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CRIMINAL LAW STATUS OF WOMEN IN SERBIAN AND YUGOSLAV LEGISLATION IN THE PERIOD FROM 1860 TO 1929

Abstract

Since ancient times, the position of women in sources of criminal law has been unequal to the status of men. Criminal law amendments and additions made in medieval and modern legislation through the adoption of new legal acts were insufficient to improve the status of women. The legislative changes in terms of recognizing broader rights of women in Serbian criminal law have emerged during the nineteenth as well as the twentieth century since legal acts providing better and improved status of women had been adopted. In this sense, the main goal of the paper is to point out the differences in the criminal law status of women under the Criminal Code of the Principality of Serbia of 1860 and the Criminal Code of the Kingdom of Yugoslavia of 1929. In pursuit of this goal, the subject of the paper includes the analysis of relevant provisions of the listed codes in relation to criminal offenses against life and body, public morality and marriage. Bearing in mind the differences observed in legal approaches concerning the position of women in the analyzed codes, the paper concludes that the criminal law status of women, from the normative approach, referred to in the Criminal Code for the Principality of Serbia of 1860, where their position was subordinate, was progressively advanced by the Criminal Code of the Kingdom of Yugoslavia of 1929 through the prescription of the principle of gender equality, thereby recognizing the need for equal criminal law protection of women.

Key words: status of women, criminal law, criminal offences, victims, perpetrators

INTRODUCTION

Historically, since ancient times, women suffered from the lack of equal criminal law status in legal sources. Changes made in medieval criminal law framework were incomplete to establish

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different criminal law status of women. The remarkable turning point, in terms of recognizing new rights of women in criminal law, has emerged during the nineteenth and especially the twentieth century, since criminal codes providing equal status to women were adopted.

However, criminal law acts adopted at the beginning of the 19th century had had a limiting character since the equal status of women has been prescribed in a fragmentary way, respecting their status only in certain provisions, without substantive equality with the position of men concerning criminal law protection. The new opportunity for legislative upgrading of the criminal law status of women had appeared in the second half of the 19th century when preparations for the adoption of the Criminal Code for the Principality of Serbia began (Živanović, 1967:475; Živanović, 1935: 84-85). Although this Code was adopted in 1860, it is noted that the position of women had not been improved, as it was expected, comparing to standards that were agreed upon and reached since the beginning of the 19th century.[1] Even though the principle of gender equality had not been established by the adoption of the Criminal Code for the Principality of Serbia, it remained in force until the adoption of the Criminal Code of the Kingdom of Yugoslavia in 1929 (Živanović, 1922:48-49).[2] By the adoption of this Code, it was made a significant legislative step forward concerning the establishment of the principle of equality in criminal law status between men and women (Čulinović, 1934:31).

During this period, three groups of crimes were of particular importance for the criminal law position of women. It is about the group of crimes against life and body, public morality and marriage. When it comes to crimes against life and body, special dilemmas have been related to those crimes that could be committed only by a woman. One of such crimes is infanticide, while the other is illegal termination of pregnancy. Furthermore, the paper deals with women's positions in analyzed criminal codes concerning the group of crimes against public morality. In this sense, special attention will be paid to the consideration of sexual intercourse and other equal criminal offence from this group in order to recognize the differences between them. Finally, special attention regarding crimes against marriage requires the criminal offence of marriage by abduction or bride kidnapping.

Therefore, the subject of the paper includes the analysis of relevant provisions of the abovementioned codes regarding criminal offenses against life and body, public morality and marriage. In this connection, special attention will be paid to the consideration of the position

[1] The Criminal Code for the Principality of Serbia from 29 March 1860.
[2] The Criminal Code of the Kingdom of Yugoslavia from 27 January 1929.

of a woman in relation to the criminal offense of illicit termination of pregnancy, infanticide, sexual intercourse and other related equal crimes against public morality, as well as to the criminal offense of marriage by abduction or bride kidnapping. In this case, the focus will be on not only identifying provisions where women could appear as perpetrators of criminal offences, but also recognizing situations where they are in the position of passive subjects (victims) of offences. The principal goal of the paper is to compare the criminal law status of women in the Criminal Code for the Principality of Serbia and the Criminal Code of the Kingdom of Yugoslavia by pointing out the differences between them. To start with the criminal law status of women as perpetrators of selected crimes against life and body.

CRIMINAL LAW STATUS OF WOMEN AS PERPETRATORS OF SELECTED CRIMES AGAINST LIFE AND BODY

The recognition, nature and essential elements of criminal offences of illicit termination of pregnancy and infanticide as crimes against life and body depend on the religious, moral and customary norms that prevail in some country in a given time. In the case of a criminal offense of infanticide, its nature is disputable. In that sense, the basic issue is whether to treat this crime as a privileged form of murder or as its aggravated form. On the other side, regarding the criminal offense of illicit termination of pregnancy, it is disputable under what conditions it is allowed to terminate a pregnancy. Therefore, these are two key issues regarding these crimes particular attention should be given.

The criminal law status of women concerning infanticide

Generally speaking, the common characteristic of this crime is that only the mother can appear as the perpetrator, while the passive subject can be only the child. Besides, it should be pointed out that the time of committing this crime is its essential element. In this regard, it should be emphasized that this crime can be committed during childbirth or immediately after childbirth, while the disorder caused by childbirth lasts. How long the period of disorder after childbirth could last depends on the circumstances of each case.

In the context of this crime, the main difference between the observed codes is that in the Criminal Code for the Principality of Serbia from 1860 this crime has privileged form by an exception, while in the Criminal Code for the Kingdom of Yugoslavia from 1929 this crime has a privileged form without any exceptions. This can be concluded by analyzing the legal disposition of the analyzed criminal offense.

In that sense, from Article 164 of the Criminal Code for the Principality of Serbia from 1860 stems that the basic form of this criminal offence does not have a privileged form. According to this article criminal offence of infanticide exists when a mother kills her child within 24 hours from childbirth or after 24 hours from childbirth as long as the disorder caused by childbirth lasts. On the other side, this crime acquires a privileged character only if the child is killed because he or she was born prematurely or due to physical defects or other disturbances.

Finally, unlike the Criminal Code for the Kingdom of Yugoslavia of 1929, in the Criminal Code for the Principality of Serbia of 1860, this crime can be committed by the act of omission. In concordance with Article 165, this crime can be committed by an act of omission when a mother conceals childbirth or when she gives birth in solitude with the intention to causes death of her child on that occasion. Furthermore, this crime can be committed by an act of omission when the mother after childbirth in solitude leaves the child deprived of any help, causing in that away conditions for the death of her child. Finally, the mother should be punished for this crime if the child is neglected in such a way that this causes its death. Therefore, for the existence of the crime, it is sufficient that the mother conceals childbirth or give birth in solitude to kill the child on that occasion, or to neglect the child so that he or she because of that dies. In this regard, there is a lack of the need for taking any further acts of commission by the mother since she could be punished in this case for the child's death due to acts of omission. On the other hand, if the mother takes an act of commission, resulting in the death of the child, then this crime would not exist, but the crime from Article 164 (Niketić, 1911:109).

Regarding the Criminal Code for the Kingdom of Yugoslavia from 1929, it should be noticed that this crime has privileged form without any exceptions. According to Article 170, the legal disposition is prescribed as follows: The mother who during childbirth or immediately after childbirth, but while the disorder caused by childbirth lasts, deprives her child of life, will be punished. The recognition of the privileged character of this criminal offense, should be noticed from the fact that the Court may, if the crime has been committed under such extenuating circumstances, mitigate the penalty at its discretion.

The criminal law status of women concerning the criminal offense of illegal termination of pregnancy

In the context of the criminal offense of illegal termination of pregnancy, the Criminal Code for the Principality of Serbia from 1860 made the difference between two situations. On the one side, according to Article 168, a pregnant woman who uses external or internal means for

abortion shall be punished, if the child is born prematurely or dead, or is born alive, but dies as a result of committed acts. On the other side, in addition to the guilty of a pregnant woman for illegal termination of pregnancy, in the Criminal Code for the Principality of Serbia from 1860 it is recognized the need for punishment another person who gave or used abortion means with or without the consent of the pregnant woman. Thus, in Article 169 is prescribed the liability for another person who, with the knowledge and at the request of a pregnant woman, gave or used abortion means for illegal termination of pregnancy. In addition, in concordance with Article 170 it is prescribed the liability for another person who, without knowledge, or against the will of a pregnant woman, gave or used abortion means for illegal termination of pregnancy (Drakić, 2011:536).

Moreover, the Criminal Code for the Kingdom of Yugoslavia from 1929 prescribes this criminal offense by establishing two forms of execution, when illegal termination of pregnancy was caused by pregnant woman or by another person with her knowledge. However, the difference from the Criminal Code for the Principality of Serbia from 1860 is reflected in the fact that according to Article 171 of this Code the Court may, if the crime has been committed under such extenuating circumstances, mitigate the penalty at its discretion or in the case of child conceived out of wedlock remit from punishment a perpetrator of this criminal offence, if the illegal termination of pregnancy was caused by pregnant woman.

On the other side, the criminal offense from Article 172 covers situation when the illegal termination of pregnancy was caused by another person who, with the knowledge and at the request of a pregnant woman, gave abortion means for illegal termination of pregnancy.This acts usually shall be perpetuated by a doctor, pharmacist, midwife or a person who performs it for a reward. In this sense, it is wortwhile to mention the liability of these persons even when they missed to notify to the competent authority termination of pregnancy within three days. Finally, it is necessary to analyze the criminal offense under Article 173. Under this article it is prescribed liability of another person who without knowledge, or against the will of a pregnant woman, gave abortion means for illegal termination of pregnancy thereby causing induced miscarriage. An aggravated form of this criminal offense exists in the case when a woman dies as the result of induced miscarriage. However, it should be noted that the Criminal Code for the Kingdom of Yugoslavia from 1929 has prescribed the conditions for permissible termination of pregnancy. Therefore, shall not be punished a doctor who causes a miscarriage or abortion based on a medical commission's opinion in order to save her life or eliminate the inevitable danger to her health, when this is not possible to achieve in any other way (Čulinović, 1934:37).

CRIMINAL LAW STATUS OF WOMEN AS VICTIMS OF SELECTED CRIMES AGAINST PUBLIC MORALITY AND MARRIAGE

When classifying crimes that violate public morality in the appropriate chapters of the Criminal Code, one should keep in mind what should be the predominant object of criminal law protection. This is why, depending on the values that need to be protected by criminal law, crimes against public morality could be classified not only in the chapter on crimes against public morality, but also in other chapters, such as those in which the protection of marriage is provided (Čubinski,1930: 412-413). Therefore, it should be noted that in the chapter of criminal offenses against public morality, only those criminal offenses are classified where the need to protect the sexual freedom of passive subjects prevails. In this sense, the issue of particular attention is how to define limits of the influence of the state concerning the regulation of crimes against public morality. The incrimination of crimes against public morality is very often strongly influenced by religious, moral and customary rules that are dominant in a given time and the achieved stage of development of considered state (Škulić, 2017:398-399; Škulić, 2018:51). Consequently, when defining the list of criminal offenses that should be recognized as offenses against public morality, it is necessary to take into account not only what should be protected as the predominant values by a particular criminal offense, but also where the state borders should be set (Čubinski,1930:414). Therefore, in determining the limits of the legislative powers of the state, it should be borne in mind that on the one hand, the issue of sexual freedoms touches on the right to privacy and that on the other hand in the field of sexual freedoms there is a strong interest of the state to establish a framework for the protection of individuals from all conduct that seriously violates the individual's right to sexual freedom.

The issues concerning marital relations, although fall into the sphere of privacy and personal freedoms of individuals, also collect great public interest in the field of legal determination of the limits of these freedoms. However, unlike the area of sexual freedoms where the primary task of criminal law is to set boundaries between the rights of the individual and the obligation of the state to regulate this area, in the area of marital relations measuring the border between private and public relations is the primary task of civil law. Therefore, when it comes to the list of criminal offenses against marriage it should be noticed that the basis for their prescription and punishment in criminal law is determined by the framework of civil law (Čubinski,1930:439). For this reason, in the field of marital regulations, criminal law is predominantly accessory and fragmentary, which means that the recognition of crimes against marriage depends on how the field of marital relations is defined by civil law. Consequently,

only certain behaviors that violate or disrupt marital relations should be protected by criminal law and only in cases where civil law sanctions primarily responsible for protecting the institution of marriage are insufficient to protect it.

The criminal law status of women concerning the criminal offenses of public morality in the Criminal Code for the Principality of Serbia from 1860

The crimes against public morality include many criminal offenses related to committing sexual intercourse and other related equal crimes. The main difference concerning the crimes against public morality between both analyzed codes is that the criminal law status of women is subordinated in the Criminal Code for the Principality of Serbia from 1860. This can be noticed from almost all criminal offences against public morality recognized by this Code. This Code has recognized numerous criminal offences regarding the commission of prohibited sexual acts with the intention to punish not only the perpetrators, but also women as the victims of these crimes.

In that sense, by Article 196, not only the perpetrator who commits prohibited sexual acts with another woman, shall be punished but also the woman as a victim of crime. In addition, the subordinate criminal law status of women can be noticed from the criminal offense under Article 197, which refers to a situation where the perpetrator removes another woman with her will, but without the knowledge or against the will of her husband, or at the request of the latter deny to return her. In this situation also not only the perpetrator of this offense shall be punished, but also the woman as a victim of crime. Moreover, there is one more condition that makes the harder criminal law status of women, reflected in the fact that criminal proceedings shall be conducted only if there is a charge of the offended husband. Consequently, the Court shall dismiss criminal proceedings after the investigation has begun, if the husband gives up from prosecution. However, if the verdict became final or the serving of the sentence has begun, there is the possibility to release, at the request of the prosecutor, the woman (Niketić, 1911:123). Furthermore, the subordination of a woman is also noticed from the criminal offense in Article 198, where a man shall be punished if allows his wife to commit prohibited sexual acts with others in public. In addition to these situations, Article 199 introduces another case of a woman's subordination to a man, prescribing that shall be punished by the charge of wife a man who keeps a mistress in the house next to his wife, while the mistress shall be expelled immediately. However, in this case, there is a possibility that the Court may defer criminal prosecution for this criminal offence, or if the execution of the sentence has started to release

the executor if he had been already imprisoned, provided that the woman withdraws the charge or forgives him later.

Finally, it should be noted that the Criminal Code for the Principality of Serbia from 1860 also prescribed two criminal offenses related to committing prohibited sexual acts with girls, which differs from each other according to who appears as the perpetrator of these crimes. Firstly, in concordance with Article 201, the perpetrator can be any person who commits prohibited sexual acts with another person, who has not yet attained the age of fifteen or provoke him to commit this crime by fraud or with the use of various promises. On the other side, if it happened to honest girls, who are above fifteen, but have not yet attained eighteen there would be a privileged form of this crime. Secondly, in concordance with Article 205, the perpetrator could be only tutors, administrators, clergy, spiritual persons and educators, who commit prohibited sexual acts with their pupils and students.

The criminal law status of women concerning the criminal offenses of public morality in the Criminal Code for the Kingdom of Yugoslavia from 1929

The Criminal Code for the Kingdom of Yugoslavia from 1929 has prescribed a broader list of criminal offences against public morality. In this sense, it should be noticed that this Code has recognized the following criminal offenses against public morality: 1) rape; 2) sexual intercourse with a helpless person; 3) rape by fraud; 4) prohibited sexual acts; 5) sexual intercourse with a child; 6) sexual intercourse or other prohibited sexual acts through abuse of position; 7) sexual intercourse through abuse of trust; 8) rape or other prohibited sexual acts by the abuse of the state of inconvenience 9) abduction by force, threat or fraud with sexual intent 10) pimping and procuring and 11) human trafficking with sexual intent. The basic difference between two observed acts is related to the fact that this Code makes the difference in the act of rape and other prohibited sexual acts. In that way, it is worthwhile noting that the broader criminal law protection of women has been enabled. Besides that, the signs of broader protection of women as the victim of criminal offences against public morality could be seen from the fact that this Code has taken into account a lot of different situations such as criminal offense of sexual intercourse through abuse of position or by abuse of trust, allowing in that way better criminal law status of women. Finally, it should be added that women by this Code exercise the protection against acts of pimping and procuring as well as human trafficking with sexual intent. To start with the criminal offence of rape.

According to Article 269, paragraph 1 the criminal offense of rape with a woman can be committed by anyone who forces a woman who is not married to sexual intercourse by the use of force or threat of simultaneous danger against her life or body (Čulinović,1934:97). This criminal offense in concordance with paragraph 2 of this Article exists if anyone forces a woman to sexual intercourse which he brought into a state of unconsciousness or made powerless to resist. In the sense of this criminal offense, it is important to underline that it covers only acts of forced sexual intercourse against a woman but not also other prohibited sexual acts, which are protected by the standalone incrimination. When it comes to the issue of the passive subject it could be concluded from the legal disposition of this crime that only women shall be a victim of this crime. However, between two acts of execution covered by this crime, it must be noted that criminal offense in paragraph 1 can be only committed against an unmarried woman, while in the context of paragraph 2 there is no limit in the status of the passive subject, meaning that it can be any women. Therefore, it should be pointed out that regarding the position of women as the passive subject in paragraph 1 of Article 269, this Code has protected only an unmarried woman, excluding thus the possibility for the protection of a spouse of the perpetrator, as a victim of the crime of rape.

Furthermore, concerning the rape described in paragraph 1 of Article 269, a special issue is to determine the use of force or threat. In this regard, it is required to determine whether the victim manifested the resistance, which would indicate that sexual intercourse was performed by the use of force (Stojanović, 2017: 567-570; Lazarević, Škulić, 2017:129). In this sense, it is not necessary to require for the existence of this crime that the victim manifested the resistance during the entire period of the use of force, since depending on the intensity of the applied force, the victim can lose the ability to resist immediately, while in other cases it may happen gradually (Čubinski,1930:416). When it comes to the application of threat, it should be emphasized that it must be serious, but does not have to be directed against a woman personally, but can also be directed at a closely related person of a woman (Stojanović, 2013: 8). On the other side, regarding the criminal offence described in paragraph 2 of Article 269, it should be remembered that the actions of bringing into a state of unconsciousness or powerless to resist must be undertaken by the perpetrator and not by a third party.

In Article 270, it is prescribed the criminal offense of sexual intercourse with a helpless person committed by anyone who forces an unmarried woman to sexual intercourse by taking advantage of such person's mental illness, mental retardation or other mental disorder, disability or some other state of that person due to which the person is incapable of resistance. The

principal difference from the criminal offense described in paragraph 2 of Article 269 where perpetrator brings the passive subject into a state of unconsciousness or powerless to resist, is that in the context of this crime the victim is already incapable to resist due to any type of mental illness occurred independently of the perpetrator's actions, allowing him in that way to exploit this state (Čubinski,1930:418).

Furthermore, Article 271, deals with the criminal offense of rape by fraud perpetrated by anyone who forces a woman to sexual intercourse, which previously persuaded that she is married to him. Therefore, in this case, sexual intercourse is performed by fraud that the perpetrator is married to a woman. This fraud can be manifested in many ways, so in that sense, it should be noted that there are no legal restrictions. For example, it may be the case when a woman thought she was concluding marriage with one person but has concluded marriage with other person or when she concluded marriage with the person she wanted to conclude it with, but that person is not the one it presented himself to be and the women would have not concluded marriage had she known of that.

The criminal offense from Article 272 is related to the cases referred to in Articles 269, 270 and 271. The main difference is reflected in the fact the criminal law status of women in Articles 269 and 270 is protected against rape as well as sexual intercourse with a helpless person, while in this case, it is about the protection against other prohibited sexual acts, meaning under this term, according to Article 289, any act by which the perpetrator satisfies his bodily and sexual desire without the permission of woman. Therefore, it can be concluded that the term of other prohibited sexual acts should be understood as undertaking acts in the sexual sphere that do not involve vaginal sexual intercourse, while at the same time are shameless, indecent or perverse, crossing the public morality boundaries. Under this understanding, this criminal offense includes the commission of prohibited sexual acts against: 1) an unmarried woman by force or threat of simultaneous danger against her life or body; 2) a woman who was previously brought into a state of unconsciousness or made powerless to resist; 3) an unmarried woman by taking advantage of such person’s mental illness, mental retardation or other mental disorder, disability or some other state of that person due to which the person is incapable of resistance; 4) a woman who has previously falsely convinced by the perpetrator that she is married to him.

In the context of the criminal offense from Article 273, it should be noticed that it incriminates sexual intercourse as well as other prohibited sexual acts with a child. Therefore, this criminal offense provides protection of child meaning under this term person who has not reached the age of fourteen. On the other side, Article 274 enables the protection of daughter-in-law, ward,

adoptee and foster child from sexual intercourse with them and other prohibited acts. Regarding these crimes is criminal offense referred to in Article 275, providing the criminal law protection of women from sexual intercourse or other prohibited sexual acts through abuse of position. In this regard, it is specified who may appear as the perpetrator of this crime. Thus, the perpetrator can be a supervisor, doctor, religious representative, teacher or member of other authority, who through abuse of his position commits sexual intercourse or other prohibited sexual acts with a person entrusted to him for learning, tutoring, guardianship or care.

Another crime against public morality is sexual intercourse through abuse of trust prescribed in Article 276. This crime exists in the case when the perpetrator by the abuse of the trust incites virgo intacta female person to sexual intercourse with him. The special characteristics of this crime are the age and status of the passive subject. Namely, the passive subject of this crime could be only female person who has attained fourteen years and who is virgo intacta physically or mentally. Physically virgo intacta is related to the female person above fourteen years who has never had sexual intercourse, while mentally virgo intacta means that the perpetrator uses a victim's insufficient experience, recklessness or dependence in order to commit sexual intercourse through abuse of trust (Čubinski,1930:424). However, if the perpetrator concludes the marriage with a seduced female person, then he shall not be punished. This provision strongly makes harder criminal law status of women as victims of this crime, since they can not exercise the protection from sexual intercourse through abuse of trust if the marriage is concluded between these persons.

This crime is followed by the next one described in Article 277. It refers to the rape or other prohibited sexual acts by the abuse of the state of inconvenience. As it is the case with previously analyzed criminal offenses, not every female person can appear as a passive subject, but only a virgo intacta female person. However, this crime is different from the previous ones in the sense that the perpetrator incites a female person to commit sexual intercourse with him by taking advantage of that person's state of inconvenience. Also, as it is the case with the previous one, in the context of this crime if the perpetrator concludes the marriage with the seduced female person, then he shall not be punished.

The offense under Article 278 covers the situation where the perpetrator removes virgo intacta female person by the use of force, threat or fraud with the intent to live in fornication with her. Additionally, an aggravated form of this criminal offence exists if the passive subject of crime is a person under the age of fourteen. Finally, as it was the case with previous crimes, the perpetrator shall not be punished if he marries the abducted female person. Moreover, under

Article 282, it is prescribed the criminal offense of pimping and procuring a person under the age of eighteen, a woman, daughter, sister, granddaughter or entrusted person of the perpetrator. Finally, the criminal law status of women is improved by Article 283, which prescribes the crime of human trafficking with sexual intent committing by anyone who removes a passive subject abroad for fornication, or transfers him or her for that reason, or forms a group for the purpose of committing this criminal offence.

The criminal law status of women concerning the criminal offense of marriage by abduction

The crime of marriage by abduction is similarly regulated in both analyzed Criminal Codes. However, there is an important difference in terms of the criminal status of women as a passive subject of this crime. In that sense, it should be noted that in the Criminal Code for the Principality of Serbia from 1860, it is made a difference between two situations: 1) marriage by abduction regardless of age of victim and 2) kidnapping of an unmarried woman who has not attained fifteen, with her will, but without the knowledge and approval of her parents or tutors. Therefore, in the first situation, Article 188 all women, regardless of age or marital status, can be passive subjects, while in the second situation from Article 189, the passive subject of the the offense can be only an unmarried woman who has not attained fifteen. In both cases, the purpose of abduction is alternatively the intention of the perpetrator to marry the abducted woman or to live with her in fornication, or to hand over the woman to another person with the same goal (Niketić, 1911:119).

On the other hand, in the Criminal Code for the Kingdom of Yugoslavia from 1929, the criminal offense of marriage by abduction under Article 293 exists when the perpetrator removes a girl under eighteen with her consent, but without approval of her parents or tutors with the intent to he or someone else marries her. This criminal offense has similarities with criminal offense under Article 246, which is an offense against personal freedoms and security, since in both cases it is about an act of abduction of a female person (Čulinović,1934:90). However, in the context of the offense under Article 246 the passive subject may be any female person, while in respect to this offense the passive subject may be only a girl under eighteen years of age. Additionally, while in the case of a criminal offense under Article 246, the removal is carried out with the use of force, threats or fraud, in this case the removal must be undertaken with the consent of a girl under eighteen, but without approval of her parents or tutors. Finally, it should be pointed out that while the criminal offense under Article 246 protects a woman from forced marriage or fraudulent marriage, the criminal offense under Article 293 protects the rights of

parents over control of family members and prohibition of actions that are contrary to civil law (Čubinski,1930:445-446).

However, in the context of this crime, it should be noted that in both analyzed Criminal Codes there is one provision that makes harder the criminal law status of women. Namely, in the situation if the kidnapper married the abducted girl, the Court will only investigate the crime only after a marriage is annulled, at the request of those persons who have the right to demand the annulment of the marriage. Therefore, only if the kidnapper does not marry the abducted woman, she has the right to initiate criminal proceedings without any interference.

CONCLUSION

The abovementioned analysis was dedicated to the consideration of the criminal law position of women regarding the following groups of criminal offenses: 1) crimes against life and body as well as 2) crimes against public morality and marriage. In this sense, it was made the difference between the criminal law position of women as perpetrators of selected crimes, but also as the victims of these crimes. When it comes to the criminal law position of women as perpetrators of crimes against life and body the special focus was paid to the analysis of two criminal offences, infanticide and illicit termination of pregnancy.

The main difference between the observed codes in the context of infanticide is that the Criminal Code for the Principality of Serbia from 1860 has recognized that this crime should have only privileged form by an exception, while the Criminal Code for the Kingdom of Yugoslavia from 1929 prescribed this crime as a privileged criminal offense without any exceptions. Furthermore, there is one more difference between two codes in respect of this crime. Contrary to the solution adopted by the Criminal Code for the Kingdom of Yugoslavia of 1929, according to the Criminal Code for the Principality of Serbia of 1860 this crime can be committed not only by the act of commission, but also by the act of omission when a mother conceals childbirth or when she gives birth in solitude with the intention to cause the death of her child on that occasion, as well as when the mother after childbirth in solitude leaves the child deprived of any help, causing in that a way conditions for the death of her child. Finally, the mother should be punished for this crime if the child is neglected in such a way that this causes its death.

On the other side, both analyzed code has recognized the criminal offense of illicit termination of pregnancy. Moreover, both codes prescribed not only the liability of women who illicit terminate her pregnancy, but also the liability for another person who, with or without the

knowledge of a pregnant woman, gave or used abortion means for her illegal termination of pregnancy. However, the difference between two codes is reflected in the fact that unlike the Criminal Code for the Principality of Serbia from 1860, according to the Criminal Code for the Kingdom of Yugoslavia from 1929 the Court may, if the crime has been committed under such extenuating circumstances, mitigate the penalty at its discretion or in the case of a child conceived out of wedlock remit from punishment a perpetrator of this criminal offence, if the illegal termination of pregnancy was caused by the pregnant woman.

The criminal law status of women as the victims of criminal offenses has been taken into account in the context of crimes against public morality and marriage. The main difference concerning the crimes against public morality between the two analyzed codes is that the criminal law status of women is subordinated in the Criminal Code for the Principality of Serbia from 1860. Firstly, it can be concluded from the criminal offences regarding the commission of prohibited sexual acts where there is legal intention to be punished not only the perpetrators, but also women as the victims of these crimes. Secondly, there is one more situation recognized by this Code that makes the harder criminal law status of women. It is about the possibility for the Court to conduct criminal proceedings only if there is a charge of the offended husband. Consequently, the court shall dismiss criminal proceedings after the investigation has begun, if the husband dismisses from the charge. Finally, it is worthwhile to mention that in the case of the criminal offences against public morality referred to in the Criminal Code for the Principality of Serbia from 1860, there is a possibility that the Court may defer criminal prosecution or if the execution of the sentence has started to release the perpetrator if he had been already imprisoned, provided that the woman withdraws the charge or forgives him later.

In the opposite situation, the Criminal Code for the Kingdom of Yugoslavia from 1929 has prescribed a broader list of criminal offences against public morality, providing the difference between the act of sexual intercourse and other prohibited sexual acts. Under the term of other prohibited sexual acts, it is understood any act by which the perpetrator satisfies his bodily and sexual desire without the permission of a woman. Namely, this Code has recognized among others the crime of rape by the use of force and threat as well as by the fraud. Moreover, there are criminal offenses of sexual intercourse with a helpless person, with a child, as well as sexual intercourse or other prohibited sexual acts through abuse of position or the abuse of trust, but also by the abuse of the state of inconvenience. Finally, in this chapter of criminal offenses the Criminal Code for the Kingdom of Yugoslavia from 1929 has prescribed abduction by force, threat or fraud with sexual intent, pimping and procuring, as well as human trafficking with

sexual intent. Regarding, the criminal law status of women, it should be noticed that this position depends on the criminal offence in the given case. For example, concerning the crime of rape as the victim can appear only the woman perpetrator is not married, excluding thus the possibility to protect a spouse of the perpetrator, as a victim of the crime of rape. On the other side, if the victim is brought into a state of unconsciousness or made powerless to resist, in that case, the victim can be every woman regardless of the marital status. Furthermore, in relation to the crime of rape by fraud, the victim is only the woman forced to sexual intercourse, which previously is persuaded by the perpetrator that she is married to him. Finally, in respect of some criminal offences, the special status of the victim is required. This is exactly the case with the crime of sexual intercourse with a child, daughter-in-law, ward, adoptee and foster child. Also, in the respect of crime of the sexual intercourse through abuse of trust as well as by the abuse of the state of inconvenience the victim can be only virgo intacta female person. Last but not the least, the criminal law status of women as victims is made harder, by excluding their protection from sexual intercourse through abuse of trust as well as by the abuse of the state of inconvenience if the marriage is concluded between the perpetrator and victim.

To conclude with the crime of marriage by abduction. In the context of this crime, there is one provision that makes harder the criminal law status of women in both analyzed criminal codes. Namely, in the situation, if the kidnapper married the abducted girl, the Court will only investigate the crime only after marriage is annulled, at the request of those persons who have the right to demand the annulment of the marriage. Therefore, only if the kidnapper does not marry the abducted woman, she has the right to initiate criminal proceedings without any interference.

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КРИВИЧНОПРАВНИ СТАТУС ЖЕНА У СРПСКОМ И ЈУГОСЛОВЕНСКОМ ЗАКОНОДАВСТВУ У ПЕРИОДУ ОД 1860. до 1929. ГОДИНЕ

Апстракт

Од давнина је положај жена у кривичноправним изворима права био неравноправан са статусом мушкараца. Промене у кривичном праву у средњовековном и модерном законодавству настале кроз усвајање нових законских аката биле су недовољне за побољшање кривичноправног статуса жена. У том погледу, законодавне промене путем којих су призната шира права жена у српском кривичном законодавству догодиле су се током деветнаестог и двадесетог века, када су усвојени законски акти којима је нормиран равноправнији статус жена. У том смислу, главни циљ рада је да укаже на разлике у кривичноправном статусу жена према Кривичном законику Кнежевине Србије из 1860.

и Кривичном законику Краљевине Југославије из 1929. године. Узимајући у обзир постављени циљ рада, приступа се анализи релевантних одредби наведених законика у вези са кривичним делима против живота и тела, јавног морала и брака. Имајући у виду уочене разлике у дефинисању нормативног положаја жена у анализираним законицима, у раду се закључује да је кривичноправни статус жена, од нормативног приступа израженог у Кривичном законику за Кнежевину Србију из 1860. године, у коме је њихов положај био подређен положају мушкараца, унапређен усвајањем Кривичног законика Краљевине Југославије из 1929. године кроз прописивање принципа равноправности полова, признавајући тако потребу за једнаком кривичноправном заштитом жена.

Кључне речи: положај жене, кривично право, кривична дела, жртве, извршиоци