SIC ITUR AD ASTRA

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Collection of papers on Hungarian and Croatian legal history 2024

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Jakov Vojta ŽUJO: Criminal protection of marriage in the interwar Yugoslav state

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1. Historical context

The Kingdom of Serbs, Croats and Slovenes/Yugoslavia was a state that existed from 1918 until 1941. It was created by merging states that were formerly part of Austria-Hungary and the Kingdoms of Serbia and Montenegro in a complex geopolitical process after the end of World War I.

From 1918 to 1929, the state's official name was the Kingdom of Serbs, Croats, and Slovenes, but the term Yugoslavia (literal translation: Land of the South Slavs) was a widespread term already, and it was also featured in the works of some Slavic, prevalently Croatian, authors and idealogues, as the genesis of the idea of the unification of the South Slavs (and further: Pan-Slavism) reached back to the 16th century.[1]

The official name of the state was changed to Kingdom of Yugoslavia by King Alexander I on 3rd October 1929. As already mentioned, the new name was more than just an act of convience, given that the state had already generally been called Yugoslavia. It was meant to reflect the state and national unitarsm.[2] To unify the diverse nations, now part of a unitary state, and solidify absolutist rule over them, there were continuous efforts to unify the legislation of the interwar Yugoslav state, with criminal

[1] BANAC, Ivo: *The National Question in Yugoslavia: Origins, History, Politics*, Cornell University Press, 1988, p. 71.
[2] DJOKIĆ, Dejan: (Dis)Integrating Yugoslavia. In: DJOKIĆ, Dejan (ed.): *Yugoslavism: Histories of a Failed Idea 1918–1992*, Hurst & Company, London, 2003, p. 149.

legislation being one of the most important aspects to be methodologically standardised.[3]

2. Overarching legislation – the Criminal Code of 1929

The efforts to unify criminal legislation involved meticulous research by the legal scientists and practitioners at the time, resulting in several legal texts being drafted in an effort to reach a single code that would universally cover criminal cases in all the legally and culturally diverse Yugoslav nations, ideally with minimal power struggle between them over which nation gets the more "privileged" status due to more of their legal norms and customs being accepted as universal. These efforts culminated with the Criminal Code of 1929, which contained various crimes against marriage and family, mostly taken and mixed and matched from other sources of criminal law present in the area at the time.

Before the criminal law of the Kingdom of SCS received its unified form in 1929, the main sources of criminal law were criminal codes and other criminal regulations in force in particular states before their unification in the Kingdom of SCS. After the unification, there were six criminal codes in force. On the territory of Serbia, it was the Criminal Code of 1860, which was shaped after the Prussian Criminal Code of 1851; in Montenegro the Criminal Code of 1906, which essentially represented a reception of the Serbian Criminal Code; in Vojvodina, the Hungarian Criminal Code of 1878. In the remaining countries (Croatia and Slavonia, Dalmatia, Slovenia, Bosnia and Herzegovina) criminal codification originated from the Austrian Criminal Code of 1852. It is clear that any sort of effort to unify these systems of law that had been developing separately for decades wouldn't be an easy task, and prominent issues would certainly arise. After a turbulent and longlasting process of unification of criminal law in interwar

[3] PASTOVIĆ, Dunja: Unification of Criminal Law in the Interwar Yugoslav State (1918–1941), *Krakowskie Studia z Historii Państwa i Prawa*, No. 4, 2019, p. 555. DOI: doi.org/10.4467/20844131KS.19.027.11645

Yugoslavia, the Criminal Code of the Kingdom of Serbs, Croats and Slovenes was enacted on 27th January 1929 and it came into force on 1st January 1930.[4]

3. Protection of marriage in the Criminal Code of 1929

The new unified Criminal Code of 1929 focused on many different aspects of marriage as a core institution, and at that time nearly synonymous with family. Marriagge and family life in the interwar Yugoslav state were regarded as a cornerstones of society. Art. 21 of the Constitution of the Kingdom of Yugoslavia from 1931 stipulates that marriage, family and children are under the protection of the state.[5]

Generally regarding the legal basis of the protection of marriage, it was stated that the lawmaker is protecting the legal right, fulfilled in the right of conducting sexual relations in a legally recognized form of marriage, from which children's rights are also drawn.[6] It is interesting to note that this definition focused on a legally recognized union and the right to consumption rather than a voluntary union of two people, which is the basis for modern interpretations and definitions of marriage.

It is also notable that bigamy is forbidden, which is the same as in contemporary Western legal systems,[7] but, unlike in the modern Western systems, it is explicitly mentioned in the Commentaries of the Criminal Code of 1929 that monogamous marriage is the foundation of the legal order in Christian states.[8] As opposed to today, where bigamy is still largely outlawed, but most Western countries are secular and

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[4] *Ibid.*, pp. 555–558, 569.

[5] *Ustav Kraljevine Jugoslavije [Constitution of the Kingdom of Yugoslavia]*, Državna štamparija Kraljevine Jugoslavije, 1931, Beograd, p. 8.

[6] DOLENC, Metod – MAKLECOV, Aleksandar: *Sistem celokupnog krivičnog prava Kraljevine Jugoslavije [The entire criminal justice system of the Kingdom of Yugoslavia]*, Izdavačko i knjižarsko preduzeće Geca Kon a. d., 1935, Beograd, pp. 174–175.

[7] WITTE, John Jr.: *The Western Case for Monogamy Over Polygamy*, Cambridge University Press, New York, 2015, p. 2. DOI: doi.org/10.1017/CBO9781316182031

[8] ČUBINSKI, Mihailo P.: *Naučni i praktični komentar Krivičnog zakonika Kraljevine Jugoslavije od 27. januara 1929. god. (Posebni dio) [Scientific and practical commentary on the Criminal Code of the Kingdom of Yugoslavia from 27th January 1929 (Special part)]*, Izdavačka knjižarnica Gece Kona, 1930, Beograd, p. 231; DOLENC – MAKLECOV, *op. cit.*, p. 174.

there is no mention of religion in modern-day legislature concerning marriage and family (religious marriage, but not as basis of any family-related institutions). Modern criminal law no longer protects monogamous marriage as such, but protects a person who first married another person in accordance with the provisions of family law. Therefore, bigamy today is primarily about the protection of individual legal rights.[9] Still, the historical connection of marriage to its Christian ideal is worth pointing out.

Criminal offenses against marriage and family are contained in Chapter 25 of the Criminal Code of 1929 (§§ 290-296) and they include following crimes against mariagge: bigamy, concealment of martial obstacles, adultery, *raptus in parentes*, and aiding an invalid marriage.

Also, in the Chapter 12 of the Criminal Code of 1929, that contains criminal offenses against the state and its constitutional order, there is a crime of disparagement of the institution of marriage (§ 100). This crime introduces a prison sentence of up to three years for publicly mocking or holding in contempt marriage as a legally recognized institution. It is introduced separately from other crimes against marriage, as part of a wider provision, where mocking the ruler, his rights, the rightful order of inheritance, and the ruling system, as well as the legally recognized institutions of family, marriage, and property. The mocking can be done orally, in written form, or otherwise. Regarding marriage, it concerns not a single marriage but marriage as an legal institution. If the perpetrator is calling for a violent abolition of marriage as an institution, they can be punished by a five-year at most prison sentence.[10] While it can hardly be imagined that anyone would call for the abolishment of marriage as an institution at that time or even mock it publicly, as it seems this crime pertains more to those that try to disparage the ruling autocracy, it is still notable that marriage as the foundation of society was considered important enough to be mentioned in a

[9] NOVOSELEC, Petar (ed.): *Posebni dio kaznenog prava [Special part of criminal law]*, 1st edition, Pravni fakultet Sveučilišta u Zagrebu, 2007, Zagreb, p. 204.
[10] RUSPINI, Ivan Angelo: Krivična djela protiv braka [Criminal offences against marriage], *Bogoslovska smotra [Theological Review]*, No. 3, 1931, pp. 262–263.

crime of this sort, protected alongside the ruler and ruling system, among other core values considered worth protecting in this way.

3.1. Bigamy (§ 290)

The crime of bigamy, found in § 290 of the Criminal Code of 1929 is a staple of the invalidity of marriage in many western legal systems, Croatian included. This contempt for bigamous relationships, according to authors Dolenc and Maklecov, was founded on Christian monogamous values, which they stated in their 1935 book analysing the entire system of Yugoslav criminal law,[11] but the same principle can be applied to all formerly majority Christian states. Bigamy is to this day criminalised and outlawed in most legal systems, except in Muslim states and Sharia law in particular.

According to § 290, whoever enters into a new marriage, even though he is already legally married, will be punished with strict imprisonment from seven days to five years. A person who was not married, and entered into a bigamous marriage knowing of an already existing marriage of his spouse, was punished in the same way. In regard to bigamy, the legislator established an exception to the general rule according to which the statute of limitations begins to run from the day the crime was committed – the statute of limitations for bigamy begins when the previous marriage ceases to be valid.[12]

The fact that Christianity strictly outlaws bigamy also explains its illegality in majority Christian countries and its legality in Muslim countries, where men having multiple women is a cultural and religious tradition. The explained state of facts also poses a question: what was the state of legality of bigamy for the Muslim population of the interwar Yugoslavia?

[11] DOLENC – MAKLECOV, *op. cit*., p. 175.
[12] DOLENC, Metod: *Tumač Krivičnog zakonika Kraljevine Jugoslavije [Commentary on the Criminal Code of the Kingdom of Yugoslavia]*, Tisak "Tipografija" d. d., 1930, Zagreb, pp. 366–367.

3.1.1. Bigamy and the Muslim community in the interwar Yugoslavia

The interwar Yugoslav state was a fairly multicultural and multireligious state for the time period, with Catholic, Orthodox, and Muslim populations (mainly in Bosnia and Herzegovina, which was under Ottoman rule for many years until Austro-Hungarian occupation in 1878). This meant that some of the religious laws weren't in accordance with the practicing criminal law that was meant to be used in the entire country. This issue is exemplified in the ban on bigamy for Muslim and Christian communities alike. Whereas bigamy was already looked down upon and an offense in Christian areas of Yugoslavia, the Muslim community considered it a custom and as well, it was a part of Sharia law, sacred to Islam. This is certainly one of the issues that arose while trying to unify the extremely diverse legal systems that formerly existed on the Yugoslav area, and as such it is worth to be highlighted.

D. N. Stanković, a Serbian judge from Niš analysed the situation regarding Muslims and bigamy in the interwar Yugoslavia in the legal journal "Archive of Legal and Social sciences". The particular question he poses is: Does § 290 of the Criminal Code of 1929 derogate bigamy and polygamy for Yugoslav citizens of the Muslim religion?

Firstly, the comment of the cassation judge G. L.Urošević on § 290 is mentioned: "*Valid are those marriages made according to existing provisions and ceremonies of all accepted religions in our Kingdom. In accordance with that, this provision tacitly derogates bigamy and polygamy of our citizens of the Muslim religion. From coming into force of this law onward, Muslims that are already in legal marriage, if they marry into a new marriage, will commit a crime under this provision*."[13]

[13] STANKOVIĆ, D. N.: Sudska hronika. Da li propis § 290 Kriv. zak. ukida bigamiju i poligamiju naših građana muslimanske veroispovesti? [Judicial Chronicle. Does regulation § 290 of Criminal Code abolish bigamy and polygamy among our citizens of the Muslim faith?], *Arhiv za pravne i društvene nauke – organ beogradskog Pravnog fakulteta [Archive of Legal and Social sciences – Journal of the Faculty of Law in Belgrade]*, bk. 24 (41), no. 4, 1932, p. 324.

Judge Stanković continues with a critique of this opinion. He points out that it is correct that if a Muslim citizen marries into a new marriage while already being in a legal marriage he is subject to punishment, but it is incorrect that bigamy and polygamy are forbidden for Muslim citizens, because bigamy and polygamy up to four women is considered legal marriage under their laws. To substantiate his claim, he points to Art. 1 of the Constitution of the religious Islamic community of the Kingdom of Yugoslavia, where it is written that Islam is an recognized religion equal to all other legally recognized religions in the Kingdom. In Art. 5 of the same text, it is stated the religion is governed by Sharia law, this Constitution, and the law on the Islamic religion. Next, judge Stanković points to Art. 19 and 30 of the Sharia law, where rules on bigamy and polygamy are found, and they are *de facto* allowed. Finally, he points to § 23 of the Criminal Code of 1929, where it is written that there is no crime if the provisions of public and private law rule out the illegality of actions.

Judge Stanković concludes his analysis by pointing out that § 290 of Criminal Code of 1929 cannot abolish bigamy or polygamy while the Sharia law allows it, due to the fact it is recognised as a civil legal source, and as such effectively rules out the illegality of these actions, according to § 23 of the very Criminal Code.[14]

3.2. Concelament of marital obstacles (§ 291)

The crime found in § 291 of the Criminal Code of 1929 is committed by anyone who, when entering into a marriage, cunningly conceals from the other party any fact that may render the marriage null and void. The fact in question must affect the validity of marriage, and because of its falsity the marriage must be nullable (marriage that is *ipso iure* not valid from the beginning) or voidable (marriage that can be, by court order, *ex tunc* made invalid). The crime is committed by the party that on purpose keeps such a fact secret, or actively misrepresents it to the other marital party. Criminal

[14] *Ibid.*, pp. 324–326.

prosecution is initiated by the injured party, but only if the marriage is voided because of the fact that was being kept secret or misrepresented.

The facts in question could be, for example, withholding the information that the party is already married, lack of parental consent when the female is under 18 years of age, and other facts crucial for the legality of marriage. Perpetrators were punished by strict prison sentence of seven days to five years at most, a signifier of how much the sanctity of true marriage was valued.[15]

3.3. Adultery (§ 292)

The crime of adultery is in many ways the most regressive legal provision found in the Criminal Code of 1929; the criminal prosecution of adultery highlights the importance of and the exalted status marriage had in the eye of the public and the state at the time — less than a hundred years ago. The fact that both the husband and the wife were treated equally and were able to be prosecuted for adultery was actually fairly liberal for the time period, as one of the rare instances of the equal legal treatment of both sexes in the context of family.

According to § 292, a husband or wife who commits adultery will be punished with imprisonment for up to two years. Also, the person with whom the adultery was committed was punished with the same punishment, regardless of whether this person was married or not. This crime was prosecuted only on a basis of private lawsuit filed by the injured spouse, despite the state doctrine of the time being that marriage is of public interest. A private lawsuit could only be filed if the marriage was divorced or in case of marital separation due to adultery. What was weighted was the public importance of marriage, both as a sanctimonious union under Christian principles and as a public good benefiting the state, and the fact that the spouses were the main creators and providers of the marriage, thus having a certain degree of control over it,

[15] ČUBINSKI, *op. cit*., pp. 234–235.; DOLENC – MAKLECOV, *op. cit*., p. 175.

and the latter prevailed. This was once again a more liberal outlook on marriage and a possible sign of changes that would slowly occur during the following century. Also, to leave the state the right to *ex officio* punish adultery would mean leaving the state the right to intrude in the most intimate relationships of private life.

If the marital partners lived separately while the adultery was committed, the spouse committing it can be freed by a court of any punishment. In this case, the legislator gave the court the possibility to exempt the adulterer from punishment, but the court could also punish him in the case when the separated life was caused by his abandonment of his wife and children.[16]

3.4. *Raptus in parentes* (§ 293)

Raptus in parentes descriptively means taking away a female under 18 years of age with her consent, but without the consent of her parents or caretakers with the intent of marrying her. In this case, there must be the consent of the girl to be taken away. Not getting her parents' consent means any act that indicates the intent of disobedience of parents' wishes, be it sneaking out or permanently leaving the parental household with a male partner will be a considered a criminal offense by the male partner. The crime is completed when the girl is brought to the place where she is to be married. A prison sentence of up to three years is prescribed, if this offense does not turn into a more serious crime – for example, if the girl's consent was coerced or obtained by fraud. The criminal prosecution is undertaken only upon the motion of the injured person. In case the marriage has been concluded, criminal prosecution against the perpetrator is possible only if the marriage is annulled.[17]

While at first glance radical, this solution has a lot more similarities to the current doctrine than firstly apparent. Since this crime passively concerns only underage females, parallels can be drawn to the still-major role parents play in

[16] ČUBINSKI, *op. cit*., pp. 235–237.; DOLENC, *op. cit*., p. 369.
[17] DOLENC, *op. cit*., pp. 370–371.

consenting to, and advising their underage children about marriage. This role can be noted in the Croatian Family Act, wich prescribes among the conditions for the validity of marriage (Art. 25): "*(1) A marriage may not be contracted by a person who is not eighteen years old. (2) Exceptionally to the provision of Paragraph 1 of this Article a court may in a non-litigation procedure allow the contracting of marriage to a person who is sixteen years old, if the court determines that the person is mentally and physically mature enough to marry, and that there is a good reason for the contracting of the marriage.*"[18]

This provision of the contemporary Croatian Family Act describes the process of marriage for persons aged 16 to 18 years old in a non-litigation procedure, as an exception to the rule that only persons aged 18 and older are allowed to marry. The parents have an active role in the court procedure, giving their testimonies on the child's psychophysical development and their overall opinion of the child's partner and the situation. This is extended to male and female underage persons, as opposed to the Yugoslav Criminal Code of 1929, where men are predominantly put in a more privileged position as opposed to women.

While there clearly exist enormous differences between the contemporary legal system and cultural sphere and the system of the interwar Yugoslav state, and the role of parents in their children's personal lives beyond the legal scope itself is wildly different as well (generally less involvement of the parents in the child's decision-making, choosing a suitor, asking for consent as a tradition, etc.), the active legal role of parents in their underage children's marital choices can be noted as a root similarity.

The crime of *raptus parentes* is addition to the provision regarding real kidnapping of a woman for the purpose of marriage (§ 246). This crime is placed in chapter 21 of Criminal Code of 1929, which contains crimes against personal freedom. In the case of real kidnapping of woman for the purpose of marriage there is no victims

[18] Obiteljski zakon (pročišćeni tekst), na snazi od 25 travnja 2020 do 31. prosinca 2023 [Family Law (consolidated text), in force from 25th April 2020 to 31st December 2023], NN 103/15, 98/19, 47/20, 49/23, https://www.zakon.hr/z/88/Obiteljski-zakon [Access on March 24, 2024].

consent to be taken away. It is important to highlight the word real in the name of this crime, since the crime itself had to be by force, a serious threat of committing a crime or by fraud, with the intention of marrying the victim. The criminal prosecution is undertaken only upon the motion of the injured person – abducted girl, if she has reached the age of 18 or her parents or guardians.[19]

It is apparent that the lawmaker considered the kidnapping of a woman for the purpose of marrying her (forcibly) important enough to classify it as a crime *sui generis*, separate from the regular crime of kidnapping. Considering this fact, and since there obviously only exists a crime of kidnapping a woman and not the other way around (woman kidnaps a man) an expected conclusion can be drawn: women were in a highly subordinate position to men during this time, and marriage was looked at more as a way of ownership, where the man owned the woman, rather than it being a consensual union of two adults.

3.5. Aiding an invalid marriage (§ 295)

This crime consists in helping to conclude a null or void marriage: "*Who, knowing that the marriage can be annulled, helps to conclude the marriage, shall be punished by imprisonment for up to three months.*"[20] This crime expands on the one mentioned in § 291 (concelament of marital obstacles), extending the reach of persons that can be penalised to other parties witnessing the marriage as well as the city official performing the marriage and knowing there exist facts that make the marriage null or void. It still encompasses the marital parties if they are involved and know the marriage is null or void. This crime is prosecuted *ex officio*, not upon the motion of the parties in question.[21] This can be explained by its more *erga omnes* nature within the limits of

[19] RUSPINI, *op. cit.*, pp. 257–258.
[20] DOLENC, *op. cit.*, p. 372.
[21] RUSPINI, *op. cit.*, p. 261.

the marital process, as it can be committed by virtually everyone involved in making the marriage come to fruition.

In the chapter 28 of Criminal Code of 1929 containing offenses against official duty, there is a crime committed by a religious representative who marries persons between whom marriage is not permitted by law (§ 399). This is a crime oriented towards religious representatives, as city officials were already covered in the crime mentioned in § 295. The here discussed crime in question pertains primarily to marriage which cannot be validly formed because it goes against general legal provisions. A religious representative who marries two people under these conditions will be imprisoned or fined. If the marriage doesn't get invalidated (because of a possible change of conditions), he can only be fined, but the court can also relieve him of any punishment. This crime is prosecuted by official duty.[22]

4. Conclusion

It is perfectly clear from the provisions of the criminal system for the protection of marriage in the interwar Yugoslavia that marriage was considered one of the most important institutions of the time, alongside family and property, less than a hunderd years ago. Through many challenges and tribulations the legal system of a new unified country faced, especially considering its multicultural and turbulent cultural background, it changed with the times, and so did the view and outlook on marriage, both through legal and civil lenses. While the pendulum was firmly on the side of the exalted, patriarchal, and state-protected marriage, thorough changes to the legal system that happened during this time and overarching root social revolution in Europe and with it the Yugoslav area swung it the other way. Western society has reached the point of supporting free, consent-centric marriage. It is important to look

[22] *Ibid*., pp. 261–262.

back at this point in history and note some of the silent but root changes slowly contributing to the liberalisation of marriage and society as a whole.