex is necessary, and for this union to possess the character of a sacrament, the people entering into matrimony need to be baptised. Unlike in the Orthodox teachings, the sacrament is contained in the consent expressed by the spouses; the priest is present merely as their witness and his blessing is not relevant for the validity of the marriage.[25]

Mixed marriages were generally not allowed because the difference in confessions was seen as a marriage prohibition or impediment.[26] This im-

21 Art. 37.

22 Art. 86.

23 Art. 88–107.

24 Art. 71–73.

25 Vitomir Jeličić, *Kanonsko Ženidbeno pravo Katoličke Crkve,* Hrvatska tiskara, Sarajevo 1930, 8–16; Edo Lovrić, *Ženidbeno pravo (obzirom na Codex*), pravnički repetitorij, Štamparija Jugoslavenskog kompasa, Zagreb, after 1917, no year, 16–17.

26 The Compendium of ecclesiastic law did not look kindly upon mixed marriages, and its article 1063 obliges the clergy to dissuade the faithful, as possible, from entering into mixed marriages. For more details on the regulation of mixed marriages in canon law of the Catholic church, and the criticism of that regulation, see: Velimir Blažević, *Mješovite ženidbe u pravu Katoličke Crkve*, Kršćanska sadašnjost, Zagreb 1975, 9–49.

pediment was more strict for the members of the non-Christian religious communities – in this case, absolution and permission for the marriage to take place could only come from the pope,[27] while for the non-Catholic Christians the permission came from the bishop in authority.[28] In order to receive this permission, the non-Catholic party was obliged to sign a statement that they wouldn't interfere with the Catholic party's profession of faith, and that all the children[29] from that union would be baptised and raised as Catholics.[30] In such marriages, it was the duty of the Catholic party to sensibly endeavour to bring their spouse to the Catholic faith.[31] This kind of marriage could only be performed in a Catholic church.

The canon law of the Catholic Church also knew two groups of legal impediments to marriage – prohibitions and diriments – with the same consequences as in the law of the Orthodox Church. Marriage prohibitions were: the prohibition of simple vows,[32] prohibition of civil kinship, disparity of cult (different confessions) and the like.[33] Diriments to marriage were: age (sixteen for men, and fourteen for women), impotence, being already married, belonging to a higher order of clergy, having taken sacred vows, abduction and violent detention, crime, consanguinity (unlimited in a straight line, and up to the third degree in a lateral line[34]), kinship by law, public morality,[35] spiritual and civil kinship.[36] Since marriage was considered a contract by nature, it required a valid consent, due to which

27 E. Lovrić, *Ženidbeno pravo*, 38–39.

28 *Ibid.,* 41.

29 This was also applied in the case of separation of a mixed marriage – the custody of the children was awarded solely to the Catholic party (unlike in purely Catholic marriages, where the custody was awarded to the innocent party). *Ibid.,* 48.

30 V. Jeličić, 88–89.

31 *Ibid.,* 90.

32 Among these were the vows of: virginity, complete purity, celibacy, taking higher orders, and becoming a monk. *Ibid.,* 81–82.

33 *Ibid.*

34 The Catholic canon law applied the canonic kinship (*computatio canonica*), that differed from the Roman and was almost identical to the Germanic counting. The kinship degree was not counted by the number of births, but by the distance from a common ancestor. In a direct line there were no differences in this system of counting; however, in lateral lines two births were treated as a single degree, making, for example, first cousins relatives of the second degree because they were two births away from a common ancestor (grandparents), while in the Roman system they would be considered the fourth degree of kinship. In case of an uneven number of births counting from the common ancestor, the higher number was used.

35 Impediment between one spouse from an invalid marriage or concubinage and the relatives of the other spouse up to the second degree in a straight line (meaning parents, grandparents, children and grandchildren). *Ibid.,* 144–146.

36 *Ibid.,* 95–150.

circumstances that preclude the expression of a valid consent were also seen as impediments: a lack of mental faculties, fallacy concerning the person, fallacy concerning the important characteristics of the person,[37] agreeing to marriage under the influence of force and fear, agreeing to marriage under a certain condition (until a condition is met).[38]

According to the Catholic canon law, a church marriage that was validly contracted could only be dissolved by the death of one of the spouses. The insolubility as an important characteristic of marriage meant that the Catholic Church did not acknowledge divorce, neither in their own faithful, nor in those of other religious communities or in atheists. For example, it was not possible for a divorcee to marry in a Catholic church regardless of their confession, not even if they were atheists.[39]

Dogmatic insolubility of marriage could not prevent the occurrence of dysfunctional marriages nor the need for their separation. This problem was solved by the Catholic Church through the institute of "divorce of bed-and-board", i.e. the permission for separation. The separation could be lifelong or temporary. Lifelong separation could only be declared in the case of adultery. Temporary separation was possible in the following cases: the conversion of one of the spouses into a non-Catholic faith; one of the spouses raising the children in a non-Catholic manner; criminal and disgraceful living; putting your spouse into great bodily or spiritual peril; abuse that makes living together unbearable. This list of reasons was not exhaustive, it was also possible to allow for a separation in cases similar to those (for example, malicious abandonment). A temporary separation would last as long as the reasons that caused it were present. It could be time-limited or unlimited.[40] The effects of marriage ceased to exist in a separation, apart from the obligation of mutual sustainment of the spouses.[41]

37 The Catholic Church had a very narrow view of important characteristics of a person; for example, the fact that a woman was not a virgin or that she conceived with a third person did not count as important characteristics *Ibid.,* 159.

38 E. Lovrić, *Ženidbeno pravo*, 32–34.

39 There were only a few exceptions to this rule, when it was possible to enter into a new marriage after the dissolution of the old one – death, sacred vows and forgiveness from the Holy See, and the privilege of faith. In case of a marriage between two non-Christians where one of the spouses converted into the Catholic faith and the other remained a non-Christian and wished to dissolve the union, divorce was allowed and the Catholic spouse could remarry based on the privilege of faith (in this case the marriage was considered dissolved only in the moment of entering the new marriage). Eugen Sladović, *Ženidbeno pravo*, Narodne novine, Zagreb, 1925, 110–111; V. Jeličić, 199–208.

40 V. Jeličić, 209–213.

41 E. Lovrić, *Ženidbeno pravo*, 48.

2.3. Marriage law of the Old Catholic Church

The Old Catholic Church provided marriage guidance for their faithful in 1924; however, they had no codified marriage law, but ordered marriage according to the holy scripture, conclusions of the ecumenical councils and the practice of early Christians instead. The teachings on marriage of the Old Catholic Church are similar to those of the Roman Catholic church[42] – it too sees marriage as a sacrament, although it does not subscribe to the idea of its insolubility, hence permitting divorce in marriages that were "unhappy and dead", but only out of reasons that are quoted in the Bible and in the Church traditions.[43]

When it came to mixed marriages between Christians of different confessions, the Old Catholic Church once again rejected the rules of the Roman Church, condemning the clerical, harsh regulations by which Catholics were not permitted to wed non-Catholics (and even if they were granted a special permission to marry, the children from such a union had to be baptized and raised in the spirit of the Roman Catholic Church).[44]

The Old Catholic Church formed its own ecclesiastical courts to decide on marital issues among the Old Catholics, but the problem of their jurisdiction arose. In the legal territory of Croatia and Slavonia the judicial and administrative authorities did not acknowledge their authority in marital issues, while the central authority deemed that the Old Catholic Church had the same position and authority that is granted to the Roman Catholic Church regarding spiritual matters.[45] This problem was of some interest for the legal sciences as well, sparking a theoretical debate regarding the disputed authority.[46] At the base of the dispute lay the fact that

42 The Old Catholic Church kept the marriage rules that were observed in the Catholic Church up until the schism that ensued after the First Vatican Council in 1870, but it did not accept the later legislation of the Roman Church, particularly criticising the Codex of Canon Law of 1917. See: Marko Kalogjera (ed.), *Naputak o starokatoličkoj crkvi,* Štamparija "Gaj", Zagreb 1927.

43 M. Kalogjera, 5; Matija Belić, "Odnos državnoga i crkvenoga zakonodavstva, naročito s obzirom na zaključenje braka – referat", *Spomenica VI glavne skupštine Kongresa pravnika Kraljevine Jugoslavije*, Merkantile, Zagreb 1934, 12–13.

44 M. Kalogjera, 14–15.

45 Sergej Troicki, "Predosnova građanskog zakonika i naše versko zakonodavstvo", special print-out from *Spomenica Dolencu, Kreku, Kušeju i Škerlju*, Jugoslovenska tiskarna, Ljubljana 1937, 517–518.

46 See: Milan Bartoš, "Tolerancija u bračnim odnosima", *Arhiv za pravne i društvene nauke*, 4/1932, 280–283; Ljubomir Radovanović, "Tolerancija u bračnim odnosima – Povodom članka g. Dr. M. Bartoša, u "Arhivu" od 25. oktobra 1932. g.", *Arhiv za pravne i društvene nauke*, 5/1932, 365–370; Milan Bartoš, "Mala napomena na primedbu g. Ljub. Radovanovića", *Arhiv za pravne i društvene nauke*, 5/1932, 370–375; Ljubomir Radovanović, "Neke primedbe na Malu napomenu g. d-ra M. Bartoša",

the Old Catholic Church separated from the Roman after the regulations on ecclesiastical courts were adopted in Croatia and Slavonia, making it unclear whether the same rules that apply to the Roman Church or other religious communities would apply to them as well.

2.4. Marriage law of the Evangelical Church

The Protestant Churches, returning to the original teachings of the early Christians, saw marriage as a purely secular affair. Unlike the Orthodox and Catholic Church, they did not view marriage as a sacrament, but as a secular contract. Thus the Reformist churches left the regulation of the marriage law to the state, due to its secular nature.[47] In the Kingdom of Yugoslavia, the state law applied to them – where it was indeed present.[48] The drafting and application of special protestant marriage laws required a lack of state legislation related to marriage in the Serbian, Montenegrin, and Bosnian legal territories. The Evangelical Church adopted in 1931 the Statute on the substantive marriage law and the Statute on the procedure in marriage affairs, which finally regulated this area.[49]

Mixed marriages were allowed and the Protestant churches acknowledged them if the spouses complied with the conditions for a valid marriage. A marriage could be contracted before a priest of either of the two parties. When it came to confession of the children from such unions, state law applied – written statements given to the officials of another church (this kind of statement was a requirement of the Catholic Church), guaranteeing that the children would be brought up in the spirit of another faith, were not recognized by the Protestant churches. Regarding the

Arhiv za pravne i društvene nauke, 6/1932, 456–460; Dragutin Tomac, "Jurisdikcija duhovnih sudova u bračnim sporovima", *Arhiv za pravne i društvene nauke*, 3/1933, 227–231.

47 Still, this attitude shifted with time. The Protestant churches still viewed marriage as a secular matter, but they did develop more of an interest in the subject with time. They never went so far as to demand complete jurisdiction over marriage the way that the Orthodox and the Catholic Church did, but they did feel the need to influence the state so that it does not adopt marriage regulations that would go against the Christian views on marriage. Edo Lovrić, *Studije iz ženidbenog prava II – Ženidba i njezini bitni momenti,* printed from „*Spomen-knjiga*" by Pravničko društvo u Zagrebu, Dioničke tiskare, Zagreb 1900, 19–20.

48 See: Tibor Koršoš, "Bračno pravo protestanata u Jugoslaviji", *Pravnički glasnik*, 4/1940, 100–107.

49 These were the marriage rules of the German Evangelical-Christian Church of the Augsburg Confession, which was one of the three Protestant churches in the Kingdom of Yugoslavia; however, they remained the only Protestant Church to adopt regulations on marriage, based on the rules that were applied before. Ivan Steinmetz, "Protestantsko bračno pravo u Bosni i Hercegovini", *Mjesečnik*, 2/1934, 71–72.

annulment and divorce of mixed marriages, Protestant marriage courts would settle the disputes upon a request from the Protestant party, and the effects of divorce for the other party were guided by the rules and courts of their own denomination (including the issues of guilt for the divorce[50]).[51]

To enter into a valid marriage the spouses had to be of an appropriate age (eighteen for men, sixteen for women), in case of a widow or a woman whose previous marriage had been annulled or divorced, there was also a post-marital waiting period of ten months; another prerequisite was that there were no legal impediments at the moment of contracting marriage. According to their consequences, marital impediments were divided into those that were grounds for annulment, and those that made the marriage voidable. A marriage was null in the case of one of the spouses already being married, and in case of consanguinity (counting relatives in a vertical line, brothers and half-brothers, sisters and half-sisters, as well as in-laws in a vertical line). A marriage was voidable in the case of: civil kinship, prohibition to marry, threats, fallacies, deceit, belonging to an unrecognized religious community (this particular impediment was removed by conversion into a recognized faith).[52]

Divorce, although not recommended, was allowed for the following reasons: adultery, fornication that goes against nature, bigamy, malicious abandonment, plotting to murder and grievous abuse, being sentenced to death or to over five years in prison, violation of marital duties, inducing a child of the family to commit a crime or to live immorally, an incorrigibly immoral life, being convicted of a crime and sentenced to prison for less than five years, or for a crime committed out of self-interest.[53] A member of the Evangelical Church who has obtained a valid divorce can contract a new marriage, unless they are prohibited from remarrying (in general or to certain persons).[54]

2.5. Islamic marriage law

According to Islamic legal science, marriage is a sacred bond[55] and a contract between a man and a woman, signed for an indefinite period of

50 *Ibid.,* 81.

51 *Ibid.* 78.

52 *Ibid.* 72–74.

53 *Ibid.,* 75.

54 *Ibid.,* 77.

55 The sanctity of marriage was not like the one in Christian teachings, where marriage represented a separate blessed entity. On the contrary, marriage was a common contract, and its only connection to sanctity was through the fact that it was regulated by religious law.

time.[56] To contract a marriage, two people of the opposite sex, of sound body and mind, needed to declare in front of witnesses[57] (either two men, or one man and two women) that they enter the marriage of their own free will. Apart from this, it was also required that the woman be free, i.e. not married or in *iddah* (the post-marital waiting period).[58] Thus, the sharia law, not unlike the Jewish law, viewed marriage not as a sacrament, but as a purely secular affair that was regulated by religious norms. This is why the presence of a priest in a marriage ceremony was not obligatory, and if he was present it was for legal security (registration), and not for religious reasons.[59] Another thing that separated Islamic marriages from other religious marriages was the allowed (though restricted) polygamy. Men were allowed to have up to four wives, while women were only allowed monogamous marriages.[60]

Mixed marriages were allowed, but only for men. Women could only marry Muslim men, while men could also marry Jewish and Christian women.[61] In mixed marriages, women were not required to convert to Islam, but any children coming from the union had to be brought up in the Muslim faith. A non-Muslim mother could not be a guardian to her own children. Disparity of cult was also an impediment to inheriting, so a woman from a mixed marriage could not inherit her husband unless she had converted to Islam prior to his death. This impediment also stood for the husband, who could not inherit a wife of a different faith.[62]

Somewhat similar to mixed marriages was the situation in which a non-Muslim husband and wife would convert to Islam. If the wife converted, her husband was offered to convert as well. If he accepted, their

56 Hafiz Abdulah Bušatlić, *Porodično i nasljedno pravo muslimana (glavne ustanove i propisi)*, published by the author, Sarajevo 1926, 9.

57 Prerequisites for the witnesses were: that they are free, of sound mind, of age, of Muslim faith, and not deaf. *Ibid.,* 12.

58 Eugen Sladović, *Islamsko pravo u Bosni i Hercegovini*, Izdavačka knjižarnica Gece Kona, Beograd 1926, 47.

59 Still, in time, the form became an obligatory element, out of need for legal security. Mehmed Begović, "Form islamskog braka", *Arhiv za pravne i društvene nauke* vol. 47, 1/1935, 50–57.

60 H. A. Bušatlić, *Porodično i nasljedno pravo muslimana (glavne ustanove i propisi)*, 35–36.

61 However, this option for mixed marriages was disputed by a Judgement of the Wider Council of the Reis-ul-Ulema No. 2111/38 of 21 December 1938, which prohibited all mixed marriages on the whole. This Judgement sided with the minority opinion of the Hanafi school of thought, thereby ending the practice of mixed marriages. Fikret Karčić, *Šerijatski sudovi u Jugoslaviji 1918–1941*, Fakultet islamskih nauka u Sarajevu, Sarajevo 2005, 87.

62 M. Begović, 56; H. A. Bušatlić, *Porodično i nasljedno pravo muslimana (glavne ustanove i propisi)*, 36.

marriage would remain valid (unless they were closely related), but if he refused – the Sharia court would divorce them. On the other hand, if the husband converted and the wife refused, the marriage would remain valid if the wife was of Christian or Jewish faith. When only one spouse converts to Islam, and there are underage children from the union, the children would belong to the converted parent.[63]

Sharia law stipulates the following circumstances as impediments to marriage: consanguinity (not too wide; for example, it was allowed for the first cousins to marry), kinship by law, kinship by suckling,[64] number of wives (no more than four), the capability of the woman, and the impediment of releasing a wife by pronouncing *talaq* three times.[65] Prohibitions to marriage were as follows: prohibition on account of consanguinity,[66] prohibition on the account of non-barrenness of the woman[67] and prohibition on account of difference of religion.[68]

The fact that Islamic marriage was a purely secular contract, without any factual sanctity – without markings of a religious character, without a solemn blessing in a temple – meant that the dissolution of the marriage was possible as soon as certain moments and causes appeared (just like with any other private contract).[69] The sharia law was familiar with several types of divorce:

a) Repudiating one's wife (*talaq*) – this was an institute whereby the marriage was divorced by the single-sided declaration of the husband; the declaration could be written or oral, and it wasn't necessary to give it in court (just as a marriage needn't have taken place in court). Repudiating one's wife could be done in several ways:

   aa) Repudiating one's wife through *talaq raj'ah* – this particular form did not lead immediately to divorce. At the moment in

63 *Ibid.,* 36–37.

64 This type of kinship exists between a wet nurse and the child that she was suckling, as well as their relatives.

65 If a man one-sidedly divorced his wife three times in a row ("repudiated his wife"), he could not marry her right away for the fourth time; instead, she had to marry some other Muslim man, and only after her new husband repudiated her, or died, could she marry her ex-husband for the fourth time.

66 A temporary prohibition to marry your wife's sister, aunt, or niece, lasting throughout the duration of the marriage. Upon the wife's death or after a divorce (and the *iddah* period), this prohibition ceased to exist.

67 Related to confirming that the wife was not pregnant, and not in *iddah*. The exception were pregnant harlots, where it was impossible to know the origin of the child, and contracting marriage with them was allowed.

68 *Ibid.,* 15–17.

69 *Ibid.* 50.

which the husband declared that he is repudiating his wife the marriage was not yet dissolved, but the period of *iddah* for the wife began. The husband could renew the marriage at any given time, whether by declaring to his wife that he is taking her back, or by having intercourse with her. If the husband did not renew the marriage until the *iddah* period expired, the marriage would be divorced.[70]

ab) Repudiating one's wife through *talaq al-baynuna* – this was a more definitive repudiation. After *talaq al-baynuna* the marriage would definitely be dissolved and the husband had no right to renew the marriage or to have sexual relations with the wife. There were two minor forms of this repudiation, the *sughra* or the "minor" divorce, which didn't pose an impediment if the divorced couple wished to wed each other once more, and the "major" divorce or *kubra*, which happened if the husband chose to repudiate his wife for the third time (the three repudiations could happen on several occasions, but also on one occasion, when a husband told his wife three times at once that he was repudiating her). This major divorce did pose an impediment for a renewed marriage between the divorced spouses; it could only be removed if the wife married another Muslim man, and then that marriage dissolved either through death or divorce, leaving her free to marry her ex-husband (*nikah halala)*.

ac) Repudiating one's wife under a condition – *taliqi talaq* – represents a declaration by which a marriage is divorced if a certain condition is met.

ad) Delegated repudiation (*talaq tafwid*) – the husband could delegate his right to a one-sided divorce to his wife. He could do it at any time, at the moment of contracting the marriage, or throughout its duration. Once delegated, provided that the wife accepted it, this right could not be revoked.

ae) Repudiating of a wife whose husband is ill (*talaqi marid*) – in this case there was the issue of legitimacy of the repudiation, especially since a gravely ill husband was thus excluding his wife from the inheritance. Because of this, a repudiation in the case of incurable illness or certain death (for example, a death sentence or being on a sinking ship) produced no effect, but it was valid in case of other illnesses.

70 *Ibid.,* 53–55.

b) Mutual divorce (*khul'*) – it was allowed, and the spouses could agree on matters of property and on child rearing.
c) Divorce due to impotence and other shortcomings – in the case of impotence (*inin*), castration, mental illness in the husband (*majnun*) or in case of other illnesses (*dzuznun and bers*) that would incapacitate the husband for sexual relations, a woman had the right to ask for a divorce before a court. (The husband also had the right to ask for a divorce before a court if his wife was unable to have sexual relations, but he could get a divorce in a far simpler manner – through repudiation – so this type of divorce was mostly reserved for women).
d) Divorce from a husband who has gone missing (*feshi nikahi mefkud*) – in the sharia law, the possibility of divorce from a husband who disappeared was a matter of some debate. The views of the practice were that it should be allowed provided that his disappearance left the wife with no means or property that she could use to support herself. A court divorce could be demanded after four years of absence.
e) Divorce from a husband who is absent (*feshi nikahi gaib*) – if a husband left his wife without giving her some form of allowance or leaving behind property that she could use to support herself, the wife was entitled to a divorce in court, and the marriage would be divorced as soon as the facts were ascertained (there was no need for a waiting period to pass).
f) Divorce from a husband who is poor (*feshi nikahi aciz anil idare*) – sharia law also permitted divorce due to husband's poverty, if that poverty was such that he was unable to support his wife. In the practice of Yugoslavian sharia courts this rule was not used.
g) Divorce from a husband who has been sentenced to a long time in prison (*feshi nikahi mahbus*) – if a husband was sentenced to prison for a long time, hence becoming unable to support his wife, she was allowed to ask for a divorce.
h) Divorce due to conversion (*el firkatu birideti*) – if both spouses converted into another faith, their marriage was dissolved. The same was true if they denigrated or ridiculed Islam. We have already covered the situation in which only one of the spouses converted.

Adultery was not seen as grounds for divorce. The sharia law sentenced adulterers to death by stoning, and the marriage would cease to exist with the death of the spouse who was stoned. This punishment was not applicable in Yugoslavia in the first half of the 20th century (because the punitive part of the sharia law was not in use), so adultery had no

influence on a marriage. If a woman committed adultery, the husband could repudiate her – but if the husband was the adulterer, the wife had no grounds for divorce.[71]

Rules pertaining to divorce in sharia law were very unfavourable for women. While a man could use informal means to get a divorce without much of a reason, a woman could only appeal to a court, and for a limited number of reasons, which were all based on the inability of the husband to perform his sexual duties or support her financially. Therefore, a woman could not get a divorce even in cases of abuse or serious rupture in relations. It's true that a woman could, formally, arrange for other grounds for divorce to be taken into consideration when she was contracting marriage, but this option was rarely used in the patriarchal society and those cases were looked upon with disdain.

2.6. Jewish marriage law

To contract a valid marriage according to Jewish law, three requirements had to be complied with: for the spouses to be of the opposite sex, to give their free consent, and for the proper form to be respected.[72] An important condition regarding form was that there had to be two witnesses in front of which the spouses would give their statements on entering the marriage.[73]

Jews were not allowed to enter into marriage with members of pagan faiths, and such marriages would be void,[74] while marriages between Jews and members of other monotheistic religions were valid in general, although the marriages would be divorced upon official duty[75] (which really meant that a disparity of cult was an impediment, but with lightened consequences – this solution was favourable for children from such marriages, who would retain their status of legitimate children even after the divorce).

A small number of impediments is specific to Jewish marriage law – a higher degree of importance was placed on divorce, so that children coming from potentially void unions would retain their legitimacy; hence, most circumstances that represent marital impediments in other law

71 *Ibid.* 53–69.

72 Samuilo Demajo, "Uništaj i razvod braka po jevrejskom bračnom pravu", *Arhiv za pravne i društvene nauke*, vol. 36, 1–2/1929, 60–61.

73 The form also required ten men of age to be present to guarantee that all of the prayers have been said, but the absence of those men or of the prayers did not influence the validity of the marriage. *Ibid.*

74 *Ibid.* 63.

75 *Ibid.* 70–71.

systems in Jewish law represent grounds for divorce. Impediments to marriage that were grounds for annulment at the request of one of the spouses were as follows: insufficient age of the spouses and coercion. Impediments that lead to annulment upon official duty were: one of the spouses already being married, belonging to a pagan faith, and consanguinity (to a limited extent).[76] If the impediment was removed, the marriage would be validated, except in the case of consanguinity, when it was necessary to contract a new marriage.[77]

Divorce was allowed, upon a number of reasons. These were divided into grounds for divorce upon a request from the innocent party, and grounds for divorce upon official duty.

Grounds for divorce upon request from the innocent party were: mental illness, stupor and feeble-mindedness, previous defloration of the bride, inability to perform marital duties, a considerable body flaw, not performing one's marital duties, adultery committed by the husband or suspected adultery of the wife, uncivil behaviour, consent from both spouses, infertility, behaviour of one spouse that endangers the life of the other, acts that jeopardise the good name of a spouse, committing a crime that brings shame on a spouse, long absence, intolerable body flaw or incurable infectious disease, grave and repeated insults, overwhelming hate, and the inability of the husband to support his wife.[78] In Jewish law it was also possible to divorce a marriage with a one-sided declaration of the husband (a letter of dismissal).

Grounds for divorce upon official duty were: consanguinity (to a wider extent than in marital impediments), disparity of cult, adultery of the wife, marriage between persons who committed adultery together, marriage between persons born out of wedlock (bastards) and persons of legitimate origin,[79] marriage to a childless widow who has not been released from a levirate marriage, and certain marital impediments that under specific conditions turn into grounds for divorce upon official duty.[80]

76 Annulment of a marriage was only stipulated if the marriage was contracted between parents and children, brothers and sisters (including half-brothers and half-sisters), and between nephews and aunts. Kinship by law represented an impediment for contracting a marriage with those relatives of the spouse that they could not marry themselves. An exception to this rule was the possibility for the husband to marry the sister of his deceased wife. *Ibid.,* 64–65.

77 *Ibid.,* 66.

78 *Ibid.,* 66–70.

79 Not every illegitimate child was the subject of this rule, but only those who were conceived in an adulterous relationship or by two people who were next of kin, which would make their marriage void.

80 *Ibid.,* 70–73.

3. THE STATE OF THE STATE LEGISLATION

Legal particularism in Yugoslavian territory was complicated even further due to the fact that there were no uniform, coherent regulations in individual legal territories either. The Balkans were a point of meeting for different civilizations, which meant that the legal systems were formed under the influence of two large powers – Austria and the Ottoman Empire. Austrian influence in the western regions of the country, which were under its rule until 1918, was all-encompassing, and partly present in those areas of Vojvodina that belonged to Austria. In Bosnia and Herzegovina both Austrian and Ottoman law were in force; formally, the Ottoman law held the primacy, and the Austrian law was to be used in case of legal gaps – in reality, most judgments were passed according to Austrian law. At the beginning, Serbian law was formed under the influence of Austrian law, although this influence was not entirely permeating.[81] In time, the French influence superseded the Austrian, and there was also a hint of Ottoman law, along with some original solutions. Montenegrin law was the least influenced from the outside – it was the only one that evolved as a codification of customary law, and not a transplant of a foreign law. The intertwining of state laws came hand in hand with the intertwining of state law with religious laws. In all of the legal territories (except in Vojvodina), the laws of some or all of the previously mentioned religious communities was applied alongside the state law. The Yugoslavian legal system was therefore a mixture of different legal systems[82] that needed to be harmonised and unified. We continue with a description of the legislation pertaining to marriage law in different legal territories.

3.1. Regulations in different legal territories

3.1.1. Legal territory of Slovenia and Dalmatia

In this legal territory, marriage law was regulated by the Austrian Civil Code[83] (ACC) and the court decrees related to marriage law. The ACC

81 See: Sima Avramović, "Mixture of legal identities: case of the Dutch (1838) and the Serbian Civil Code", *Annals FLB – Belgrade Law Review,* 4/2018, 13–37, Sima Avramović, "Srpski građanski zakonik (1844) i pravni transplanti – kopija austrijskog uzora ili više od toga?", M. Polojac, Z. Mirković, M. Đurđević (ed.), *Srpski građanski zakonik – 170 godina kasnije,* Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 13–46.

82 For more details on mixed legal systems see: Vernon Valentine Palmer, "Mixed Legal Systems... and the Myth of Pure Laws", *Louisiana Law Review*, 67(4)/2007, 1208–1211; Esin Örücü, "What is a Mixed Legal System: Exclusion or Expansion?", *Electronic Journal of Comparative Law,* 12(1)/2008, 1–18.

83 Austrijski građanski zakonik, translated by Dragoljub Aranđelović, Geca Kon, Belgrade 1922.

regulated the issues related to contracting and divorcing a marriage with state law, but it also contained some religious rules for certain institutes (marriage was insoluble for the Catholics, unlike for the other religious communities), and some special rules for the Jewish community (among other things, prohibiting levirate marriage).

The obligatory form for contracting a marriage was a church wedding (Art. 75 of the ACC), with the civil marriage out of necessity being an exception to this rule. A civil marriage out of necessity was allowed in case that a priest, out of reasons not acknowledged by state regulations, refuses to perform the wedding, as well as when the marriage was contracted between persons who did not belong to any of the recognized denominations (atheists were in this category).[84]

Mixed marriages were allowed between Christians, but not between Christians and non-Christians (Art. 64 of the ACC). The original text of the ACC contained within Art. 77 the rule of the Catholic Church whereby it had the sole authority to wed two persons (if one of them was Catholic), but the Act of 31 December 1868 abolished this Article, so that mixed marriages could be contracted before priests of any Christian denomination (Art. 77 of the ACC with an explanation).

Divorce was allowed for non-Catholics (Art. 115 of the ACC), but it was not allowed for Catholics and for mixed marriages in which one party was Catholic (Art. 111 of the ACC). The insolubility of marriage, in accord with the Catholic dogma, along with the diriment of being already married (Art. 64) produced some consequences: a previously divorced non-Catholic could not enter into a new marriage with a Catholic while their former spouse was still alive; also, a previously divorced non-Catholic who converted into Catholicism could not contract a new marriage.[85]

Disputes related to marriage law were under the jurisdiction of regular courts, with the exception of disputes under the jurisdiction of sharia courts.[86]

3.1.2. Legal territory of Croatia and Slavonia

In this legal territory the matters related to contracting and divorcing a marriage were regulated by the imperial patent of 29 November 1852, which introduced ACC in Croatia and Slavonia, and the imperial patent of 8 October 1856 (the Act on Marriage among Catholics) which regulated marriage law in accord with the Concordat with Austria of 1855,

84 Bertold Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko bračno pravo Kraljevine Jugoslavije*, Tipografija, Zagreb 1935, 6.

85 *Ibid.,* 7.

86 *Ibid.*

along with the Guidelines for ecclesiastic courts in marriage-related issues, which was published with the Act on Marriage among Catholics (the Act of 25 May 1868 whereby marriage rules of the ACC were reinstated in Austria did not apply to Croatia and Slavonia).[87]

The imperial patent of 1852 stipulates that rules of the ACC that regulate the contracting, separation and divorcing of a marriage will not be applied to the members of the Roman Catholic, Greek Catholic and Orthodox faith; instead, religious laws would apply and ecclesiastic courts would judge in such instances. For the members of other confessions, marriage law of the ACC was still in force.[88]

A church wedding was the obligatory form for contracting marriage, civil marriage out of necessity was not allowed.

There was some debate on whether the new Code of Canon Law of 1917. or the canon law that was in force when the act regulating marriage laws was adopted should be applied to the members of the Roman Catholic Church. On this matter the jurisprudence was of the opinion that the old law should apply, while the theory was divided.[89] For the members of the Orthodox Church, the marriage rules of the Serbian Orthodox Church were in force, insomuch as they did not go against the laws that applied in this legal territory (meaning that the rules of the Orthodox Church related to the civil legal consequences of marriage, contracting mixed marriages, annulment of mixed marriages contracted outside of the SOC, and divorce of marriages contracted outside of the SOC (if the parties were Roman Catholic) did not apply).[90]

For the members of Roman Catholic, Orthodox, and Muslim faith, disputes related to marriage law were under the jurisdiction of ecclesiastic courts. In mixed marriages, if on the occasion of marriage at least one of the parties was Catholic, and if at the moment a lawsuit was filed at least one of the parties was Catholic, the ecclesiastic court of the Catholic Church had sole authority. In cases where both spouses were non-Catholics of different confessions there was no rule determining the authority of the court, so a general rule applied, whereby the court of the defendant had the authority. If at the moment of contracting marriage both parties were non-Catholics, after which one of them converted to Catholicism, each party would file a lawsuit to their own ecclesiastic court. If both parties belonged to the same non-Catholic denomination, their ecclesiastic court had the authority (regardless of whether they were Catholics be-

87 *Ibid.* 8–9.

88 *Ibid.*

89 *Ibid.,* 9–10.

90 *Ibid.,* 8–13.

fore). Members of the Jewish religious community and of the Reformed Churches were under the jurisdiction of state courts. As it was already mentioned, there was some debate on who had the jurisdiction over the matters related to Old Catholics – they formed their own ecclesiastic courts, but their authority was disputed.[91]

3.1.3. Legal territory of Vojvodina

In the territory of Vojvodina, Hungarian law applied. Contracting a marriage and divorce were regulated by customary law and the Act on Marriage of 1894 (Art. XXXI).[92] The Act on Marriage arranged the matters related to contracting and divorcing a marriage on a purely secular basis. The state stipulated all of the conditions for contracting marriage, civil marriage was the obligatory form of contracting marriage, and disparity of cult did not present an impediment for marriage to take place.[93] The rules on divorce were likewise equal for everyone, making marriage dissolvable even for the members of the Roman Catholic Church.

A specific characteristic of the marriage law of Vojvodina, stemming from the civil form of contracting marriage, was the non-existent marriage. That was a marriage which was not contracted according to the stipulated form, which is to say before a civil servant, between two persons of the opposite sex (who are not deaf and mute, nor incapable to communicate using signs). Thus a marriage that took place in a church alone was a non-existent marriage. The consequences of a non-existent marriage were more far-reaching than those of a void marriage, since the effects of marriage were not acknowledged at all (making, for example, the children of such a union illegitimate).[94]

For disputes related to validity and divorce, the state courts had sole authority, with the exception of disputes that were under the jurisdiction of sharia courts.

3.1.4. Legal territory of Serbia

Within the Serbian legal territory, the matters related to contracting a marriage and divorce were regulated by the Serbian Civil Code[95] (SCC). Marriage rules of the SCC were mostly codified marriage law of the Ser-

91 Mihajlo Lanović, "Haške konvencije o ženidbenom pravu i naši zakoni", *Mjesečnik*, 1/1912, 32–40.

92 Olga Cvejić-Janičić, "Bračno pravo u Vojvodini između dva svetska rata", *Zbornik Matice srpske za društvene nauke*, 125/2008, 34.

93 *Ibid.,* 36–37.

94 *Ibid.,* 36–38.

95 Građanski zakonik za Kraljevinu Srbiju, *Zbornik građanskih zakonika stare Jugoslavije*, Grafički zavod – Titograd, Titograd 1960, 153–268.

bian Orthodox Church[96], even making references to canon law in certain articles.[97] For non-Orthodox citizens, their own religious laws applied.

Mixed marriages between Christians and non-Christians was prohibited, and such marriages were not acknowledged (Art. 79 of the SCC). If in a valid marriage between two Christians one of the spouses converted, such a marriage would be annulled upon official duty (Art. 94 of the SCC). As for mixed marriages between Christians of different denominations, the Act of 9 September 1853 stipulated that even marriages between Christians in which one party is of the Orthodox faith had to take place before a priest and according to the rules of the Serbian Orthodox Church. The Concordat of 1914 did, however, allow for mixed marriages with Catholics to be contracted both before an Orthodox and Catholic priest, according to the preference of the spouses.[98]

Disputes regarding validity and divorce for those of the Orthodox and Catholic faith were under the jurisdiction of ecclesiastic courts, and for mixed marriages in which one party was Orthodox, the Orthodox Church had sole authority. An exception to this rule were mixed marriages to Catholics that were contracted before a Catholic priest – in those cases, the disputes were under the jurisdiction of Catholic ecclesiastic courts.[99] Other confessions were under the jurisdiction of state courts,[100] with the exception of disputes that were under the jurisdiction of sharia courts.

3.1.5. Legal territory of Montenegro

Marriage law was not codified in the territory of Montenegro. Due to this lack of state regulations, canon laws applied, and ecclesiastic courts had the authority in disputes regarding validity of marriage and divorce. The Concordat of 1886 acknowledged the importance of mixed marriages between Catholics and Orthodox Christians, and as for the jurisdiction over disputes in such marriages, the spouses could choose to address either the Orthodox or the Catholic ecclesiastic court.[101]

96 Article 60 of the SCC does not provide a precise definition of marriage, nor does it mention its contract-like nature; instead, it points out that "the rights and duties of the spouses result from marriage, which happens between two persons of the opposite sex, married by a priest of the Orthodox Church (...)" – whereby we conclude that the legislator left the definition of the concept, legal nature, and form of contracting marriage to canon law, which defined it as a sacrament. This nature of marriage was recognized throughout the period in which SCC applied.

97 See: Lazar Marković, *Porodično pravo*, Knjižara Gece Kona, Beograd 1920, 8–10.

98 Matija Belić, "Bračno pravo i konkordati", *Mjesečnik*, 11–12/1934, 538.

99 B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko*, 16–21.

100 In marriage related lawsuits, the state courts in Serbia applied the religious marriage law of the religious community of the spouses.

101 M, Belić, 537–538.

3.1.6. Legal territory of Bosnia and Herzegovina

In the legal territory of Bosnia and Herzegovina, according to the regulations adopted during Austrian reign, in matters of contracting a marriage, separation and divorce, canon laws applied and ecclesiastic courts had jurisdiction over disputes. In mixed marriages, sharia courts had the authority only if the marriage took place before the sharia court.[102]

3.2. Unified law

After World War I, the Kingdom of Serbs, Croats and Slovenes was obligated under the Treaty of Saint-Germain to apply the sharia law for its Muslim minority, and likewise give jurisdiction over family and inheritance law to the sharia courts. This obligation was guaranteed by two constitutions, and made concrete by the adoption of the Act on the Organization of Sharia Courts and on Sharia Judges of 1929.[103] Sharia courts were departments of regular courts, and had the authority to decide according to sharia law in marriage disputes where both of the spouses were of Muslim faith, or if the marriage took place in front of a sharia court (Art. 2), clearly defining the jurisdiction in mixed marriage cases.

4. THE PROBLEM OF CONFLICTING LAWS AND RECOGNITION OF COURT DECISIONS

Legal particularism made legal affairs between different legal territories of Yugoslavia particularly challenging. Different regulations, often at odds with one another, demanded rules that would regulate the conflict of laws and determine which law was to be applied. Since the Kingdom of Yugoslavia did not have any particular law on the clashing of interprovincial regulations, the rules of private international law (which were not always adequate) were applied via analogy to determine which law should be applied.[104]

This general problem of the Kingdom of Yugoslavia was even bigger when it came to marriage and divorce, because in those instances besides

102 B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko,* 21–22.

103 Zakon o uređenju šerijatskih sudova i o šerijatskim sudijama, Geca Kon, Beograd 1929.

104 An analogous application demanded that the rules of private international law should not be strictly applied, but to take heed of whether certain institutes of PIL correspond with the manner in which interlocal conflicts of law were settled. For this reason, when interlocal conflicts of law were settled (and when recognizing court decisions of other legal territories) the principle of public order could not be observed.

the conflicting laws of the six legal territories there was also the issue of conflict between state laws and the many religious laws. Along with the problem of determining which law to apply, there was also the problem of jurisdiction, which, again, was not just a problem between the state courts, but also between the state and religious courts, and by analogy there was also the problem of recognition of court decisions. To make things even more complicated, the religious affiliation of people could change, which could bring on even more problems in determining which law to apply. Such chaotic state of affairs was made all the more intolerable by the fact that this branch of law was not something for specialised professionals to ponder; instead, marriage was a matter of concern for all the citizens, who could not be expected to understand the complexity of the legal situation.

According to the rules of private international law, with the analogous application to the conflict of local laws, in matters of marriage, the laws of the legal territories in which the future spouses resided were to be applied. That meant that for a marriage to take place, all the requirements stipulated by the laws of both parties should be cumulatively fulfilled, and that there were no impediments in those laws. The exception was the legal territory of Vojvodina, where somewhat different rules applied.[105] The legal effects of a contracted marriage were determined according to the territory in which the spouses lived together, i.e. according to the law of the territory in which the husband resided, since the law stipulated that the wife takes on the residence of her husband. As for divorce and the separation of bed and board, there was a problem because – apart from the legal territory of Vojvodina – these matters were not regulated in private international law either, leaving the legal science to recommend the application of law of the legal territory in which the spouses resided, or of the law of the territory in which the separation or divorce proceedings were taking place.[106] In the legal territory of Vojvodina, there were certain colliding norms, but they were related only to those cases in which one of the spouses resided in the territory of Vojvodina, and in cases where the spouses were not residents of Vojvodina, there were no colliding norms.[107]

105 In the legal territory of Vojvodina the marriage age and transaction capacity were determined according to the laws of legal areas in which the future spouses resided. For other legal affairs, determining which law to apply depended on whether the groom belonged to the legal territory of Vojvodina or not. If the groom belonged to the legal territory of Vojvodina, then the law that applied on contracting marriage was solely the law of Vojvodina, while in other cases the laws of both legal territories in which the future spouses resided were applied. B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko bračno pravo Kraljevine Jugoslavije*, 152.

106 *Ibid.,* 157–164.

107 *Ibid.,* 161–162.

The other issue was that of determining the jurisdiction over marriage related disputes. For disputes related to marriage and divorce, the court of the territory in which the spouses had their last joint residency had the authority. Although jurisdiction was precisely defined, oversights were fairly common and courts without authority would often decide on marriage matters which were not within their jurisdiction. These cases were particularly common in the practice of religious courts, which were guided first and foremost by the interests and doctrines of their faith, paying less heed to the regulations about jurisdiction.[108]

A much more serious problem were situations in which the court with authority (most often a religious court) would give a ruling that would overstep the bounds of its jurisdiction, or give an unlawful ruling. There was the issue of legal force of such a ruling, and there were two opinions on the matter – first, that such rulings must be respected as valid and that the shortcomings of such a ruling do not interfere with its validity, and second, that the state was not obliged to act upon unlawful rulings.[109]

The gravest problems arose in the situations in which there were two conflicting rulings on the same marriage related issue, without any one of the courts overstepping its bounds. These situations were very common in Roman Catholic marriages when one of the spouses converted into another religion – with the court of the other religion pronouncing the marriage divorced, and the court of the Roman Catholic Church ruling that the marriage still existed. In such situations, it was usually proposed to apply the law of the church in which the marriage took place or to take into account only the ruling that came first, but neither of these solutions was adequate. Eisner was of the opinion that in these cases the rules of their own ecclesiastic courts should apply on each of the spouses, which was the most appropriate point of view, but it didn't solve the problem in itself.[110]

Finally, there was the issue of recognition for rulings given by religious courts in other legal territories. Here the rule was that the rulings of religious courts were generally applied to the territory of the entire state, unless: the religious court gave a ruling in a territory in which state courts had sole jurisdiction over marriage issues; the religious court gave a ruling in a case in which the state court or the religious court of another church or religious community had the authority; the ruling of the religious court went against state laws.[111]

108 See: Giga Avakumović, *Povodom jedne osude katoličkog ženidbenog suda u Đakovu*, Srpska manastirska štamparija, Sremski Karlovci 1914.

109 B. Eisner, *Međunarodno, međupokrajinsko (interlokalno) i međuvjersko*, 27–34.

110 *Ibid.,* 35–40.

111 *Ibid.,* 168.

Apart from recognizing court rulings, there was also the problem of recognizing marriages contracted in other legal territories due to civil form. As the main form of marriage in the better part of Yugoslavia was the church marriage, and as it was thereby mostly considered a sacrament by nature, courts did not recognize marriages contracted abroad in the civil form, invoking the principle of public order that the civil form of marriage collided with. This problem was not only present in private international law, but also interlocally, seeing how the civil form of marriage was mandatory in the legal territory of Vojvodina, while in most of the other territories marriage disputes were solved by religious courts that did not recognize civil marriages contracted in Vojvodina. Unlike religious courts, state courts did recognize civil marriages, but they had no jurisdiction over marriage disputes in the better part of the country.[112]

5. SOCIAL ISSUES, EXPERT DEBATE AND PROPOSALS FOR THE REFORM

From all of this it is rather obvious that legal regulations were severely outdated and, as such, unfit for the circumstances of life in a modern country; there was also confusion regarding which laws to apply, all of which resulted in considerable legal insecurity. In order to illustrate this state of affairs, we will continue to describe the gravest problems that resulted from such legislation.

The first problem of importance was the inequality of citizens before the law, and the inability of certain categories of citizens to contract marriage, coming from that inequality. The Constitution of the Kingdom of SCS of 1921, and the Constitution of the Kingdom of Yugoslavia of 1931, all citizens were guaranteed equality before the law, along with freedom of conscience and freedom of confession.[113] As we could see, marriage law was not equal for all the citizens, since it was mostly determined by the confession of the future spouses. In cases where both spouses were of the same faith, this was a minor issue, but in cases of mixed marriages it

112 Živojin Perić, *Lično bračno pravo po Srpskom građanskom zakoniku*, Izdavačko i knjižarsko preduzeće Geca Kon, Beograd 1934, 40 and 48; Živojin Perić, *O sukobu zakona u međunarodnom privatnom pravu*, Izdavačka knjižarnica Gece Kona, Beograd 1926, 71–78, f.n. 84; Živojin Perić, "Locus regit actum u bračnom pravu", *Arhiv za pravne i društvene nauke*, vol. 38, 1–2/1930, 129–139. Other than this, see: Milan Bartoš, "Locus regit actum u bračnom pravu – Je li ovo načelo primljeno ili odbačeno kod nas?", *Arhiv za pravne i društvene nauke*, 6/1932, 431–445.

113 Articles 4 and 12 of the Constitution of the Kingdom of Serbs, Croats and Slovenes, i.e. articles 4 and 11 of the Constitution of the Kingdom of Yugoslavia. *Ustavi i vlade Kneževine Srbije, Kraljevine Srbije, Kraljevine SHS i Kraljevine Jugoslavije*, Nova knjiga, Beograd 1988.

was a considerable problem. Many regulations did not allow for mixed marriages (in Serbia, for example, between Orthodox believers and non-Christians), and even in those instances when it was allowed, it was unclear which church had the authority to perform such marriages (for example, both the Orthodox and the Catholic Church claimed to have the sole authority for performing marriage rites between Orthodox Christians and Catholics). Because of the mandatory church marriage form, rights of non-believers were also violated, because marriage law forced them to join a religious community since they were otherwise unable to contract a valid marriage.

The citizens who could not contract a valid marriage due to this particular problem often solved it by relocating temporarily to Vojvodina or some of the neighbouring countries where civil marriage was allowed, but even this circumventing solution came with legal insecurity since, as it was already discussed in the passage on conflicting laws, these marriages were often unrecognized in other legal territories.

Another problem that should be pointed out is the emergence of bigamy resulting from contradictory regulations. This situation could develop because certain religious communities or state institutions did not recognize marriages contracted before another religious community or institution. Because they treated married couples as unmarried according to their own laws, they would allow them to contract new marriages according to their regulations, before divorcing the previous one. For example, if a member of the Roman Catholic Church contracted marriage before an Orthodox priest, the marriage was valid according to state law, but unrecognized by the Roman Catholic Church.[114] As such a marriage was considered non-existent in the law of the Roman Church, the priests of this Church would perform weddings for such persons according to the laws of their Church, regardless of the fact that the previous marriage was not divorced. Another way to bigamy were the polygamous sharia marriages, that were allowed for Muslim men; the problem appeared when a person who was not of the Muslim faith, and who had already contracted marriage according to non-Muslim regulations, converted into Islam and then entered into another marriage according to the rules of sharia law.[115]

114 Edo Lovrić, "Izjednačenje bračnih prava u Kraljevini: koreferat", Metod Dolenc, Rudolf Sajovic (ed.), *Spomenica na Drugi kongres pravnika Kraljevine Srba, Hrvata i Slovenaca*, Pravnik, Ljubljana 1927, 78.

115 See: Toma Pavlović, "Odnos državnoga i crkvenoga zakonodavstva, naročito s obzirom na zaključenje braka: referat", *Spomenica VI glavne skupštine Kongresa pravnika Kraljevine Jugoslavije*, Merkantile, Zagreb 1934, 62–64.

The state tried to prevent this from happening, labeling bigamy as a criminal offence by the Penal Code of the Kingdom of Yugoslavia of 1929.[116] Until then, only the priest who had performed the second wedding was held responsible, but the spouse who was already married was not punished, nor was the marriage annulled by force of law. The new code stipulated in Art. 290 a punishment for persons who enter a new marriage even though they were already legally married,[117] and punishment for the priest was kept in the Article 399. However, we have no data from the court practice to confirm whether or not these rules were indeed applied.

A direct result of bigamy was the confusion related to marital obligations, which certainly couldn't be fulfilled towards both spouses, along with a great deal of legal insecurity and vagueness when it came to inheriting the bigamist.

The third problem appeared in the form of foiling the law by converting into another faith. This phenomenon was a type of abuse of the right to the freedom of confession in order to avoid the application of law, and it was mostly used to obtain a divorce that could not be obtained legally otherwise. The most common form this misuse happened with Christians who were in a valid church marriage converted to Islam. According to the Serbian Civil Code, this conversion would be grounds for annulment of the marriage, that could be demanded by the converts themselves. The misuse of conversion was present in other legal territories as well, since the material stipulations of the sharia law, as it was already mentioned, allowed the man to dissolve a marriage with a one-sided declaration of will, and forbade the woman to marry a man of a different faith – in the case where a husband of a woman who had converted to Islam refused to convert himself, the sharia court would divorce such a marriage.[118] Apart from converting to Islam, it was also common for Roman Catholics to convert to the Orthodox or Protestant faith, which, albeit under some taxing conditions, allowed them to divorce and (more importantly) contract another marriage.[119]

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116 Josip Vesel, Vladimir Timoškin (ed.), *Krivični zakonik Kraljevine Jugoslavije i 343 rešenja svih apelacionih sudova i svih odeljenja Kasacionog suda god. 1930–1935*, Bosanska pošta "Josip Bretler", Sarajevo 1935.

117 Some interpreted this regulation as a prohibition of polygamy for Muslims. See: D. Stanković, "Da li propis § 290. Kriv. zak. ukida bigamiju i poligamiju naših građana muslimanske veroispovesti?", *Arhiv za pravne i društvene nauke*, vol. 41, 4/1932, 324–326.

118 Hafiz Abdulah Bušatlić, "Nešto o nadležnosti za sklapanje brakova pomuslimanjenih lica", *Mjesečnik*, 1/1923, 22–26; T. Pavlović, 78.

119 Ž. Perić, *Lično bračno pravo*, 69–74. See also: M. M. Vlajić, "Promena vere bez ubeđenja", *Ženski pokret*, 11/1932, 154–157.

The possibility of these misuses added another layer of legal insecurity. On top of everything, the practice of misusing the right to conversion aggravated the relationship between the religious communities that was already tense to begin with. It should be noted that even though these situations don't appear to be that big of a problem from the modern day perspective, when divorce is a common and acceptable practice – at the beginning of the past century, the situation was quite different. The regime of separate property meant that after a divorce there was no division of joint property; instead, each spouse held on to their own separate property, and the right to inherit and the rights and obligation of the spouses were only binding during the period in which the marital union existed. With this in mind, it is clear how these misuses could considerably damage the other spouse.

The fourth problem was acting *contra legem* in the matters of marriage law, especially when it came to religious courts. This concerned cases in which marriage was contracted even though it failed to comply with the requirements of substantive law, and also divorces and disputes related to the consequences of marriage. Priests and religious officials, by the very nature of their position, shared stronger bonds with their religious communities than with the state, and they were rarely familiar with the law, so they put the interests of the religious community above the legal norms.[120] A particularly vivid example for this occurrence were the church marriages in the territory of Vojvodina, where by law civil marriage was the norm. Regardless of the law in force, many citizens, especially those coming from the territory of pre-war Kingdom of Serbia, chose to contract marriage solely before a priest. The Orthodox church attempted to solve this problem by sending letters to the representatives of the Ministry, but its propositions for changing the law in force were not adopted.[121] Nevertheless, the number of marriages contracted before a priest alone was on the rise, and the courts regarded those marriages as non-existent and denied them any legal effect. This problem grew to drastic proportions in time, so the By-law on Convalidation of marriages in Vojvodina was adopted in 1928 to mitigate the consequences of this practice.[122]

120 Bertold Ajzner, "Izjednačenje bračnih prava u Kraljevini: koreferat", Metod Dolenc, Rudolf Sajovic (ed.), *Spomenica na Drugi kongres pravnika Kraljevine Srba, Hrvata i Slovenaca*, Pravnik, Ljubljana 1927, 60.

121 See: Dalibor Đukić, "Ustrojstvo Srpske pravoslavne crkve i bračno pravo u Kraljevini SHS – Jugoslaviji", Dejan Mitrović (ed.), *Pravo u funkciji razvoja društva: zbornik radova*, Univerzitet u Prištini sa privremenim sedištem u Kosovskoj Mitrovici, Kosovska Mitrovica 2019, 258–260.

122 However, this by-law also failed to provide an adequate solution to the existing problems. See: Milan Špehar, "Uredba o konvalidaciji brakova u Vojvodini", *Arhiv za pravne i društvene nauke*, 1/1929, 46–52.

As we can see from all of this, marriage law was outdated and incoherent and as such was not adequate for a multinational and multiconfessional state that Yugoslavia was. The outdated norms related to contracting marriage and divorce were often inadequate in the legislation of other states of that time as well (there was a big shift happening in the private lives of people everywhere in the world, so the inadequacy of the old norms was a logical consequence), but their inadequacy and lack of function were still more prominent in the first Yugoslavian state. The reason behind this lays in the fact that the marriage regulations were very old, but also in the pronounced conflict between the religious communities, who all had high ambitions in the clerical domain and used their influence on marriage law to achieve them. The biggest conflict was certainly that between the Orthodox and Roman Catholic Church, which started with the adoption of the Code of Canon Law in 1917. The Orthodox Church responded to the clerical rules of the Code by adopting similarly limiting norms in their Marriage Regulations of 1933. A similar thing happened with the tightening of the rules of the Muslim community, whose Judgment of the Wider Council of the Reis-ul-Ulema of 21 December 1938 removed even that small number of possibilities for mixed marriages previously allowed by the sharia law (marriages between a Muslim man and a Jewish or Christian woman).[123] This state of affairs was highly detrimental to the new state, and shortly after the unification the professionals from the field of law stepped forward to discuss the directions of the future reform from a scientific and political point of view.

The extensive problems and the inadequacy of the existing legislation led to a fairly wide consensus on the need for an all-encompassing reform of marriage law, but there arose the question of which model the reform was to abide by. Depending on the form of contracting marriage, there were three possible models: the system of a mandatory church marriage with the exception of a civil marriage from necessity, the system of a facultative civil or church marriage, and the system of a mandatory civil marriage. According to the first model, the church form of marriage would be mandatory, and the contracting of a civil marriage would only be allowed in those cases where contracting a church marriage would be impossible due to impediments stemming from canon law unrecognized by the state law, or when neither of the spouses belonged to a recognized religion. According to the second model, a civil marriage would be allowed for all the citizens who did not wish to contract marriage in a church, but the state would acknowledge the civil effects of a religious marriage – the adoption of this model would effectively make the civil and religious marriage

123 F. Karčić, 137.

equal. The last, third model saw the civil marriage as the only and mandatory form of contracting marriage. In the case this model was adopted, church marriages would not be prohibited, but they would produce no civil legal effects. So, the spouses had the option of contracting a church marriage after having contracted it civilly, but churches would be prohibited from performing church marriages if a civil marriage had not been contracted previously.

Contrary to the discussion concerning the form of contracting marriage – where the disunity ran deep and there was a lot of debate on which model to choose – when it came to the other important constituents of the new marriage law, agreement was more or less easily achieved. Thus, stemming from the equality of all citizens, as stipulated by the Constitution, there was a push for the state to regulate the rules of material marriage law (related both to contracting marriage and divorce) regardless of the form that is eventually adopted. Likewise, many agreed that the jurisdiction over marriage related disputes should belong to the regular state courts, thereby solving the problem of unreliable religious courts and their practice *contra legem*. Finally, the professionals in law agreed that civil registries should be kept by the organs of the state.[124]

Debates on these issues carried on incessantly in the academic circles, and even a wider circle of professionals took part in them. This subject was discussed twice in the congresses of lawyers, in the Second and the Sixth congress, which apart from the discussions also adopted resolutions that reflected the attitudes of the professionals in law and proposed organizational solutions to the state organs. A number of lawyers close to the church circles advocated for the adoption of the Austrian model for the civil marriage from necessity. This point of view was mostly explained by the importance that religion held for the state, and the religious feelings of the citizens for whom civil marriage was foreign and strange.[125] On the other hand, most lawyers, especially the younger ones, were of the opin-

124 The Sixth Congress of lawyers in the third part of its resolution pointed out that "state authorities should be in charge of keeping the civil registries, and marital disputes should be solved solely by the state courts". For the full text of the resolutions from the Congress of lawyers see f.n. 132

125 One of the arguments was that it would be wrong to go from one extreme to another, and that the church form of marriage was suited to the religious ideas of a wide array of people, leaving the civil marriage only as an option out of necessity. See: E. Lovrić, "Izjednačenje bračnih prava", 77. Another interesting argument is one coming from the church circles, that marriage by its nature is both a matter pertaining to the church and to the state, so that it should not be appropriated by one side alone. By that logic, a mandatory church marriage was a necessity built into the nature of marriage, and if a mandatory civil marriage was to be introduced – then a mandatory church wedding should follow it. Jovan Jeremić, *Za obaveznost crkvenog braka*, special print-out from "*Pravosuđe*" for the first half of 1940, Napredak, Beograd 1940.

ion that the model of mandatory civil marriage should be adopted. They pointed out that this solution would considerably improve legal security and solve most of the problems related to this issue.[126] They underlined that it was not likely that the state could impose their marriage law onto the churches and coerce the priests and religious officials to apply it properly, and that the option of facultative marriage pleased neither the supporters of civil marriage, nor the supporters of religious marriage.[127] The third option, championed by a small number of distinguished lawyers, advocated for a compromise – a facultative choice between the civil and the religious marriage, in which case the state would recognize both with equal legal effects. To support this solution, they claimed that it would solve almost all of the problems related to this issue, while still maintaining some advantages of the church marriage, such as economicalness,[128] and respecting the religious feelings of the citizens. There were two rather different modalities of facultative choice between the two forms of marriage that were being proposed: the first modality, represented by Dragoljub Aranđelović, Bertold Ajzner and Stanko Lapajne, would stipulate for each marriage (including the one contracted in the form of a religious rite) to be regulated by the unified state law,[129] and the second modality, represented by Sergej Troicki, saw the church marriage not just as a form of contracting marriage; instead, it would stipulate for the church, i.e. its organs and ecclesiastical courts, to be in charge of the entire regulation and actions related to church marriage, apart from the part of marriage law concerning property.[130]

126 See: T. Pavlović, 65–67; M. Belić, "Odnos državnog i crkvenog zakonodavstva"; Aleksandar Andrijević, *Naš brak i reforma njegova*, Štamparija Pavla Fer. Ilajca, Veliki Bečkerek 1919.

127 It's interesting that civil marriage was also proposed by Abdulah Bušatlić as a way to solve the problem of conversion to Islam to reap the benefits of the sharia law. H. A. Bušatlić, "Nešto o nadležnosti", 26.

128 Church marriage was a lot more economical because the churches and religious communities had a wide organizational network that was present in almost every village of the mostly rural state. On the other hand, the state administration of the time was far less spread out than today, existing only in the cities and in larger settlements. Apart from the financial expense of going to the city for a civil wedding, this also represented a departure of marriage from the everyday life of the people, something that the proponents of this solution also pointed out.

129 See: B. Ajzner, "Izjednačenje bračnih prava u Kraljevini", 84–90.

130 For a more detailed review of the attitudes of renowned lawyers on the regulation of future marriage law, see: Bertold Eisner, Mladen Pliverić, *Mišljenja o predosnovi Građanskog zakonika za Kraljevinu Jugoslaviju*, Pravničko društvo, Zagreb 1937, 121–122, f.n. 1. See: Sergej Troicki, "Obavezni ili fakultativni građanski brak", special print-out from *Letopis Matice srpske*, vol. 307, b. I–II, 85–93; S. Troicki, "Predosnova građanskog zakonika"; S. Troicki, *Hrišćanska filozofija braka* 204–216.

The lawyer congresses, of which we can say that they represented the views of the professionals in the field of law, adopted resolutions which proposed the introduction of unified marriage law and mandatory civil law for all citizens, and entrusting the state organs with all the court and administrative authorities related to marriage.[131]

This discussion posed the question of the church's role in society and its position in the state-church law. Nobody questioned or condemned the moral authority of the churches, since almost all citizens of Yugoslavia declared themselves as members of various religious communities,[132] but the issue of legitimacy of the monopoly they had over marriage law was openly discussed. The current which proposed mandatory church marriage (with the possibility of civil marriage out of necessity) emphasised that the majority of the population was religious and that the church marriage was a widespread tradition. On the other hand, the proponents of mandatory civil marriage pointed out that civil marriage did not oppose Christian teachings and cited the history of marriage law for proof that the state was originally in charge of contracting marriage, and that it wasn't until later that the church took over that role. Besides this, they pointed out that a church marriage could be contracted facultatively after the civil one has taken place. The Orthodox and Roman Catholic Church, however, had no desire to renounce their authorities. To them, marriage was not a legal affair, nor a contract, but solely a sacrament which, by its very

131 The resolution of the Second congress of lawyers read: The congress of lawyers is of the opinion:

I. Legal security in the entire land demands that even before the unification of civil law a unique civil marriage act be adopted, that should stipulate the requirements for the validity of marriage and grounds for divorce, for all citizens alike regardless of their faith.

II. The civil marriage act must: a) adopt the civil form of contracting marriage; b) determine that marital disputes be judged solely by civil courts. Metod Dolenc, Rudolf Sajovic (ed.), *Spomenica na Drugi kongres pravnika Kraljevine Srba, Hrvata i Slovenaca*, Pravnik, Ljubljana, 1927, 90.

The resolution of the Sixth congress of lawyers read:

1) that the substantive personal law and matrimonial property law be urgently regulated by state law equal for all citizens;

2) that a mandatory civil marriage is introduced;

3) that the civil registries be kept by the state authorities, and marital disputes solved exclusively by the regular state courts. *Dodatak spomenici VI. Glavne skupštine kongresa pravnika Kraljevine Jugoslavije*, Merkantile, Zagreb 1935, 28–29.

132 In the entire country, in the census of 1921, only 1.381 citizens declared themselves as not belonging to a confession, which made about 0,011% of the population.

http://pod2.stat.gov.rs/ObjavljenePublikacije/G1921/Pdf/G19214001.pdf Accessed on 25 June 2022

nature, was under their authority. Such a notion of marriage generated a view by which the church should have sole authority over marriage law, and, moreover, that civil marriage is not in essence a marriage at all, and that as such it should not be recognized. These two churches, therefore, treated civil marriage as a concubinate and condemned it, and persons who lived together in a civil marriage suffered considerable church sanctions.[133] Apart from theological reasons, the churches were also reluctant to give up their jurisdiction over marriage law because of their efforts to gain as much foothold possible in state politics, something they competed in. An exception to this general tendency were the Protestant churches, since they did not consider marriage a sacrament but a purely secular transaction, leaving the regulation of marriage law to the state and only interfering if they had to.

The exception represented by the application of sharia law in marital affairs of the Muslims had a significant role in the relationship of the state towards the other religious communities. On the one hand, the other religious communities demanded the same treatment for their own marriage laws,[134] and on the other, the proponents of the mandatory civil marriage had a hard time justifying the abolition of all the other religious laws save for the sharia law.[135] Another inconvenience was that the sharia law in the Kingdom was not codified, subjecting to debate the application of certain stipulations which clashed with other marriage laws. Some of the debatable institutes, such as the divorce of previous marriages and the contracting of polygamous marriages by converts to Islam, were not allowed by some of the sharia courts, unlike the more conservative ones who adhered more strictly to sharia regulations. Three solutions were proposed for the future standing of sharia law: abolishing sharia law and introduc-

133 Persons such as these were not allowed to partake in holy sacraments, they were not entitled to a funeral church rite, they couldn't receive absolution for their sins, nor have any other holy rite performed for them. These persons had no right to participate in the administrative tasks of parish municipalities, and children born from these marriages could not become priests. T. Pavlović, 57.

134 S. Troicki refered to this right of the Muslim minority when pointing out that it was not logical, and that the parties who signed the Treaty of Saint-Germain certainly had no intention of denying the majority what was guaranteed to a minority (religious form of marriage). S. Troicki, *Hrišćanska filozofija braka*, 208–209.

135 As a solution to this problem Ivo Milić suggested that Muslims should also be obliged to contract a civil marriage, after which they could contract a religious marriage according to sharia law if they wished. Metod Dolenc, Rudolf Sajovic (ed.), *Spomenica na Drugi kongres pravnika Kraljevine Srba, Hrvata i Slovenaca*, Pravnik, Ljubljana, 1927, 84. This attitude was problematic from the perspective of sharia law. It was justified for Christian church marriages that were sacraments by nature and could be contracted after a civil marriage had taken place, but a sharia marriage was a purely secular affair and as such could not coexist with a mandatory civil marriage.

ing a unified legislation for all citizens,[136] reforming sharia laws the way other Muslim countries did, and conserving the current state of affairs. The compromising solution, which required a reform and updating of the regulations, was supported by the fact that traditional Muslim countries, Turkey and Egypt, had just reformed their own marriage laws,[137] framing the reform as a Muslim cause, and not something imposed by the Western culture.[138] Another possibility for reform was the option to alternate between the state law and the sharia law the way it was done in France (Algiers), allowing those Muslims who did not want to contract marriage according to sharia law to do so according to civil regulations.[139] Although there were many reasons for embracing reform, if only a very moderate one, the Muslim community held fast to their conservative views, refusing to accept even the slightest change.

Even though there was no consensus on concrete solutions for these troublesome issues, all the participants in the debate recognized the problem with the current state of affairs of the legislation, and agreed that it should be reformed as soon as possible. In the resolution adopted at the Second congress of lawyers it was underlined that legal security requires that even before the unification of civil law, a unique marriage law for the entire country is adopted, regulating the matter of marriage law equally for everyone, regardless of their faith.[140] These strivings did not remain only in the realm of suggestions: in 1920, the head of the Catholic department within the Ministry of Religion, Mihajlo Lanović, made a Draft bill on the interreligious relations in the Kingdom of SCS, which, among other things, offered a detailed regulation of interreligious marriage law. A number of improvements were proposed for this draft (moderating its conservative nature to some point), but even with the subsequent changes,

136 This attitude was particularly evident in the Second and Sixth congress of lawyers, where it was pointed out in several reports that the exclusive application of sharia law was not in line with the spirit of civil law and equality of citizens before the law. The congress rejected the resolution which stipulated that the marriage law of Muslims should not be interfered with, and the resolutions that did get adopted demanded rules that would apply for all citizens equally.

137 These acts effectively reformed sharia law: by setting an age requirement, by determining a mandatory form of contracting marriage (before a sharia court), by narrowing down the husbands' rights and broadening the wives' rights concerning grounds for divorce, and by limiting polygamy. See: Bertold Eisner, "Šerijatsko pravo i naš jedinstveni građanski zakonik", *Pravosuđe*, special print-out from vol. 6 for July 1936.

138 Even the Supreme sharia court for Bosnia and Herzegovina suggested in 1918 a reform according to the Turkish model. B. Ajzner, "Izjednačenje bračnih prava", 65–66.

139 This reform fit into the proposition of a system with facultative civil marriage, as advocated by Sergej Troicki, but it was never given any serious consideration.

140 M. Dolenc, R. Sajovic (ed.), *Spomenica na Drugi kongres pravnika*, 90.

this draft never made the legislative procedure, leaving this area completely unregulated by individual laws.[141]

Finally, there was a rather interesting idea for solving the problem of marriage law in the Kingdom, and it is worth mentioning here. Since everything was indicating that there will be no reform any time soon, Dragutin Tomac pointed out that marriage law was reformed by the Constitution of the Kingdom of SCS, more specifically its Article 28, stating: "Marriage is under the protection of the state." According to his interpretation, this Article of the Constitution derogates the entire religious legislation and introduces civil marriage into the legal system of the Kingdom.[142] This interpretation, of course, was neither right,[143] nor enforceable, but it illustrates how some writers tried to solve the chaotic situation.

6. REFORMS PROPOSED IN THE DRAFT CIVIL CODE FOR THE KINGDOM OF YUGOSLAVIA OF 1934 AND THE DEBATE ON CONSENSUAL DIVORCE

The debate on the reform of marriage law was very intense, with a lot of conflicting opinions, and one of the rare things that everyone seemed to agree on was the need to implement the reform as soon as possible. Due to all of this, the goal was to adopt special marriage regulations, or at least an interconfessional law for matters related to religious marriage specifically, or to adopt special regulations related to marriage within the general interconfessional law. The government of Yugoslavia, on the other hand, didn't feel the urgency to adopt at least some form of new regulations, it didn't even see the reform of marriage law as a separate issue, leaving it instead as a part of the future all-encompassing reform of civil law and the adoption of a new civil code for the entire country. The committee for the drafting of a new civil code was formed not long after the unification, but its work was slow and laborious, and the first draft of the new civil code wasn't published until 1934, under the name Draft Civil Code for the Kingdom of Yugoslavia.[144]

141 Ivan Z. Galić, "Interkonfesijsko bračno pravo u Kraljevini Srba, Hrvata i Slovenaca", *Mjesečnik*, 6–7/1921, 268–277.

142 Dragutin Tomac, *Ustav i bračno pravo*, published by the author, Zagreb 1925.

143 The meaning of article 28 of the Constitution of the Kingdom SCS was a matter of some debate. The interpretation of the text, especially if we consider the minutes from the sessions of the assembly, brings forth as the most likely meaning of this (rather vague) article the idea that marriage is not just a plain civil contract, but a special type of contract for which the state sets special rules, leaving less space for the individual will of the contracting parties.

144 See: Zoran Mirković, "Kodifikovanje građanskog zakonika nove države i njegovo mesto u istoriji evropskih kodifikacija", Boris Begović, Zoran Mirković (ed.), *Sto*

The draft of the code was modelled after the adapted ACC, which was justified by the fact that ACC was applied in much of the pre-war territory of the state, as well as the fact that the SCC was for the better part a reception of the ACC. Apart from the ACC, which served as the basis, other contemporary legislations influenced the Draft, particularly the Czechoslovakian, i.e. the Czechoslovak Marriage Act of 1919 and the Czechoslovak Civil Code Draft of 1931. Other than the Czechoslovakian legislation, the Draft was also influenced by the Swiss Civil Code, and, to a lesser degree, the German Civil Code. The Draft also took the state regulation of marriage from its Austrian role model – marriage was seen as a contract with a secular goal, and the rules concerning marriage were determined by state law.

The decision to take the adapted ACC as the basis of the new code, and, later on, not to stray too far from the transplanted model, generated quite a bit of resistance from the professionals in the field. The most unfavourable remarks concerned the poor systematisation of the ACC and its obsolescence, and the critics proposed taking another, more modern code to serve as the basis (most often the Swiss or the French). Some also proposed the General Property Code by Bogišić as an alternative, although its inadequacy – both due to its incompleteness, and the fact that it was made for an economically underdeveloped environment – was quite obvious. Those who supported the transplant of the ACC didn't refute the claims that this model had some serious flaws; they did, however, point out that the ACC was applied in various forms in the better part of the country (pointing out as well that the SCC was mostly a reception of the ACC), and that it was something that both the people and the legal science were familiar with due to its long-standing application. Another argument for taking from the ACC was the urgent need for a unified code. Emphasising that it takes a long time to create a completely new, unique code, they saw the transplanting of the ACC as a temporary solution that would be in force until a new code was created. The same logic guided the decision to make the departures from the ACC mostly towards Czechoslovakian law, which was also reformed Austrian law.[145]

godina od ujedinjenja – formiranje države i prava, Univerzitet u Beogradu – Pravni fakultet, Beograd 2020, 267–300; Vesna Radovčić, "Pokušaj kodifikacije građanskog prava u staroj Jugoslaviji: Predosnova građanskog zakonika za Kraljevinu Jugoslaviju", *Radovi 7*, Sveučilište u Zagrebu – Institut za hrvatsku povjest, Zagreb 1975, 249–307.

145 For more details on the debate, see: "Šta govori u korist predosnove novog Građanskog zakonika, a šta protiv: Mišljenja g. g. dr. Dragoljuba Aranđelovića i dr. Mihaila Konstantinovića", *Politika*, no. 10009, from 1 April 1936, p. 8; B. Eisner, M. Pliverić, 3–8; Živojin Perić, *Obrazloženje §§ 1–319 Predosnove građanskog zakonika za Kraljevinu Jugoslaviju*, Ministarstvo pravde, Beograd 1939, 2–3; Mihailo Konstantinović, "Jugoslovenski građanski zakonik: Austrijski ili Crnogorski za-

The Draft never entered into parliamentary procedure, mostly because of the unfavourable climate of the inter-war parliamentary life, which made adopting new regulations quite difficult – but the text itself and the proposed solutions brought about a new wave of debate, the most important parts of which we will summarise here.[146]

Marriage was defined as a special contract,[147] casting away the religious notion of marriage as a holy sacrament; however, mandatory church marriage was kept as the proper form of contracting marriage,[148] while the civil marriage was introduced only as a necessity, i.e. in those situations in which the future spouses were not believers, or if the priest, for reasons rooted in canon law and not recognized by civil law, refused to perform a church wedding.[149]

Substantive marriage law was regulated by civil law[150] and therefore equal for all citizens regardless of their confession (except for the application of sharia law in marriage matters of the Muslims). The consequence of this would be the repealing of all the prohibitions for interreligious marriages, of marital impediments related to ordination or monastic vows and of all the specific rules for individual confessions (present in the ACC), and the jurisdiction over all marital disputes would go to the state courts.[151]

konik?", *Pravni zbornik*, 2–3/1933, reprinted in *Anali Pravnog fakulteta u Beogradu*, 3–4/1982: 384–396.

146 The fact that the new code never got adopted is probably the result of a lack of authority that would support the proposition in legislative procedure. Alan Watson pointed out that authority plays an important role in legal transplanting, and in codification as well. From Moses, through Hammurabi and Justinian, and all the way to Napoleon, great undertakings in codification were all, as a rule, tied to the authority of powerful rulers. With the assassination of King Aleksandar Karađorđević, that kind of authority ceased to exist in Yugoslavia. See: Alan Votson, *Pravni transplanti*, Pravni fakultet Univerziteta u Beogradu, Beograd 2010, 97–105; 137–144.

147 Art. 103. of the Draft. Predosnova građanskog zakonika za Kraljevinu Jugoslaviju, Državna štamparija Kraljevine Jugoslavije, Beograd 1934. Interestingly, the definition of marriage as proposed in the Draft was criticised as being a non-critical transplant of the solution in the ACC (this came in particular from the legal quarters, because the definition was formulated according to the Catholic views on marriage), and it was particularly pointed out that it was not true that the essence of marriage was procreation. In that sense the Draft was behind other contemporary legislations, which did not define marriage, leaving that task instead to the legal sciences.

148 Art. 129. of the Draft

149 Art. 130. of the Draft

150 B. Eisner, M. Pliverić, 119–121.

151 Disputes that were to be solved according to sharia law would be under the jurisdiction of special sharia courts, but those courts would also belong to the system of state courts, the only difference being their application of religious law.

The suggested solutions were fairly conservative, leaving the proponents of mandatory civil marriage unsatisfied, since the form of contracting marriage was still religious[152] – but also the proponents of religious marriage, because the mandatory form of contracting marriage was indeed still religious, but the essence of marriage lost its religious character and became a purely state issue.[153] Finally, this solution was not optimal even for the proponents of facultative choice of marriage form, because it adopted the religious form of contracting marriage as mandatory without any particular justification.

Unlike for the form of contracting marriage, in which the Draft had remained conservative and did not stray from its model, the ACC, a considerably different solution was taken for the regulation of divorce, where under the influence of Czechoslovakian legislation a more modern, liberal approach was adopted. Norms on divorce were also equal for all the confessions, including the Roman Catholics. Article 165 of the Draft stipulated in great detail the grounds for divorce, those being: adultery; crime committed out of base or dishonourable motives, betraying a deviant character; malicious abandonment; plotting to murder or gravely endanger the life or health of the spouse; severe abuse; mental illness; disordered lifestyle; and mutual divorce due to overwhelming hatred. Grounds for divorce were set a lot wider compared to the previous regulation (although there were suggestions to introduce some other grounds for divorce by people close to the church),[154] but the point that caused the greatest debates and provoked the most attacks from the conservative side was the solution regarding mutual divorce due to overwhelming hatred.[155] The critics of this solution pointed out that this practically introduced consensual divorce – because if the spouses wished to divorce, they could always declare to feel overwhelming hatred for one another.[156]

152 T. Pavlović, 69–70.

153 S. Troicki, "Predosnova građanskog zakonika", 527.

154 B. Eisner, M. Pliverić, 159–161; S. Troicki, "Predosnova građanskog zakonika", 539–541.

155 This solution was present in the ACC as well (Art. 115), entering it under the influence of the school of natural law, without any religious grounds. Still, in the territory where the ACC applied, the use of this rule was limited by the fact that it only applied to non-Catholics, and only if their religious laws allowed it (which they didn't, as a rule).

156 However, those same critics state that spouses who wish to get a divorce can do so even with the current regulations – by consenting to organize a fraud, but they really paid no heed to this possibility. Dragoljub Aranđelović, "Brakorazvodni uzroci: po Građanskom zakoniku Srbije, Bračnim pravilima Srpske Pravoslavne Crkve i Predosnovi građanskog zakonika", *Arhiv za pravne i društvene nauke*, vol. 51, 2/1937, 110–128. Interestingly enough, this provision was also criticised by the proponents of the mandatory civil marriage. See: T. Pavlović, 68–70.

The institute of guilt for divorce (and also guilt for the separation from bed and board) was kept in the Draft in Articles 169 and 742, but its importance was more or less reduced[157] – guilt was important in the process of choosing the surname that the wife will bear after the divorce, and on the occasion of inheritance of the separated spouses.[158] This was a significant improvement, since guilt for divorce was very vague and often difficult to confirm in practice.[159]

Other than divorce, the Draft also takes from Austrian legislation the institute of separation from bed and board, which may be mutual or can be ordered during the divorce proceedings if the court decides that the marriage should not be divorced straight away, leaving a time period in which reconciliation could happen instead. Separation could be ordered for the same reasons stipulated for divorce, but also for other reasons due to which marital relations reached such a point that it would not be justified to ask the spouse (plaintiff) to continue with cohabitation. This institute was criticised as being groundless in a law code which stipulates divorce under equal conditions for all citizens, and for losing its function of being a substitute for divorce in Roman Catholic countries. The new function of this institute was probably an extended attempt to guide the spouses towards reconciliation and renewal of joint life. The time period for separation was set to a maximum of two years if the court ordered it instead of a divorce, according to the Article 165 of the Draft; after the two-year period had passed, and the cohabitation had not been resumed, each spouse could ask for a definite divorce.[160]

157 In the ACC, guilt for divorce warranted a more serious punishment – prohibition to contract a new marriage (Art. 119). A similar provision is found in the Marriage rules of the SOC, Art. 113, paragraph 2, prohibiting a person through whose fault two of their previous marriages had been divorced from marrying again.

158 Article 742 of the Draft stipulates that the surviving spouse loses the right to inherit along with the right to previous legacies if they were separated from bed and board through their own fault.

159 For a more detailed illustration of this problem, see: Jovo Davidović, "Jednostrano raskidanje bračne zajednice bez opravdanog razloga jeste navođenje na preljubu ostavljenog ili otstranjenog bračnog druga" (with commentary by S. Troicki), *Arhiv za pravne i društvene nauke*, vol. 58, 1–2/1940, 112–116.

160 Transplanting the institute of separation of bed and board may seem like inertia at first sight – a non-critical adoption of a completely superfluous stipulation, since divorce was already allowed, but this was not the case here. In this case we have a legal transplant of an adopted institute that begins to function in a completely new way. Instead of the earlier function of providing an alternative to divorce for Roman Catholics, it gained a new function – making divorce more challenging and pointing all citizens towards the renewal of married life, regardless of their confession (not counting, of course, the citizens of Muslim faith, for whom a different set of religious rules applied). The theoretical base of transformation in legal transplants was first set by Alan Watson within his theory of legal transplants – this is what happens when

7. CONCLUDING OBSERVATIONS

The legal regulations that regulated marriage law in the Kingdom of SCS and the Kingdom of Yugoslavia were outdated and inadequate for the social circumstances of the time. With the exception of Vojvodina, marriage law was unreformed and under a great deal of influence of religious law, which worked against reforms. Legal particularism of state law was further complicated by the particularism of religious law. This brought about very complicated cases of conflicting laws that could not be solved due to a lack of rules, and the regulations themselves were so contradictory that it was practically impossible to create adequate rules that would solve internal conflicts of law. All of this was exacerbated by the *contra legem* actions and different practices of religious courts in matters related to marriage.

A reform of the current state of affairs was essential, and the main question was how to remove the shackles of the detrimental religious influence from marriage regulations, making them adequate for life in a multiconfessional state. Religious communities tried to hold on to their social influence through marriage law, and the feuds that existed between the different religious communities unfolded in part through these regulations. One way to make things bearable was to reduce the detrimental and socially unacceptable influence of religious law to a degree that would allow proper functioning of legal traffic. The main issue of marriage law reform was determining the extent to which the influence of churches and religious communities should be reduced. The model of state regulation and mandatory civil marriage offered a uniform regulation and legal security, but religious marriage was in accord with the religious sentiment of the people, more solemn, more economical, and it didn't provoke resistance from the religious communities. It was clear that some of the rules pertaining to religious marriage laws had to change, but it remained to be seen to what extent those rules would be changed. Matters were further complicated due to the fact that the churches and religious communities did not want to reform their marriage laws,[161] nor accept state reforms, while the educated lawyers mostly advocated for the complete exclusion of churches and religious communities from marriage law.

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the legal norm in the receiving system acts in a fundamentally different way than it did in its system of origin. See: A. Watson, 171.

161 In a survey of religions that was organized in 1921, almost every religious community voted for having complete authority over matters of marriage law, showing no intention whatsoever to reform it in any serious way. (In this survey, only the Serbian Orthodox Church refrained from expressing this attitude, probably because they followed the questions of the survey more closely; however, it was something they discussed openly enough in other places.) Rado Kušej, *Verska anketa u Beogradu i njeni zaključci*, published by the author, Ljubljana 1922.

This situation led to a fiery confrontation that could not end in a constructive manner. A moderate, compromising solution represented by the facultative choice between the civil and the church marriage was repudiated both by the professionals from the field of law – because it was "a solution that nobody was completely satisfied with" – and the religious communities, who disagreed with and deprecated civil marriage on principle. The compromising solution, therefore, was only supported by a small number of renowned lawyers.

With its reforms, the Draft Civil Code combined the conservative preservation of form and the newer, more liberal set of rules. The mandatory form of religious marriage was kept, and civil marriage was introduced only for those cases in which contracting a religious marriage was not possible – which wasn't an optimal solution, but was done as a compromise with the conservative current – while the marriage rules in themselves were completely regulated by state law, and the authority over marriage disputes went to the state courts. This definition of marriage as religious by form and civil in essence met with great resistance from the church circles, who were of the opinion that a religious marriage should be regulated with religious rules; this attitude, however, had no theological legitimacy, since entering into marriage was indeed a sacrament according to Christian teachings – but the regulation of marriage rules was not. On the other hand, the norms of marriage law were quite liberal for that day and age, especially the one regarding divorce by mutual consent. Reforms proposed by the Draft had significantly reduces the possibilities for the arisal of litigious situations that we discussed in the previous chapters, and that presented a threat to legal security.

However, even this moderate and compromising reform failed. The reasons for this should be sought in the harsh and dismissive battle between the proponents of the mandatory civil marriage and the mandatory church marriage, but even more so in the political life and the crisis of legislation in Yugoslavia. The fact that for twenty three years of its existence Yugoslavia had not reformed such an important issue as marriage law speaks of the magnitude of the legislative crisis and the consequences it had upon society.

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БРАЧНО ПРАВО У КРАЉЕВИНИ СХС / ЈУГОСЛАВИЈИ: СТАЊЕ ЗАКОНОДАВСТВА И ПОКУШАЈ РЕФОРМЕ

Сажетак

По уједињењу у Југославији је постојао правни партикуларизам између шест правних подручја на којима се примењивало предратно право. На пољу брачног права ситуација је била додатно сложена, јер је постојао додатни партикуларизам између верског брачног права шест конфесија.

У чланку се сумарно приказује стање државног и верског законодавства са посебним освртом на застареле норме, а у наставку се излажу проблеми правне несигурности и сукоба закона који су проистекли из таквог уређења. У стручној јавности постојала је општа сагласност да је постојеће стање било веома нефункционално и да су биле потребне реформе, али сагласност око конкретних решења није постојала. Спорно је било колики утицај верске заједнице треба да имају у будућем уређењу, и зависно од тога предлагана су три модела: обавезни црквени брак, факултативни грађански или црквени брак, или обавезни грађански брак. Напослетку се приказује званичан предлог умерене реформе у Предоснови грађанског законика, као и разлози због којих она никад није била спроведена. Посебно се анализира преузимање страног права и адекватност трансплантираних норми у оквиру домаћег правног система.

Кључне речи: *брачно право, државно-црквено право, црквени брак, грађански брак, правни трансплантати*

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