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1. Introduction

After the World War I, several new states were created in Europe with the Kingdom Yugoslavia being one of them. It emerged in 1918 as a rather heterogeneous state.¹ It officially recognised three nationalities (Slovenians, Serbs and Croats), but many others lived on this territory and a significant number of religions were legally recognised. This created numerous problems in practice, legal particularism being one of them, threatening the strength of this state. The pledge of the durability of the new state was reflected in the construction of a unique legal system which *"would become the link of a new unified nation and bridge mutual differences"*.² It meant dismantling its constituent historical units and thus creating conditions for a unitary and centralised state. But, the practice showed that it wasn't an easy task at all. Certain legal areas, such as marriage law, were the embodiment of chaos existing in this multinational and multi-religious state.

Marriage rights posed legal, religious, cultural, political and national problems. This area of law was characterised by the concurrent validity of both religious and civil marriage, with the religious type of marriage ceremony prevailing. Such a legal order, in which not only lawyers were involved, but also religious communities, could have been interpreted as a fertile ground for the onset of *"inter-religious war"*.³ The existing

¹ The State of Slovenes, Croats and Serbs which was created in 1918 later unified with the Kingdom of Serbia and Montenegro and formed the Kingdom of Serbs, Croats and Slovenes. In 1929 that state was renamed the Kingdom of Yugoslavia.

² ČEPULO, Dalibor: *Od srednjeg vijeka do suvremenog doba [Croatian Legal History in European Context, From Middle Ages to Contemporary Period]*. Sveučilište u Zagrebu, Pravni fakultet, Zagreb, 2021, p. 283.

³ MILIĆ, Ivo: *Za opšte obvezni građanski brak [For the Mandatory Civil Marriage]*. *Letopis Matice Srpske*, Novi Sad, Vol. 309, No. 1–2., 1926, p. 7.

non-uniformity of marriage law became the most important and essential discussion in the standardisation process where doubts about the introduction of civil marriage as either in obligatory or optional form emerged. The work on this issue continued throughout the entire inter-war period.

2. Legal particularism in the Kingdom of Yugoslavia

The term “legal particularism” refers to the co-existence of several legal areas in the Kingdom of Yugoslavia. These areas used different legal and judicial systems and sources of law since they were parts of different states before the unification. There was a plan to establish a court of cassation as the highest court which would standardise the judicial practice throughout Yugoslavia, but until the realisation of the idea, the former supreme courts of the territories were considered sections of the single court of cassation. They also maintained their status of supreme courts within each legal area. Consequently, there was a highly decentralised organisation of regular courts, in whose area of jurisdiction different substantive and procedural law was applied. Regulations which were in force in 1918 still remained valid in the Kingdom of Yugoslavia and their implementation was envisaged until the adoption of unified Yugoslav Statutes.⁴ Therefore, the term “legal federalism” is also appropriate to describe the legal system which existed in this state.⁵ Even after the foundation of the mentioned court of cassation, the standardisation process did not achieve the wanted results.

We are speaking about six associated legal areas which were kind of relics of previous legal systems: The Serbian, the Montenegrin, the Bosnian-Herzegovinian, the so-called former Hungarian area, the Dalmatian-Slovenian and the Croatian-Slavonian legal area. In addition to everything mentioned above, the existence of these

⁴ KREŠIĆ, Mirela: Much Ado About Nothing: Debates on the Type of Marriage in Yugoslavia between the Two World Wars. In: LÖHNIG, Martin (ed.): *Kulturkampf um die Ehe. Reform des europäischen Eherechts nach dem Großen Krieg*, Mohr Siebeck Tübingen, 2021, p. 190.

⁵ ČEPULO, *op. cit.*, p. 287.

mentioned legal areas also implied the differences in the regulation of the Church-State relationship which created additional confusion in this field. Considering the rootedness of differences and the complexity of problems in the area of marriage law, it does not surprise that the process of standardisation was long and in certain areas not even completed, at least not within the scope and in the way intended.

3. An overview of marriage law in the Kingdom of Yugoslavia

As a result of the co-existence of different legal areas, the concurrent validity of two types of marriage law and the recognition of many religions, there were multiple different sources of marriage law. A solution that was adopted was that the constitutionally recognised religious communities were granted the status of legal entities that were tied to the state and through the transfer of jurisdiction they were tasked with executing some state affairs (marriage and jurisprudence in marital affairs, too).⁶ But, as we will see, this did not lead to the wanted results.

3.1. The Serbian Legal Area

This legal area comprised the area of the pre-war Kingdom of Serbia which had its Court of Cassation in Belgrade with appellate courts in Belgrade and Skopje. Here, only religious marriage was valid. The most numerous population was Orthodox so it is no wonder that the application of the rules of the Orthodox Church was explicitly prescribed. Also, bodies of the Orthodox Church had jurisdiction to conduct marriages involving Orthodox believers.

When it comes to other Christian (non-Orthodox) populations, there was a law from 1861 which regulated marriage related questions in accordance with their religious rules.⁷ Speaking about the Roman Catholic Church, the application of its rules

⁶ KREŠIĆ, *op. cit.*, p. 190.

⁷ Act on Court jurisdiction in Marriage Cases between non-Orthodox Persons dated 8 December 1861.

was confirmed by concluding the Concordat in 1914. Laws of Jews and Muslims were not specifically mentioned as the relevant marriage-regulators, but by analogy they applied as well. In theory, all non-Orthodox believers were subject to civil courts. But, reality was quite various since the practice of courts of every religious community was recognised: Jews had their courts, Sharia courts had jurisdiction over Muslims, and the courts of the Roman Catholic Church had jurisdiction over Catholics who were subject to the marital rules from *Codex juris canonici*.

In 1921, all Orthodox Churches in Yugoslavia were unified into a single Serbian Orthodox Church (SOC) which brought certain novelties considering the Orthodox population through Yugoslavia and with regard to the regulation of marriage law. Novelties were primarily introduced by the Constitution of the SOC from 1931⁸ and its Marriage rules from 1933.⁹

3.2. The Montenegrin Legal Area

This area comprised the area of the pre-war Kingdom of Montenegro and had the Grand Court and the Appellate Court in Podgorica. The situation considering marriage law in this legal area was the same as in the previous case: it was not possible to have a civil marriage and rules applied on a concrete case depended on the religious affiliation of citizens. The Orthodox Church enjoyed the status of state religion, and in addition to it, recognized religious communities included the Roman Catholic Church and the Islamic religious community.¹⁰

⁸ The Constitution of the Serbian Orthodox Church, SN KJ dated 24 November 1931, no. 275–LXXXVI.

⁹ Marriage Rules of the Serbian Orthodox Church. In: *Official organ of the Serbian Orthodox Patriarchate*, dated 7 September 1933, no. 34-35; KREŠIĆ, *op. cit.*, pp. 191–192.

¹⁰ KREŠIĆ, *op. cit.*, p. 192.

3.3. The Bosnian-Herzegovinian Legal Area

This legal area comprised the today's territory of Bosnia and Herzegovina and it had the Supreme Court and the Appellate Court in Sarajevo. Marriage law was as well connected to the religious affiliation of the citizens and the only type of marriage permitted was religious, but the whole system was even more complex than in the previous cases. Five religious organisations were recognised on this territory, each having an impact on the topic: Orthodox, Roman and Greek Catholic, Evangelical of the Augsburg and Helvetic Confession, Jewish and Islamic. The last one mentioned enjoyed the status of state religion.

Marriage disputes were under the jurisdiction of religious courts, whereas civil courts, including Sharia courts (who ruled according to Sharia law), had jurisdiction over property rights disputes between the spouses.¹¹

3.4. The so-called Former Hungarian Legal Area

This legal area comprised the (Slovenian) Prekmurje region, the (Croatian) Međimurje region, Baranya, Bačka and western Banat. Section B of the Belgrade Court of Cassation in Novi Sad and the Appellate Court in Novi Sad had jurisdiction on this territory. The term "Hungarian" indicates that this area used to be in the Hungarian part of the Austro-Hungarian Monarchy which became part of Yugoslavia according to the provisions of the Trianon Peace Treaty (1920). The background story about the history of this legal area had its impact on the regulation of marriage law.¹² The relevant and the main source of law was the Hungarian Act on Matrimonial Law (Act 31 of 1894). Unlike the previous cases, civil marriage was valid here, regardless of the religious

¹¹ According to Art. 1 of Civil Procedure Act for Bosnia and Herzegovina Sanctioned by the Supreme Decision dated 14 April 1883. KREŠIĆ, *op.cit.*, pp.192–195.

¹² GOSZTONYI, Gergely: A polgári szabadságjogok [Civil liberties]. In: MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian constitutional history]*. Budapest, 2020, Osiris Kiadó, p. 285.

affiliation of its inhabitants. Consequently, marriage ceremony was officiated by a clerk in the presence of two witnesses and civil courts had jurisdiction.

Although the Act continued to be valid through the existence of first Yugoslav state, its application became highly questionable with time: this was a Hungarian act, and the population considered ignoring Hungarian acts equal to removing the Hungarian supremacy so the efforts that aimed at eliminating, not only this one, but other Hungarian acts as well, were constantly present. Also, Church circles (Catholic and Orthodox) became extremely powerful and they championed the abolishment of mandatory civil marriage.¹³

In the Prekmurje region, the application of the valid Hungarian regulation was obstructed by Slovenian lawyers who were transferred to this territory and weren't acquainted with Hungarian law nor language. They administered justice according to Austrian acts and introduced the legislation that was in force in the Slovenian-Dalmatian legal area. Since that ensued the possibility of introduction of religious type of marriage ceremony with no chance of divorce, they also enjoyed the support of the Catholic Church circles.

When it comes to Međimurje, marriages were performed exclusively before a priest. There were some attempts, by the commissioner who was in charge of this area, to force the stricter application of the Act, but the issued decree was not completely implemented since clerks had poor knowledge of Hungarian law. *De facto*, civil marriage here existed in an optional form. Due to untenability of such a situation, a compromise solution was to gradually introduce optional religious marriage. But, despite the brief validity of it, civil marriage officially remained mandatory in this legal area.

¹³ KREŠIĆ, *op. cit.*, p. 196.

3.5. The Dalmatian-Slovenian Legal Area

This legal area comprised the area of Dalmatia and Slovenian lands where Austrian legislation was in force, which was the South Slavic area of the Austrian part of the former Austro-Hungarian Monarchy. Section B of the Table of Seven in Zagreb and the Appellate Courts in Split and Ljubljana had jurisdiction on this territory.

Here, as well, civil marriage law was applied, regardless of the religious affiliation of the inhabitants. Although, according to the Austrian General Civil Code, religious marriage was standard at first with the mentioned form being subsequently allowed. Civil courts had jurisdiction. But, this order of introducing the forms in which marriages could have been concluded caused confusion.¹⁴

Persons not affiliated to any religion (or if they were Muslims) were obliged to have a civil marriage, while this type of marriage was also allowed in an optional form. This involved situations in which one partner in the betrothal was not a member of a recognised faith, or was a member of the Jewish faith and the other was Christian. Subsequently, the possibility of mixed marriages of Christians who were allowed to get married by a religious body representing either partner, rather than exclusively in the Roman Catholic Church, was introduced.

The specialty of this area is so-called "emergency civil marriage" (Ger. *Notzivilehe*). It was possible in all those cases where the Church did not want to participate in marriage ceremony for reasons not recognised as marriage impediments by the ABGB. The marriage in this form was officiated by representatives of state authorities, in the presence of two witnesses and a scribe.

¹⁴ *Ibid.*, p. 198.

3.6. The Croatian-Slavonian Legal Area

This legal area comprised the area of the Kingdom of Croatia and Slavonia located in the Hungarian part of the former Austro-Hungarian Monarchy. Here, the jurisdiction was exercised by the Section A of the Table of Seven in Zagreb and the Appellate Court in Zagreb. When this area was a part of the previous state, it had autonomy in home affairs, judiciary, religion and education on the basis of the Croatian-Hungarian Compromise (1868) which had its consequences on the organisation of marriage law in the Kingdom of Yugoslavia.

Here, the concurrent validity of both religious and civil marriage law is the best expressed. Nevertheless, the whole system is well organised with precisely defined sources of law and addressees of norms. Even the Table of Seven has highlighted it in its ruling: "*The privilege of spiritual judicature was granted just to the enumerated religions, and cannot be extended to other religions.*"¹⁵

Religious marriage law was applied to Roman and Greek Catholics and Orthodox believers with religious courts having jurisdiction. The relevant sources of law for Catholics were the Art. X of the Concordat (1855), the Act Concerning the Marriage of Catholics (1856), the Instructions to Ecclesiastical Courts in Matrimonial Causes (1856) and the *Codex juris canonici* (1917). When it comes to marriages of Orthodox believers, they were regulated by the *Systema Consistoriale* from 1782 and, of course, the Marriage Rules of the SOC.¹⁶ Jews, Evangelicals and Muslims were subject to the ABGB and the provisions on marriage cases from the Temporary Rules of Civil Procedure of 1852.

¹⁵ Plenarna rješidba Stola sedmorice od 23. siječnja 1919. br. 2711, ex 1918. In: VRAGOVIĆ, Aleksa: *Zbirka rješidaba Kr. Hrv. Slav. Dalm. Stola sedmorice kao vrhovnog suda u građansko-pravnim predmetima, vol. 2, Rješidbe br. 533–950* [The Collection of Rulings of the Table of Seven of the Kingdom of Croatia-Slavonia-Dalmatia as the Supreme Court in Civil Law Matters vol. 2, Decisions no. 533–950], No. 539, Zagreb, 1927–1928, p. 5; KREŠIĆ, *op. cit.*, p. 202.

¹⁶ But, only with regard to the requirements for valid marriage, divorce from bed-and-board and divorce, and only to the extent they were not contrary to other regulations valid in this area.

4. Consequences of legal particularism in marriage law

As we can see, conflict of laws was one of the main characteristics of marriage law in the Kingdom of Yugoslavia, and it manifested on many levels: it existed between religious and state (civil) legislation throughout the territory of the state, between different legal areas, among different marriage laws in individual area and finally, among individual religious laws.

Simply said, it basically meant that some citizens in Yugoslavia were obliged to enter a civil marriage, while others were obliged to get married in church, and yet, other could enter a *Notzivilehe*. It also meant that some citizens were allowed to get married in a manner not allowed in another legal area, although they are the citizens of the same state. Consequently, the person could have been considered as married according to one legal area, but not according to another. The same worked for questions of validity of marriage and divorce. The fact that a person could have been divorced and remarried in one legal area and not in another, ensued a completely new question: polygamy, which was obviously impossible to regulate adequately. The described confusion that existed in terms of divorce was also a suitable platform for bypassing the law (have in mind that Roman Catholics couldn't get a divorce, while others could.) Everything presented was in support of the conclusion that constitutionally guaranteed principle of equality of citizens was undoubtedly violated.

In addition, the composition of society was constantly changing its structure. Differences in the approaches of different religious groups were often reasons why people in some parts of the state converted. That wasn't encouraging when it comes to conflicts between religious groups which existed since in such a disorderly state it wasn't unusual that individual religious courts would overstep their jurisdiction. Not only converting was the reason of restructuring, but people would often even migrate within the state in order to change their municipal affiliation to a different legal area.

Further doubts were focused on the property rights-status or the issue of mutual inheritance by spouses, the mixed marriages and the legal status of children born within such marriages. Considering everything mentioned, we can conclude that the fact that the type of marriage depended on geographic longitudes and latitudes caused disorderly state and legal uncertainty.¹⁷

5. Yugoslav constitutions about marriage

Described situation can justifiably encourage us to seek into the most powerful source of law which would have the potential to unify legal chaos, but even the constitutional provisions on marriage turned out to be a dead letter. During the existence of the first Yugoslav state, two constitutions (1920 and 1931) were adopted, both of them referring to marriage in one single provision which is an indication for the relevance of marital questions for constitution makers. This indication is definitely confirmed by the way one of the constitutions was made: it was a reflection of the amount of interest among MPs to deal with the mentioned problems in this area of law.

An imposed 1931 Constitution in Art. 21 mentioned that: *"Marriage, the family and children enjoy the protection of the state"*. On the other side, Art. 28 of the 1921 Constitution stated that: *"Marriage enjoys the protection of the state"*. This Constitution was a result of the regular constitutional procedure, in which Assembly could debate and decide on the constitutional proposal that was put forward by a specially formed Constitutional Committee. During the general debate in the Assembly, it was stated by just three MPs that the wording in the Constitution is "an unclear provision" and that it is unclear what lies behind these words. Obviously, so broadly described provisions were unable to satisfy the concrete needs for unification of marriage law in this state. However, these statements weren't sufficient to begin a constructive discussion.

¹⁷ KREŠIĆ, *op. cit.*, pp. 202–205.

In addition, when it comes to regulating specific conflict of law issues, a general rule was declared in Yugoslavia, by which every judicial decision with an execution clause (which was delivered by a court in one legal area) must be deemed final and enforceable in other legal areas as well. Consequently, the accepted opinion was that it is not necessary to issue special legal rules intended exclusively to resolve inter-provincial conflicts since it was held that general legal regulations are sufficient to serve as provisional legal rules to properly eliminate existing problems. That certainly served as the foundation for the above presented lack of interest among MPs which can also be interpreted as the acceptance of the direction for the future regulation of marriage law. But, despite of the flaws, these constitutional provisions did provide a framework for a reform of marriage whereby the regulation of marital relations was supposed to be a part of the state's activities.¹⁸

6. Debates and proposals

Despite some proposals to retain the existing system with couple of modifications, it was finally concluded that religious rules are not an adequate basis for regulating the marriage law. They are characterised by unchangeability and even conservatism which are never desirable features for modern legal systems that need to be in accordance with fast-happening changes of the society. So, the proposal to introduce the civil type of marriage was accepted, since it could give the state what belonged to it, by entrusting it with the care of citizens' social needs, rights and obligations, without taking anything away from religious communities. The only thing uncertain was whether it should be mandatory or optional.

Mandatory civil marriage could definitely fulfil the constitutionally guaranteed equality of all citizens and ensure the legal certainty. By eliminating the conflicts existing between religious communities and also between them and the state, it would

¹⁸ *Ibid.*, pp. 208–209.

contribute to the creation of a unified state. It was also considered as a simpler way to the wanted unification.

However, considering the real social structure in this state, optional form of civil marriage imposed itself as the most suitable for meeting both the constitutional principles and practical needs. It could provide the satisfaction of the state, the Church and individual interest which would mitigate the response of conservative and clerical circles and cause fewest upheavals in society. In the end, it suited the best for the two cultural backbones of the state: Christianity and Roman law.¹⁹

7. The Preliminary Principles of the Yugoslav Civil Code

As stated above, the work on the unification of law began right after the unification of the state. Since only one area wasn't familiar with the ABGB,²⁰ it was logical to take this source as a basis for drafting the *Preliminary Principles of the Yugoslav Civil Code* (1934).

Marriage law provisions can be found in Part 1, Chapter 2 and according to them, the authors²¹ of the *Preliminary Principles* championed the introduction of optional civil marriage. They considered the acceptance of mandatory civil marriage as a degradation of marriage to a simple legal transaction from everyday life harming its reputation. It was also stated that a preference for civil marriage was the opinion of a minority. In order to be in accordance with social reality, the solution that was accepted referred to the religious affiliation of citizens because it allowed the marriage to be officiated by a representative of a recognised religious community. It also provided the possibility to enter *Notzivilehe*. But, the provision on religious marriage was an

¹⁹ *Ibid.*, pp. 209–214.

²⁰ The ABGB was in force in the Dalmatian-Slovenian and the Croatian-Slavonian legal area. It indirectly applied to Bosnia and Herzegovina, and the Serbian Civil Code (1844) was a shortened translation of the ABGB. That means that the only legal area in which the ABGB did not apply in any form was the Montenegrin.

²¹ Draft on marriage law was made by a commission of professors of canon law from the Yugoslav Schools of Law. KREŠIĆ, *op. cit.*, pp. 215–216.

exception since the marriage law was regulated on a non-religious basis and the religious significance of marriage was not relevant to the state. However, this attempt of standardisation also never succeeded because it was never enacted. Nothing changed in terms of marriage law or marriage type.

8. Conclusion

As one author stated, it seems "that a quarter-century of debate and advocacy for reform of marriage law and the introduction of civil marriage was actually just a *vox clamantis in deserto*".²² All these presented attempts of better, more transparent, efficient and uniform regulation of a marriage law have found their realisation only in the legal order of the socialist Yugoslavia during and after the World War II. It finally managed to achieve the wanted results by separating the church and the state. Consequently, marriage lost its value as a sacrament and was presented exclusively as a contract and an issue for the state and part of daily life.

²² *Ibid.*, p. 221.