

DOI: 10.7251/GFP2212091R

UDC: 347.6:340.142

**Pregledni naučni rad**

*Datum prijema rada:*  
1. jun 2022.

*Datum prihvatanja rada:*  
25. jul 2022.

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## Qualifying Characteristics of Common Law Marriage

**Abstract:** This article focuses on the qualifying characteristics of a common law marriage, as an informal community of a man and a woman, which has to fulfill certain prescribed conditions in order to produce certain legal actions. Therefore, we start from the hypothesis that the qualifying characteristics of common law marriage can be determined on the basis of the legal definition of common law marriage, which is conditioned by social, historical and legal perceptions of common law marriage. The aim of this article is to determine the qualifying characteristics of common law marriage in a comparative legal context, their critical analysis and determination of qualifying characteristics and definition of common law marriage in positive law and the future Family Law in Republika Srpska. This gives importance and relevance to this paper. The comparative legal context includes both the countries of the former SFRY and some European countries.

**Key words:** qualifying characteristics, common law marriage, marriage, elements of common law marriage, family, inheritance.

### 1. INTRODUCTION

Common law marriages as certain communities of life are recognized today, not only as precursors of marriage, but also as special institutions that law has begun to respect. Although it seems that this is primarily a family law institute, this topic is important not only for family law, but also for social welfare, inheritance and other rights and areas of life.

Qualifying characteristics of common law marriage represent the basic elements for its normative and actual existence. These characteristics qualify community of life between two people as common law marriage. The constitutive elements of the common law marriage are those which will be discussed in this article, starting from theoretical determinations, through legislative regulation to case law and certain scientific proposals. These elements differ depending on the sociohistorical context and understanding of the common law marriage. The legal or normative understanding of common law marriage is closely related to that. Based on the comparative legal analysis, in order to adopt the best definition of this union in posi-

tive law it is necessary to determine the key qualifying characteristics of the common law marriage. This becomes especially important having in mind that according to the latest information from the Ministry of Justice of the Republika Srpska, they are working on the adoption of a new Family Law, so we can consider the best definition of common law marriage. This gives importance and relevance to this paper, where the possible elements of common law marriage are exclusively analyzed.

Having all the above in mind, this paper starts from the hypothesis that the qualifying characteristics of common law marriage can be determined on the basis of the legal definition of common law marriage which is conditioned by social, historical and legal perceptions of common law marriage. The aim of this article is to determine the qualifying characteristics of common law marriage in a comparative legal context, their analysis, and to determine the qualifying characteristics and definition of common law marriage in positive law and the future Family Law of the Republika Srpska. The comparative legal context includes both the countries of the former SFRY and some European countries. All of the above will be achieved by applying scientific and research methods. The presentation plan includes review of formal sources of law on the qualifying characteristics of common law marriage, analysis of legal literature on these characteristics with historical and comparative legal aspect, determination of qualifying characteristics of common law marriage in case law, consideration of proving common law marriage as a qualifying feature and analysis of these features of common law marriage in the Draft Family Law of the Republika Srpska, 2022.

## **2. FORMAL SOURCES OF LAW ON THE QUALIFYING CHARACTERISTICS OF THE COMMON LAW MARRIAGE**

Determining the sources of law according to which the qualifying characteristics of common law marriage can be identified should start from the constitution as the chief legal act. After that, it is useful to look at the legal matter, primarily the countries of the former SFRY. The Constitution of the Republika Srpska contains more general norms and does not precisely regulate this matter. The Constitution of the Republika Srpska does not mention or regulate common law marriage or its effects. Only two provisions can be significant: equalization of children born out of wedlock and in marriage, and leaving the law to regulate marital and family relations (Article 36). Therefore, the Constitution of the Republika Srpska does not contain explicit provisions, even if they refer to common law marriage. This is an example of an approach to common law marriage in constitutional matters.

A different approach leaves the law to regulate the common law marriage, or its definition and qualifying characteristics, and the legal effects of the common law marriage as well. The Constitution of the Republic of North Macedonia leaves to the law the regulation not only of legal relations in marriage and family as the Constitution of the Republika Srpska does, but also of common law marriage (Article 40).

The third approach is reflected in the Constitution of the Republic of Serbia, where the constitution determines the equalizing effect of common law marriage and marital union. It contains a reference provision to the legal regulation of the effects of the common law marriage, but also an explicit provision that the common law marriage is equal to the marital one, in accordance with the law (Article 65).

Last approach hypothetically singles out the constitutional regulation of common law marriage or adopting a definition that contains the qualifying elements of the common law

marriage. This would be possible during social change perception on common law marriage, even when the concept of common law marriage is changed through a referendum vote of citizens.

The Family Law of the Republika Srpska<sup>1</sup> defines common law marriage as a community of a woman and a man which is not legally regulated in the manner prescribed by this law, and is equal to the marital union in terms of the right to mutual support and other property relations, under the conditions and manner prescribed by this law (Art. 12). This provision contains an editorial mistake, the plural - “men”. Slobodan Panov’s observation about the clumsy formulation of the common law marriage in the law of the Republika Srpska is interesting. Common law marriage is defined as a community of a woman and a man that is not legally regulated in the manner prescribed by law. Panov believes that the common law marriage is legally regulated in the manner prescribed by law, and it only lacks the form provided for marriage.<sup>2</sup>

According to the Family Law of the Federation of Bosnia and Herzegovina<sup>3</sup>, it is emphasized that common law marriage is defined in terms of the Family Law, or for the purposes of this law, and is more detailed in terms of qualifying characteristics. It is defined as a union of a woman and a man who are not married or in common law marriage with another person, which lasts at least three years or less if partners have a common child (Art.3).

As in the Family Law of the FBiH the same definition is contained in the Family Law of the Brčko District of BiH (Art. 5)<sup>4</sup> as well. This law adds a provision on equalization with the marital union in terms of the right to mutual support and other property relations, under the conditions and in the manner prescribed by this law, like in the Family Law of the Republika Srpska. These laws in BiH do not name persons entering into a common law marriage (eg common law spouses or partners).

On the other hand, the Family Law of the Republic of Serbia<sup>5</sup> appoints persons who enter into a common law marriage (common law partners), and defines a common law marriage as a more permanent union of a woman and a man, between whom there are no impediments to marriage (Article 4). It regulates the actions of the common law marriage, through a more general formulation, by saying that common law partners have the rights and obligations of a spouse under the conditions determined by this law.

Family Act in the Republic of Croatia<sup>6</sup> understands common law marriage as a cohabitation (which is the same as the cohabitation in other laws) of an unmarried woman and an unmarried man (which highlights the impediments to marriage that common law partners may not be married) that lasts at least a year, and shorter if partners have a common child or if the relationship has been succeeded by marriage (the latter is a very interesting alternative condition related to the permanence of the common law marriage as a qualifying feature). This law regulates in more detail the effects of the extramarital union and discrimination in relation to the marital one.

<sup>1</sup> *Official Gazette of Republika Srpska*, no. 54/2002, 41/2008 and 63/2014.

<sup>2</sup> Panov, S. (2016). *Porodično pravo*. Belgrade: Faculty of Law in Belgrade, 149.

<sup>3</sup> *Official Gazette of the Federation of BiH*, no. 35/2005, 41/2005 and 31/2014.

<sup>4</sup> *Official Gazette of the Brčko District of BiH*, no. 23/2007.

<sup>5</sup> *Official Gazette of the Republic of Serbia*, no. 18/2005 and 6/2015.

<sup>6</sup> *Narodne novine*, br. 103/15 i 98/19. *Official Gazette*, no. 103/15 and 98/19.

In Montenegro, the Family Law<sup>7</sup> systematically, in several provisions, reveals certain qualifying characteristics of the common law marriage, saying when it will be equal with the marital one. Based on that, it is concluded that it is a living community of a man and a woman lasting at least three years or less if partners have a common child or if, as in Croatian law, the relationship has been succeeded by marriage, provided that at the time of establishment there were no impediments to concluding a valid marriage (Art. 12).

The Law on Marriage and Family Relations in Slovenia<sup>8</sup> understands common law marriage as a more permanent living community of a woman and a man who have not concluded marriage provided there is no reason by which marriage between them would be invalid (Art.12). In the first part of the provision the Family Law of the Republic of North Macedonia<sup>9</sup> similarly defines common law marriage as a living community of a man and a woman which is not established in accordance with the provisions of this law, but adds in the definition that it must last at least a year (Art. 13). This is also the shortest period, in terms of the duration of the common law marriage, known to the regulations in the territory of the former SFRY. Unlike such solutions, the family legislation of the Republika Srpska in some legal institutes (support, property relations of spouses) speaks more precisely about the duration of common law marriage, but this is not equal for all cases because the permanence of common law marriage is not included as a qualifying feature in the definition of common law marriage, where it belongs.

In addition, there are other regulations that mention common law marriage.

Art. 201 of the Law on Obligations Act (LOA)<sup>10</sup> uses the term common law partners and in the part about compensation for non-pecuniary damage talks about common law partners with more permanent living community. The term “common law marriage” is also used in Art. 381 LOA in part of obsolescence claims. The only qualifying circumstance that can be learned from the LOA is that it is a more permanent living community.

The Criminal Code of the Republika Srpska<sup>11</sup> contains certain criminal offenses of illegally entering into a common law marriage (eg with a child under the age of 16), which refers to a lower age threshold for establishing common law marriage. Art. 295 of the Criminal Code mentions permanent common law marriage, and uses term common law partner. Terms in different regulations should be standardized, so that one does not use a common law partner, the other a spouse, and the third a partner.<sup>12</sup> Also, the definition of common law marriage from the Family Law should be the basis for understanding the common law marriage in regulating various legal consequences in various regulations.

<sup>7</sup> *Official Gazette of the Republic of Montenegro*, no. 1/2007 and the *Official Gazette of Montenegro*, no. 53/2016 and 76/2020.

<sup>8</sup> Zakon o zakonski zvezi in družinskih razmerjih. *Uradni list RS*, št. 69/04 – uradno prečiščeno besedilo, 101/07 – odl. US, 90/11 – odl. US, 84/12 – odl. US, 82/15 – odl. US, 15/17 – DZ in 30/18 – ZSVI.

<sup>9</sup> Family Law. *Official Gazette of RM*, no. 80/1992, 9/1996, 38/2004, 33/2006, 84/2008, 67/10, 156/10, 39/12, 44/12, 38/14, 115/14, 104/15 i 150/15. For more details: Trajkovski, D., Slaninka Dineva, M. (2005). *Semejno pravo*. Skopje: Svetlost grafika.

<sup>10</sup> *Official Gazette of SFRY*, no. 29/1978, 39/1985, 45/1989 - decision of the CCY (Constitutional Court of Yugoslavia) and 57/1989 and the *Official Gazette of the Republika Srpska*, no. 17/1993, 3/1996, 39/2003 and 74/2004.

<sup>11</sup> *Official Gazette of Republika Srpska*, no. 64/2017, 15/2021 and 89/2021.

<sup>12</sup> For more details see the law of Serbia: Panov, S. (2016). *Porodično pravo*. Beograd: Pravni fakultet u Beogradu, 155-156.

### 3. LEGAL LITERATURE ON THE QUALIFYING CHARACTERISTICS OF THE COMMON LAW MARRIAGE WITH A BRIEF HISTORICAL AND COMPARATIVE OVERVIEW

A common law marriage (lat. *concubinatus*, engl. *non-marital cohabitation*) is an informal living community of a man and a woman, which must meet certain prescribed conditions in order to produce certain legal actions.<sup>13</sup> The terms concubinage, liberal community and marriage of conscience are also used.<sup>14</sup> In the literature, common law marriages were classified in different ways: according to partners' age (common law marriage between adults, between minors and between adults and minors); with regard to the civil component (when one partner is not married, when both are married and when one is married to a third party and the other is not); according to publicity characteristics (anonymous and popular) and finally according to duration (fleeting, temporary and concubinage).<sup>15</sup>

Roman law knew concubinage, as a permanent union of a man and a woman who for certain reasons were not husband and wife. Contrary to the canons and Christianity, which forbade common law marriage and punished it, the French Civil Code (Napoleonic Code) ignored it. Matija Vlastar's Syntagm attached a certain importance to the permanent community of life in Serbian medieval law.<sup>16</sup> Also, the Serbian Civil Code banned this community, and after the Second World War, only some effects of the common law marriage in connection with social security were recognized.<sup>17</sup> During the Second World War, two positive views on the common law marriage were known through the Instruction for keeping civil registers in Croatia and the Decision on providing assistance to families whose guardians were in captivity.<sup>18</sup> Neither the Constitution of the Federal People's Republic of Yugoslavia nor the Basic Law on Marriage from 1946 mention common law marriage. So, we cannot even talk about the qualifying features of the common law marriage in this period, because there was no suitable ground for it at all. Property issues from the common law marriage were resolved according to the general rules of civil law. In this regard, the Supreme Court of Yugoslavia issued Instruction no. Su 42/54 dated 4 March 1954. Only the adoption of republican and provincial regulations regulates some issues of common law marriage.

Legal theory mentions the concept of common law marriage status and contract. The first implies that the common law marriage is regulated by law and includes systems in which the registration of the common law marriage is necessary (France, the Netherlands, etc.) and those in which it is not necessary (our regulations), and the second implies that it is left to common law spouses (partners) to regulate their relations (German law).<sup>19</sup>

<sup>13</sup> About research and literature related to common law marriage, see: Smock, P., Casper, L., Wyse, J. (2008). *Nonmarital Cohabitation: Current Knowledge and Future Directions for Research. Research Report*. Michigan: Population Studies Center, 2-31.

<sup>14</sup> Janjić-Komar, M., Korać R., Ponjavić Z. (1995). *Porodično pravo*. Beograd: Nomos, 115.

<sup>15</sup> Bosanac M. (1976). *Vanbračna porodica*. Zagreb: Prosvjeta, 45-52.

<sup>16</sup> Draškić M. (2007). *Porodično pravo i prava djeteta*. Belgrade: Faculty of Law in Belgrade and the Official Gazette, 143.

<sup>17</sup> Janjić-Komar, Korać, Ponjavić (1995), 117-118.

<sup>18</sup> For more see: Draškić (2007), 144.

<sup>19</sup> Kovaček-Stanić, G. (2005). *Porodično pravo*. Novi Sad: Faculty of Law in Novi Sad, 175. For more seei.

For example, in the Netherlands, the Registered Partnership Act from 1998 was enacted and incorporated into the Civil Code, which contains the conditions for the establishment of a registered partnership, the effects and termination of the partnership. On the other hand, in German law, partners are free to conclude contracts according to the general rules of civil law and to regulate actions and issues related to common law marriage.<sup>20</sup>

Regarding the definition of common law marriage, we conclude that the most common qualifying characteristics of common law marriage are: gender diversity, community of life, length of its duration and the absence of impediments to marriage.

However, some authors mention other qualifying features. Some additionally emphasize the monogamy, stability and notoriety of the common law marriage as its essential features.<sup>21</sup> The stability of common law marriage implies its longer duration, and notoriety means that it looks like a marriage to the outside world. Počuča states that the minimum condition for the existence of common law marriage is the will of two people to live in a community of life, and that will is expressed by living in the same space, eating together, caring for children, etc.<sup>22</sup> On the other hand, in the old French law for the existence of an institution of *possession d'état* similar to marriage, three elements were required: using a common surname, conduct as spouses and acting in public as spouses.<sup>23</sup>

*Gender diversity* is a condition for marriage in our law. This is not the case in some western countries, where not only marriage, but common law marriage between persons of the same sex is allowed as well.<sup>24</sup> It is a variable condition depending on the social and legal perceptions in the certain country. In the territory of the former SFRY, all family legislations determine gender diversity, that a woman and a man can enter into common law marriage. This is explained by the biological arguments of giving birth and raising children.<sup>25</sup> On the other hand, criticism of this approach is based on the explanation that such communities have other goals in addition to biological ones.<sup>26</sup> Some laws recognize common law marriages for same-sex couples (Dutch and French), and some require their registration (former states and Belgium).<sup>27</sup> Our attitude is that only with a significant change in social consciousness, if and when it happens, should we redefine this concept, and, for now, it is no time for that. An interesting example is Hungary, where the Constitutional Court extended the definition of common law marriage to homosexual partners.<sup>28</sup>

<sup>20</sup> For comparative law see: Kovaček-Stanić (2005), 180-185.

<sup>21</sup> Janjić-Komar, Korać, Ponjavić (1995), 116-117.

<sup>22</sup> Počuča, M. (2010). *Porodično pravo*. Novi Sad: Faculty of Law for Commerce and Judiciary, 131, 132.

<sup>23</sup> Planiol, M. (1932). *Traité élémentaire de droit civil*. Paris, 173, prema Mladenović, M. (1993). *Porodično pravo u SR Jugoslaviji*. Beograd: Naučna knjiga, 171.

<sup>24</sup> See more: Saez, M. (2011). Same-Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families around the World: Why 'Same' Is So Different. In: A. Janssen, M. E. Storme (eds.) *European Review of Private Law*, 19 (5), 631-668; Cunningham, M. (2005). Gender in Cohabitation and Marriage. In: C. L. Shehan (ed.) *Journal of Family Issues*, 26(8), 1037-1061.

<sup>25</sup> Ponjavić, Z. (2007). *Porodično pravo*. Kragujevac: Faculty of Law in Kragujevac, 84.

<sup>26</sup> Randelović, D., Šolaja, I. (2019). Vanbračne zajednice u propisima država bivše SFRJ. In: V. Đurić, (ed.) *Godišnjak Fakulteta pravnih nauka Apeiron*, 9, 219.

<sup>27</sup> Počuča (2010), 131.

<sup>28</sup> Lucić, N., Duić, D., Muhvić, D. (2020). Izvanbračna zajednica: analiza međunarodnih i europskih normi u svrhu stvaranja nacionalnih standarda. In: I. Pejić (ed.) *Zbornik radova Pravnog fakulteta u Nišu*, 86, 21.

Determining the content of the *community of life* should certainly start from the cohabitation of common law spouses, with this community implying a set of emotional, cultural, intellectual, economic and other contents between the partners.<sup>29</sup> According to the opposite standpoint in theory, the community of life is not a constitutive element of the common law marriage concept, but it is important to live together and run a joint household.<sup>30</sup> Common law partners do not have to be together all the time, if there are objective reasons; their true will is important.<sup>31</sup>

The permanence of common law marriage indicates its stability and separates it from casual relationships. The Family Law of the Republika Srpska, in the definition of common law marriage, does not determine its *duration* as a constitutive element of the term. But, in some legal actions, it is stated that the duration of this community is necessary. When supporting persons from common law marriage, Art. 248 of the Family Law of the Republika Srpska provides one of the conditions that common law marriage should last for three years and longer, and Art. 284 uses the phrase “for a long time”. It can be concluded that the permanence as a qualifying feature of common law marriage in the law of Republika Srpska is not part of the general concept of common law marriage, but the family legislation through special provisions recognizes the permanence of common law marriage as a necessary condition for realization of legal actions. This permanence is determined in two ways: in the case of supporting common law partners by indicating the minimum period of duration, and in the case of common property of common law partners by using the legal standard that it lasted longer, which the court will assess in each case. Comparing this solution with the family law of the Republic of Serbia, it is concluded that in the definition of common law marriage (“permanent community of life”) the Serbian legislator used a general phrase. The legislator’s intention was to put the emphasis on the intention of the common law partners for their union, and the court would in any case determine the length of its duration as a necessary characteristic for the constitution of common law marriage. Slovenian law speaks of a permanent community of life. However, the Slovenian solution requires a longer period than it follows in the formulation of the Family Law of the Republic of Serbia.<sup>32</sup> The shortest period of common law marriage is regulated in Macedonian law (at least one year). On the other hand, there are laws that provide alternatives to the duration of common law marriage as a qualifying characteristic. Here, we distinguish two solutions: in FBiH common law marriage should last at least three years or less if partners have a common child and in Croatian and Montenegrin law: at least three years or less if partners have a common child or if the relationship has been succeeded by marriage, more possible solutions). These solutions contribute more to legal certainty.

*Absence of impediments to marriage* - is the next qualifying characteristic. Common law marriage in which all the conditions for marriage are met is called free common law marriage.<sup>33</sup> This circumstance is not explicitly regulated in domestic law, but it should

<sup>29</sup> Panov (2016), 149.

<sup>30</sup> Cvejić-Jančić, O. (2001). *Porodično pravo*. Novi Sad: Publishing center at the University of Novi Sad, Faculty of Law, 206; Jović, O. (2006). *Brak ili vanbračna zajednica - pravo izbora. Zbornik sa savetovanja Novo porodično zakonodavstvo*, Kragujevac: Faculty of Law in Kragujevac, The Ministry of Labour, Employment, Veterans and Social Policy and Faculty of Law in Belgrade, 191.

<sup>31</sup> Jović (2006), 192.

<sup>32</sup> Panov (2016), 150.

<sup>33</sup> Mladenović (1993), 170.

not be ignored that it can be reached by interpretation. It is similar in Macedonian law. Two more approaches can be singled out in the former SFRY: listing specific impediments to marriage that come into consideration (FBiH – absence of marriage or common law marriage; Croatia – absence of marriage<sup>34</sup>) or stating the necessity of absence of (all) impediments to marriage (Serbia, Montenegro, Slovenia). Although the term “impediment to marriage” is not the happiest solution in common law marriage, such obstacles should be interpreted in the context of obstacles to the establishment of common law marriage, borrowed from marriage law.

The preliminary draft of the Civil Law of Serbia specifies and cites some obstacles for common law marriage, such as consanguinity, marriage or common law marriage with another person (Art. 2119). The question arises, is the common law marriage an obstacle to the establishment of a new common law marriage? We agree with the attitude that the first established common law marriage produces (family) legal actions, and other common law marriages only civil legal actions.<sup>35</sup> Legal protection, in case of common law marriage regardless the impediments to marriage, is established with the aim of preventing obvious abuses or violations of known biological laws.<sup>36</sup> Therefore, some impediments to marriage in common law marriage will not be important, such as lack of will.<sup>37</sup>

#### 4. QUALIFYING CHARACTERISTICS OF THE COMMON LAW MARRIAGE RECOGNIZED IN CASE LAW

When analyzing the characteristic features of common law marriage, it is important to find out the legal perceptions of the courts. In one decision, the court determined that the common law marriage is a *factual relationship* to which the Family Law binds certain rights.<sup>38</sup>

In another case, a Croatian court states that a common law marriage implies an unmarried woman and an unmarried man, a community that has lasted a certain time and a community that included not only living together but also establishing an *economic community* in which the partners jointly decide on their mutual funds.<sup>39</sup> This court clarifies that it must be a community whose content corresponds to the marriage, and that it means not only living together but also establishing an economic community in which partners jointly decide on their mutual fund; it also implies the establishment of a high degree of interrelation, mutual care and assistance.

„The existence or non-existence of common law marriage is estimated according to all the circumstances of the relationship of common law marriage, where *it is not neces-*

<sup>34</sup> The Croatian legislator speaks of an unmarried woman and an unmarried man, which means that if one or both spouses are married, there will be no common law marriage, and that the existence of common law marriage is not an obstacle. Alinčić, M., Hrabar, D., Jakovac-Lozić, D., Korać, A. (2006). *Obiteljsko pravo*. Zagreb: Narodne novine, 106.

<sup>35</sup> Panov (2016), 151.

<sup>36</sup> Bosanac (1976), 44.

<sup>37</sup> Jović (2006), 193-194.

<sup>38</sup> District Court in Banja Luka, 71 0 P 112763 11 Gž from 16.03.2012., available at: Medić, D., Tajić, H. (2013). *Porodično pravo u praksi*. Sarajevo: Privredna štampa, kao i ostala navedena sudska praksa.

<sup>39</sup> County Court in Bjelovar, Gž – 438/08-2, od 05.06.2008.

sary for common law partners to live together in the same place all the time.<sup>40</sup> Respecting the views of legal theory as well, our attitude is that we must start from the necessity of cohabitation, with exceptions that are emphasized by case law if there are other circumstances that indicate common law marriage.

In another older case, it was emphasized that *the will is what is necessary to common law partners to establish mutual relations that correspond to marriage* relations and to consciously and willingly perform the powers and duties prescribed for the married spouses.<sup>41</sup>

In order to successfully establish a common law marriage the courts also recognize the necessity of the absence of impediments to marriage. The Supreme Court of Slovenia held that a permanent common law marriage between a man and a woman does not have the same legal consequences as marriage if one of the partners is still married.<sup>42</sup>

The courts also stated that common law marriage *cannot be declared marital by a court or some other legal authority*, because this is not provided by any procedural or substantive regulations.<sup>43</sup>

It is evident that the courts recognize the qualifying features of the common law marriage in a practical way, and that they, by normative and theoretically set qualifying elements of the common law marriage, more precisely and specifically determine the content. Some of these circumstances or elements are clearly singled out in the legal literature and coincide with the views of some legal theorists. Basically, they were following the norm, but sometimes highlighting some specific elements such as the will of common law partners to establish a community of life that will look like marriage.

## 5. PROVING COMMON LAW MARRIAGE AS A QUALIFYING CHARACTERISTIC?

The question is whether the qualifying elements of common law marriage should include proving - provability of common law marriage. This may be justified from the legal certainty perspective, but questionable from the perspective of practical feasibility given the many circumstances of the case which are taken into account in determining the existence of common law marriage. It can be claimed that proving as a special qualifying characteristic is in the domain of civil procedural law and that it can only be talked about theoretically, but that it should not be included as a qualifying element (definition) of common law marriage. Moreover, the definition of common law marriage is substantive and it is contained in family law. However, proving common law marriage is extremely important and sometimes the realization of all possible rights of common law partners depends on it. On the other hand, some foreign laws speak about the registration of common law marriages, which is most closely related to the issue of provability of common law marriage. This was also theoretically discussed. What do our legal and judicial practice say about that?

Domestic judicial practice asks the question whether a lawsuit can be started to establish the existence of common law marriage (declaratory judgment)? This issue is regulated by the Civil Procedure Law in the Republika Srpska.<sup>44</sup> A declaratory judgment is filed

<sup>40</sup> Supreme Court of Croatia, Rev – 2086/85, od 05.12.1985.

<sup>41</sup> District Court in Kragujevac, Gž - 1103/83 dated 1 November 1983.

<sup>42</sup> Supreme Court of Slovenia, Pž - 1048/77 dated 8 February 1978.

<sup>43</sup> Supreme Court in Vojvodina, Gz - 392/81 of 16 July 1981.

<sup>44</sup> *Official Gazette of Republika Srpska*, no. 58/2003, 85/2003, 74/2005, 63/2007, 49/2009 and

to establish the existence of a right or legal relationship; the truth or falsity of a document, and the establishment of facts is allowed only when explicitly provided by law. The filing of this judgment requires explicit legal authority or the existence of a legal interest.<sup>45</sup> Unlike marriage, which is a legally regulated relationship, common law marriage is factual relationship.<sup>46</sup>

In one court case in Banja Luka, the plaintiff initiated a lawsuit to establish the existence of common law marriage. The first-instance court rejected the lawsuit as inadmissible, considering that the common law marriage is a factual relationship - a fact that cannot be determined by this lawsuit. Deciding on the appeal, the District Court in Banja Luka supported the position of the first instance court, stating that the lawsuit was not allowed due to the content of legal protection which is the subject of the lawsuit, and the plaintiff's legal interest in the specific case was not legally relevant.<sup>47</sup> Therefore, it is considered that it is not allowed to initiate a declaratory judgment to establish the existence of common law marriage, because it is a request of establishing the facts.

Croatian courts have similar opinion. The second-instance court, in contrast to the first-instance court, has come to the conclusion that there is no legal interest in establishing the existence of common law marriage, which is justified by invoking the pension rights or rights based on war disability that may arise in the future. The legal interest must exist at the time the decision is made, so the lawsuit must be dismissed.<sup>48</sup>

On the other hand, the existence of common law marriage is often proven in court proceedings for exercising various property rights of common law spouses. Proving common law marriage in our country is quite difficult and longer in practice, most often after the death of a common law partner. Various evidences are used. The most important are written documents, witnesses, and the hearing of the parties. They are assessed as a whole in the context of the particular case circumstances. The following things are important: joint photos, common place of residence, bills, witness statements, postcards address, packages and other postal items, number of members for utilities payments, joint celebrations and other things.<sup>49</sup> Proving the existence of common law marriage does not mean that it will automatically have legal effects, because it depends on special legal regulations.

Slovenian Marriage and Family Relations Act from the corpus of regulations of the states of the former SFRY is the only that has "procedural" - legal provisions. In Art. 12, para. 2 of this law stipulates that if the decision on the right or duty depends on the existence of common law marriage, this issue is decided in the procedure for determining this right or duty, provided that the decision has legal effect only in the case of this issue.

The solution to the problem of *proving* the existence of common law marriage can be

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61/2013.

<sup>45</sup> For details Stanković, G., Račić, R. (2010). *Parnično procesno pravo*. Banja Luka: Faculty of Law, University of Banja Luka.

<sup>46</sup> It should be also thought about Slobodan Panov's scientific criticism of Art. 12. of the valid Family Law of the Republika Srpska that common law marriage is not a legally regulated community, and he considers that it is a legally regulated community in the manner prescribed by law. Panov (2016), 149.

<sup>47</sup> District Court in Banja Luka, 71 0 P 112763 11 Gž dated 16 March 2012;

<sup>48</sup> County Court in Zagreb, Gž-1089/10 dated 9 March 2010.

<sup>49</sup> Slobodna Evropa. BiH – vanbračna zajednica. Retrieved April 15, 2022, from <https://www.slobodnaevropa.org/a/bih-vanbracna-zajednica/31474967.html>

the registration of common law marriage. Marriage is registered in the civil registry books. However, the question is whether the freedom, as the essence of common law marriage, is lost by introducing registration and then why not conclude a marriage. Certainly, the registration of common law marriage would contribute to legal certainty and easier exercise of rights, as well as to the avoidance of litigation. Registration of common law marriage according to special regulations is familiar to Dutch, German, Swiss, Norwegian, Belgian, Danish, Finnish, and Swedish law, even without the obligation of special registration, etc.<sup>50</sup> Some authors even emphasize that it is necessary for the existence of common law marriage to be known to third parties.<sup>51</sup> Registration of common law marriage would also eliminate some practical dilemmas in proving.

## **6. ANALYSIS OF QUALIFYING CHARACTERISTICS OF COMMON LAW MARRIAGE IN THE PRE-DRAFT FAMILY LAW OF THE REPUBLIKA SRPSKA FROM 2022**

As previously emphasized, the Ministry of Justice of Republika Srpska is working on drafting the Family Law. Working Group for drafting the new Family Law has been formed, consisting of representatives of line ministries, academia, the Bar Association and Notary Chamber of Republika Srpska, the Association of Social Workers and NGOs. This group, led by Darko Radić, Ph.D. professor at the Faculty of Law, University of Banja Luka, created the Pre / Draft of the future Family Law of the Republic of Srpska, which was determined by the Government of the Republic of Srpska and is expected to be sent to the parliamentary procedure. According to him, common law marriage is defined as a community of life of a woman and man (common law spouses) with no impediments to marriage, which lasted at least two years or less if partners have got a common child. It is further emphasized that the common law marriage is equal with the marital union in terms of the right to mutual support, property - legal relations, under the conditions and in the manner prescribed by this law.

This provision contains two paragraphs. The first paragraph provides a definition of common law marriage that is universal and may be relevant to other branches of law such as inheritance or social law. In fact, this definition contains the qualifying characteristics of the common law marriage and how it might look in the future positive law of the Republika Srpska. Of course, since this is a draft text of the Family Law and after it is sent, during the parliamentary adoption procedure, changes to this definition are possible. This is a framework that can be thought about and that needs to be scientifically and critically analyzed for now. Therefore, the editorial error that common law marriage is a community of life of a woman and men (plural) is understandable, so we believe that it should say "a woman and a man". The legislator decided to use the term "common law spouses" (in theory, the term common law partners can also be found). This definition refers to qualifying elements of common law marriage as: community of life, gender diversity, absence of impediments to marriage and duration of common law marriage. These elements should be achieved cumulatively. Only the permanence of common law marriage contains two alternatives: that it lasted at least two years (principle of minimum duration) or that it lasted less than two years, provided that a child was born (implying the child of these com-

<sup>50</sup> Randelović, Šolaja (2019), 220-221. Vid. više, kao i argumentaciju kod Kaščelan, B. (2012). Registracija vanbračne zajednice. *Pravni život*, 10, 85-103.

<sup>51</sup> Janjić-Komar, Korać, Ponjavić (1995), 117.

mon law spouses). The legislator decided not to state specifically which impediments to marriage are in question, so hypothetically all impediments to marriage that apply to the marital union would come into consideration. Also, the use of the term impediments to “marriage” is unusual, considering that this is common law marriage. Some comparative law explicitly lists some of the impediments to marriage that come into consideration. For now, it is not possible to know the motive why the period of at least two years was chosen. Until now, the opinion on the duration of common law marriage of three years and longer has prevailed in some comparative law, but in domestic case law as well; somewhere it is about a more permanent common law marriage without specifying the minimum duration. Certainly, prescribing a minimum duration leads to greater legal certainty. Another alternative condition in the qualifying characteristic - the duration of the common law marriage is determined like, for example, in Croatian law.

The second paragraph contains a general provision on the legal effects of common law marriage. The effects of the common law marriage are determined by comparing it with the marital union. According to this part of the provision, common law marriage is equal with marital union only in terms of the right to mutual support and in terms of property - legal relations. When we talk about property-legal relations, it includes all other property-legal relations, but, according to the preliminary draft of the Family Law, only under the conditions and in the manner prescribed by this law. This means that the common law marriage is not fully equated with the marital one in terms of property - legal relations, fully and unlimitedly, but under special additional conditions contained in the Family Law.

## 7. CONCLUSION

The subject of this paper is common law marriage, and its characteristics. These qualifying characteristics of common law marriage are determined on the basis of legal definitions of common law marriage, or by family law regulations in the countries of the former SFRY, and beyond. As it has been seen, the definition and qualifying characteristics of common law marriage depend on social, historical and legal perceptions. Therefore, throughout history, these communities have not been recognized, and in some places they have received wider support, especially today in some western countries. In this paper qualifying characteristics of common law marriage are considered in a comparative legal context and, their analysis is given as in the case of the common law marriage in positive law and the future Family Law of the Republika Srpska. It is started from formal sources of law on qualifying characteristics of common law marriage, analysis of legal literature on these characteristics with historical and comparative legal review, determination of qualifying characteristics of common law marriage in case law, consideration of possibility to prove common law marriage as a qualifying characteristic and analysis of these features in the Draft Family Law of the Republika Srpska from 2022. When we look at the analysis of the definition of common law marriage, we conclude that the most common qualifying characteristics of common law marriage are: gender diversity, community of life, length of its duration and the absence of impediments to marriage. It depends on the legal system whether some of these features will be present or all cumulatively. Thus, not all states prescribe the absence of impediments to marriage as a basic element of common law marriage, and those that do do not list them. In modern Western countries, gender diversity is also a variable element, as some countries allow same-sex common law marriages. We do not discuss this, because the time to change social perceptions has not come yet. On the other hand, the proposal presented in the Draft

Family Law of Republika Srpska should be supported so that the definition of common law marriage includes all the above qualifying features that should be added separately, unlike the positive legal solution, which lists only those features related to the permanence of common law marriage given in alternatives (one of them is to include the duration of the common law marriage of at least 3 years instead of the proposed 2) and those related to the absence of impediments to marriage for the establishment of common law marriage. The possibility of registering common law marriages should also be considered in order to facilitate proving common law marriage and exercising rights.

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## Kvalifikacione karakteristike braka u common law

**Rezime:** Ovaj članak se fokusira na kvalifikacione karakteristike vanbračne zajednice, kao neformalne zajednice muškarca i žene, koja mora da ispuni određene propisane uslove da bi proizvela određene pravne radnje. Stoga polazimo od hipoteze da se kvalifikacione karakteristike vanbračne zajednice mogu utvrditi na osnovu pravne definicije vanbračne zajednice, što je uslovljeno društvenim, istorijskim i pravnim shvatanjima vanbračne zajednice. Cilj ovog članka je utvrđivanje kvalifikacionih karakteristika vanbračne zajednice u uporednopravnom kontekstu, njihova kritička analiza i utvrđivanje kvalifikacionih karakteristika i definicija vanbračne zajednice u pozitivnom pravu i budućem Porodičnom pravu u Republici Srpskoj. Ovo daje važnost i relevantnost ovom radu. Uporednopravni kontekst obuhvata kako zemlje bivše SFRJ, tako i neke evropske zemlje.

**Ključne reči:** kvalifikacione karakteristike, common law brak, brak, elementi vanbračnog braka, porodica, nasleđe.

