"Legal Aspects of Unmarried Cohabitation in Serbian Law - Alternative Way of Joint Living of a Man and a Woman".

Olga S. Jovic, LLM
Faculty of Law,
Priština, headed in Kosovska Mitrovica, Serbia

A. Introduction

The evolution of the modern society has had its impact on the qualitatively different approach towards the joint living of unmarried couples, both in legal and in moral sense. Although unmarried cohabitation has been socially present aspect since ancient times, it was only when family was put into the centre of social interest that unmarried cohabitation became legal aspect too. Unmarried cohabitation, with its objective and specific features, is legally determined in Serbian Family Law, and that is why there is the need to investigate the contents of this legal institution.

The changes in attitude towards values in life and lifestyle resulted in standard regulation of unmarried couples in Serbian legislation, through Family Act, in the manner it regulates marriage, establishing a new institutional framework of a community of a man and a woman. The regulative approach towards unmarried couples results in loss of differentiation between marriage and unmarried cohabitation and leads towards their equalization. This, again, results in confusion of theses on real relationship on one hand, and social relations, on the other.

The fact that unmarried cohabitation is an alternative way of joint living of a man and a woman which is parallel to marriage leads to conviction that partners can choose one out of the two, socially equally valued and treated, ways of joint living. This leads us to the question whether legal equalization of unmarried and marital cohabitation is an attack towards freedom of an individual, because it is opposite of free way of regulating the relationship of a man and a woman, which, as a rule, should not be controlled by the rules of an institution. The institutional framework of unmarried cohabitation restricts partners’ free choice in the way they organize their relationship, avoiding the compulsory marriage regime and the constitution of marital rights and duties. Although the main feature of unmarried cohabitation is freedom of commencement and freedom of ending, unmarried cohabitation becomes a legal institution because of the legal effects which make it close to marriage in its essence.

The starting point in studying this topic is the attitude that marriage is no longer a special relationship which deserves a special treatment, taking into account the growing number of unmarried (informal) cohabitations which are, in their external and contextual characteristics, equivalent to marriage. The key element for both marital and unmarried cohabitation is a complete life cohabitation of a man and a woman, which is a result of one subjective and one objective criterion. The subjective criterion being willingness of the partners to start a joint living with an idea of unlimited time period, while the objective criterion is manifested in formal or informal confirmation that there is a complete life cohabitation between partners in one heterosexual union. They submit these criteria to the relevant social group in their community. 1 Unmarried cohabitation is a family legal relationship, which is recognized by the law as a real relationship between a man and a woman, if the
prescribed conditions are fulfilled, and it also has its legal consequences, rights and duties.

B. Terms Marriage and Unmarried Cohabitation

In domestic legislation, unmarried cohabitation was not regulated by law and it produced no legal effects, especially not the effects the law prescribes for spouses. In historical context, although unmarried cohabitation existed, they produced no effects in the domain of family law, that is, unmarried status did not exist. Constitutional reformation in 1974 enabled family legislations of the republics and provinces of the former SFRJ to regulate the effects of the commencement and ending of unmarried cohabitation in the domain of social security. In the period after the WWII until the Constitution of FNRJ and the Basic Marital Act was passed in 1946, unmarried cohabitation was partially recognized by the Yugoslav National Liberation Committee Decree (19/12/1944) in the domain of social security benefits for the families whose supporters were in captivity. A woman was entitled to the benefits if her unmarried husband (who she had been living with for at least six months or he had been supporting her for the duration of that period) was in captivity, the army or killed at war.

Ten years later, in 1954, Federal Supreme Court passed Guidelines Concerning the Conflict Resolution in Cases of unmarried Cohabitations, for the purpose of resolving property claims of unmarried partners by applying general legal rules of property law. Unmarried cohabitation was legally regulated by the Marriage and Family Relations Act of Serbia, in the manner that, under certain circumstances, it produced certain effects concerning property exclusively, but only after it ceased to exist. In the new Family Act from 2005, the life cohabitation of unmarried partners is, in its content, equal to the one which exists among spouses, which means that, according to the law, the effects of these two are equalized.

Marriage has always been in the centre of civilization as a social and legal element, adopting the characteristics of the given period which shaped it. As a social and legal category, marriage has passed through different stages of development, thus understanding of marriage depends on the period of time which is being studied, social circumstances and the legal system. Ever since Roman Legislation up to the present, the efforts of the theoretic scholars have been directed towards determination of the legal term of marriage, above all, because of the differences which exist in the understanding of its nature, choice of its contents and purpose in a particular society in a particular period of time. That is the reason why the definitions which determine the term of marriage in modern society are rarely explicit. Many European legislations lack the definition of marriage due to the cultural diversity of each society and the absence of an (un)objective criterion which determines legal nature of marriage that would be truthful and fit for all marriages. Still, Serbian Family Act determines marriage as legally regulated cohabitation of a man and a woman.

Compared to how it once was, when there were many conditions to be fulfilled in order to become married, modern society narrowed their number and size. Marital impediments of religious character perished, parents consent is no longer required, and the form of marital contract has been simplified. Modern tendency of family law is to lessen marital impediments, which leads towards liberalization and simplification of marital contract, with an idea to increase the responsibility of the spouses in case the marriage fails. Therefore, marriage as an institution is recognized by the legal establishment only if it complies with the conditions prescribed by the law on
forming, effects and ending of a marriage. Its essence is life cohabitation between a man and a woman as a real and complete life cohabitation of two entities of different gender, that is, marriage is exclusively heterosexual, monogamy cohabitation.\(^7\)

On the other hand, an essential question to ask when studying unmarried cohabitation is determination of the term of this cohabitation, that is, determination of the conceptual attitude of the state towards unmarried cohabitation as an institution.\(^8\) Namely, the number of people who live together outside wedlock is a widely spread phenomenon in most European countries.\(^9\) The concept of immorality of two people living together outside wedlock is abandoned; unmarried cohabitation is legally protected.

This popular form of joint living of a man and a woman in our country resulted in defining unmarried cohabitation as a lasting life cohabitation of a man and a woman, that is, unmarried partners. Furthermore, our domestic legal norms determine that the rights and duties of unmarried partners are the same as those of married partners.\(^10\) Granting unmarried partners the same rights as spouses represents a radical departure from basic values and the belief that legal marriage should have supremacy over unmarried cohabitation, thus enabling partners to choose a more liberal form of life communion.

In our legal literature, the term unmarried cohabitation is determined as a communion similar to marriage without the formalities prescribed for a marriage,\(^11\) that is, as a life communion of one man and one woman that lasted for a certain period of time and is known as such to third parties. It begins with the beginning of their joint living and ends with the end of the intent of forming such cohabitation.\(^12\)

From the aspect of comparative law, it is hard to draw clear conclusions on unmarried cohabitation, due to the fact that the term of unmarried cohabitation is formally and conceptually different in different occasions. This applies to unmarried cohabitation as well as to other numerous forms of joint living, too. In English legislation, for example, they use the term 'cohabitation', a term which, in its original meaning represents living together, that is, joint living,\(^13\) whereas in French law the term 'concubinage' represents life communion of two persons of different gender as well as the live communion of two persons of the same gender.\(^14\)

Recently, besides the aforementioned terms, the term for unmarried cohabitation existing in Dutch legislation is registered partnership.\(^15\) Due to this deficiency in terminology, it is necessary to describe the elements of unmarried cohabitation that make it a legal institution, in more details, taking into account the fact that different genders criterion is no longer an essential factor for the identification of unmarried cohabitation.

### C. Constitutive Elements of Unmarried Cohabitation

Although Serbian Family Act prescribes the conditions unmarried cohabitation needs to fulfill in order to be legally recognized and have legal family effects, these terms are not clarified in detail. Their interpretation is left to legal theory and practice. The basic condition prescribed by the law is related to the existence of a joint living, which, in its contents, needs to be identical to the one that exists among married partners. Outside manifestations of joint living of unmarried partners must originate from their internal need, as well as from their emotional, moral, spiritual and sexual bonds, i.e. willingness of the partners to live together as spouses.\(^17\) What constitutes unmarried cohabitation is the totality of the reciprocal relations of
unmarried partners, the fact which compensates for the lack of the legal form of marriage.

Unlike married partners who can agree to have separate households and places of living, unmarried partners must have joint household and joint place of living, because joint living of unmarried partners is the only guarantor of the existence of unmarried cohabitation, since it actually begins with the commencement of joint living, without the formalities that could confirm the beginning and the end of unmarried cohabitation. Consequently, unlike spouses who have possibilities to make a deal to have different households and places of living, if unmarried cohabitation is to be recognized as such, the possibility to have different households and places of living must be excluded, because otherwise it does not exist in reality, since it is not formed in the presence of a state body and there is no special record of it. However, it does not and cannot mean that the partners must be together all the time. Joint living shall exist in the cases when the partners agree to have temporary or occasionally separate living due to objective circumstances (for example working in a foreign country). The determining factor for the constitution and existence of a joint living of unmarried partners is their true internal need to live together as a husband and wife.

In order to be legally recognized as unmarried cohabitation, it needs to fulfill the time condition i.e. it needs to be long lasting, that is, it needs to be a lasting joint living of a man and a woman (Art. 4 par. 1 FLS). The duration of the cohabitation provides the possibility to express outside manifestations of a joint living, i.e. it shows the stability of the relationship and helps it to be widely known. Thus, for example, in French law, the concubinage as a solution is characterized by certain stability like marriage, because the state of concubinage is not characterized only by joint living, but by a stable and continuous relationship. Determining the time limit for the duration of unmarried cohabitation is in compliance with the attitude that unmarried cohabitation should be founded with the intent of indefinite duration. This is a fact which considerably differentiates it from occasional extra marital sexual relationships, which do not mean joint living, because the partners do not have the intention to form a mutual relationship which would be recognized by the society as stable enough.

This legal standard accepts the standpoint that unmarried cohabitation needs not necessarily be long lasting, but rather the fact that the partners have the intention to form a cohabitation which is not temporary or limited. The legal standard ‘a lasting life communion’ is used in legal norms with the possibility to change its form in each individual case. It is not possible to determine the contents of this legal standard in advance, so it acquires its full expression in court practice in each individual case.

The difference of the relationship and its intensity in unmarried cohabitation, especially if a child(ren) were born in such a cohabitation, does not produce the presumption of fatherhood of the mother’s unmarried partner. Namely, the father of the child born outside wedlock is the man whose fatherhood is confirmed by affiliation, that is, whose fatherhood is determined by a legally bonding court rule. The fact that a child or children were born in unmarried cohabitation is regularly taken as an evidence for legal recognition of unmarried cohabitation by the court of law. The law does not regulate the relationship of unmarried partners towards their common child (except in the case of bio-medically assisted conception Art. 58 par. 2 of the SFA), so that the rights and duties of the parents and relatives towards the child born in unmarried cohabitation exist only when the origin of the child is determined.

Besides the existence of a lasting cohabitation of a man and a woman, there is also a third condition that needs to be fulfilled so that unmarried cohabitation can produce legal effects. That is the condition that in the time when the cohabitation was
formed there were no marital impediments prescribed by law (marriage, incompetence of judgment, kinship, guardianship and lack of consent). It is necessary to mention here the fact that unmarried cohabitation shall not be legally recognized in all those cases when a marriage would not be lawful.

By recognizing marriage as an impediment for the constitution of a legal term of unmarried cohabitation, the law protects the principle of monogamy; as for minority as a marital impediment, social community does not accept cohabitation of minors, because of possible negative impacts such a cohabitation might produce for the minors. However, in the cases when only one partner is minor, the cohabitation could be recognized as unmarried cohabitation, if there are reasons for the removal of such an impediment. Kinship is a marital impediment to the extent in which sexual intercourse among relatives is incriminated in criminal law as incest.

Cohabitation with a person unable to reason cannot be recognized as unmarried cohabitation, because the person unable to reason cannot understand the meaning and the consequences unmarried cohabitation produces.

Other impediments for full validity of unmarried cohabitation, have no relevance in practice: the lack of free will due to force or delusion cannot last for a longer period of time, due to the fact that the constitution of unmarried cohabitation is a longer process than the moment of stating ones will when getting married, therefore it is not a relevant fact from the aspect of potential legal recognition of unmarried cohabitation.

Using the same analogy when applying the provisions of marital law, marital impediment that existed in the time of constitution of unmarried cohabitation, represents circumstances which prevent the constitution of a legal term of unmarried cohabitation. However, our legislation recognizes several situations when ratification of absolutely void and voidable marriages shall be performed, and with the equalization of marriage and unmarried cohabitation, there is no impediment for the court to recognize the unmarried cohabitation its legal effects, due to justifiable reasons. Taking this criteria as a starting point, we differentiate legally valid, that is, legal unmarried cohabitations from illegal cohabitations. In this latter case, unmarried cohabitation is not a legal institution because it does not comply with the standards for its validity prescribed by the law, that is, the conditions based on which the court could recognize such a cohabitation as legally valid do not exist.

According to our law, unmarried cohabitation which fulfils legal conditions, in terms of the existence of life community, length and absence of marital impediments, produces family and legal consequences regarding the right for protection against domestic violence, child adoption, and determination of fatherhood of a child conceived through bio-medical assistance, life support and joint property of the unmarried partners. This means that unmarried partners have the status which implies a set of rights and duties of personal and property character (indefinite and imperative), as well as the rights and duties of personal property and property character. Due to the fact that there is no specific form when constituting unmarried cohabitation, it does not produce statutory effects in terms of name, citizenship and capacity to have rights and obligations of unmarried partners.

D. Legal Attitude towards Unmarried Cohabitation

Comparative laws that regulate unmarried cohabitations differ in relation to the conditions for their constitution, to legal effects they produce and the mode of ending. Thus, the theory of family law differentiates two basic concepts of unmarried
cohabitation, depending on the fact whether the unmarried cohabitation is regulated by law in the particular legal system or the relations in it can be regulated by a contract among partners.\textsuperscript{30}

The contractual concept of unmarried cohabitation is a prevailing approach in the legislations of the European Union countries. In its nature, the contractual concept of unmarried cohabitation implies the liberty of the partners to sign all kinds of contracts, while the validity of such legal acts is judged in compliance with the regulations of the law of contract, property law, law of wills, labor law or any other kind of law.\textsuperscript{31} With regards to this fact, Ministers Committee of the European Council, in its recommendation on the validity of the contracts signed by persons who live together as unmarried partners and their testamentary dispositions (1988), advises the member countries to abide all the contracts delivered by unmarried partners relating to their property during the unmarried cohabitations and after its end, as well as all the dispositions unmarried partners make for each other in their will.\textsuperscript{32} This approach is a result of the belief that a contract represents a flexible means of legal protection of property of unmarried partners, because unmarried partners regulate mutual rights and duties without the interference of state institutions which represent public authority and which, in some cases, have the discouraging effect with regards to the partners’ intent to marry. Contract enables the partners to keep their relationship private and protected from the unwanted interest of the public. The contractual concept, thus, guarantees greater individual freedom, but it obligates the partners to address the protection of their rights and legitimate interests with greater responsibility and higher level of legal consciousness.\textsuperscript{33} However, besides the unquestionable advantage, the contractual concept has one basic disadvantage. Namely, the position of the contractual parties, although formally equal, is not always the consequence of economic or psychological equality of the unmarried partners. Thus, for example, in the conditions of low level of economic and social security, it is justifiable to predict that certain property interest could be gained through this contract, which could not be gained otherwise.\textsuperscript{34}

The statutory approach towards unmarried cohabitation implies recognition of unmarried status, and is justified by the intent to protect the weaker party in unmarried relationship from malpractice of the other unmarried partner. Basic characteristic of the statutory concept is to bring closer and equalize legal effects of marriage and unmarried cohabitation. However, this approach demands certain remarks. Namely, if unmarried cohabitation is long lasting, complete life cohabitation of a man and a woman which is, in its contents and outside manifestations, not different from marriage, we distinguish two situations. In one case, if unmarried partners could not get married because of a legal marital impediment, such unmarried cohabitation shall not have its legal property effects. In the other case, if unmarried partners did not want to get married, it is unjustifiable do enforce the appearance and effects of a marriage, because it opposes their will and the status they chose. On the other hand, if unmarried cohabitation is a free cohabitation which does not apply the rules of marital law, and if its status is recognized only in respect to some property rights, then a differentiating element which distinguishes unmarried cohabitation from marriage remains. If a man and a woman constituted unmarried cohabitation because of some marital impediments that prevented them from getting married, their property interests would be protected, and this fact compensates for the lack of status recognized to marriage. If unmarried partners started living in unmarried cohabitation voluntarily, freedom of choice is exercised, and legal protection of their property is not diminished.
Within a legislation group that accepts the statutory concept of unmarried cohabitation, we can divide the legislations in those where unmarried cohabitation produces legal effects only if it is registered as such (Dutch, Belgian law) and those where this condition is not requested (former Yugoslav republics: Macedonia, Croatia, Slovenia, Serbia belong to this group).\(^{35}\)

When standardizing unmarried status, depending on the legislative technique, unmarried cohabitation can have a protective function for the weaker partner, and in that case marriage remains the only recognized form of joint living of two persons of different gender, or it is possible to see the unmarried cohabitation as a factual cohabitation that has no legal effects in terms of its existence of ending. The relations between the partners are resolved by applying the rules of civil, not family law.\(^{36}\)

\section*{E. Formal and Informal Marriage}

If a marriage is to be regarded as valid, it needs to comply with the legal forms. A formal ceremony of marriage has multiple significance and role. Two constitutive elements of the form of marriage are: jurisdiction for marriages and the procedure of marriage. The jurisdiction for marriages is the privilege and duty of the authority to act at the marital ceremony,\(^ {37}\) whereas the ceremony itself implies the registering (prior) procedure, the procedure of marriage and the procedure of registration.

To the contrary, when constituting unmarried cohabitation, no formalities are necessary for its commencement. However, the fact that no formalities are required when forming unmarried cohabitation, as opposed to marriage, did not affect the commonly accepted attitude that unmarried cohabitation of a man and a woman who are not married, has the same consequences as if they were married.\(^ {38}\) Unmarried cohabitation is an alternative form of joint living of a man and a woman which is parallel to marriage. Thus, partners, depending on their preferences, choose one out of the two legally standardized forms of cohabitation.\(^ {39}\) Besides that, legal effects of unmarried cohabitation are conditioned by the same substantial premises that need to exist when forming a valid marriage. Unmarried cohabitation is constituted when forming a joint living, with a man’s and a woman’s (unmarried partners’) mutual consent, and is ended, by their mutual consent, too, without any formalities. To the contrary, law strictly regulates the beginning and the ending of a marriage, implying numerous formalities that need to be fulfilled by the future spouses so that their marriage is legally valid. Divorce is the only way of ending a valid marriage as long as the spouses are alive, and it needs to be done in the relevant court procedure. Furthermore, while each marriage is registered, unmarried cohabitations do not have such a record. This means that unmarried cohabitation begins and ends without any notification by the public authority.

Theoretical research of this problem leads us inevitably to the conclusion that unmarried cohabitation is, in fact, informal or factual marriage, due to the lack of any form needed for its beginning or ending, and with regards to the facts that it still produces all legal effects of a marriage. That is why a question whether individuals have the choice how to organize their joint living rises. It is realistic to suppose that unmarried partners do not want their cohabitation to have the legal consequences of a real marriage, that is, that they want to avoid legal intervention upon the ending of their cohabitation.
In legal political context a question raises, whether it is justifiable to equalize unmarried cohabitation, with all its specifics, with legal effects of marriage, thus making it alternative to marriage or its informal form.

F. Conclusion

When studying the phenomenon of unmarried cohabitation as informal marriage in Serbian family law, a considerable omission in legal standardization of this legal institution becomes apparent. Namely, legalization of unmarried cohabitation leaves out the protection of unmarried family, while the only direct protection is granted to the participants in this relation – the unmarried partners, despite the fact that, in all contemporary legislations, more and more importance is given to legal determination of a parent-child relationship, as well as normative regulation of the rights a child has based on his or her status.

If two adults chose an unmarried cohabitation as their way of joint living, first question is whether judicial intervention annihilates their choice, that is, whether they have the possibility to choose a form of their joint living at all. According to the legislative diction, an unmarried cohabitation is, in its contents, equal to that married spouses.

If a child is born out of wedlock, as opposed to a child born in a marriage, it does not imply any legal premise that could aid in determining the origin of the child in relation to its father, but rather, it needs to be determined in each specific case. The departure in this respect, is related to the determination of extra marital fatherhood in cases when the child was conceived with bio medical assistance (Art. 58 par. 2), and it raises, a second question is why is the family status of a child conceived in unmarried cohabitation with bio medical assistance more privileged that the status of a child conceived in a natural way in the same type of cohabitation.

The reasons that motivated the legislator to standardize unmarried cohabitation in this manner, as an incomplete form of marriage, are justified by the need to prevent the exploitation of the weaker partner, mainly in socio-economic sense. Safety and stability of family relations is an important factor in all segments of society, because it directly affects the development of a community. However, a controversy remains whether this approach to unmarried cohabitation shall contribute to its stable position in the system of social relations, and whether legal framework of unmarried cohabitation shall affect the quality of the partners’ mutual relations and their relation towards their mutual children as its most important effects.
Endnotes:

5 See Draskic M., Family Law and Children’s Rights, Belgrade, 2005, p. 73
6 See Art. 3 par. 1 of the Family Law of Serbia, “Official Gazette of Serbia” No. 18/2005
7 See Herring J., Family Law, Pearson Education Limited, England 2001, 2004, p. 34. In English Law for example, the broadest accepted definition of marriage is that in the case of Hyde vs. Hyde and Woodhouse: ‘marriage is a voluntary life communion of a man and a woman excluding all others’. (1866) LR 1 PD 130
8 See Cvejic-Jancic O., Family Law, book I – marital law, op. cit., p. 204
9 According to statistics data acquired when researching frequency of unmarried cohabitations in Great Britain, it was found that one out of eight couples live outside wedlock. 23% of women ages between 18 and 49 were living in unmarried cohabitation. During the year 2002, 40% of children were born to unmarried cohabitations. See Herring J., Family Law, op. cit. p. 59
10 See Art. 4 of the Serbian Family Law.
12 See Ponjavic Z., Family Law, Kragujevac 2005, p. 132
13 Thus, this term represents two students living together as tenants, a boy and a girl living together with the intent of getting married and all other cases when two separate individuals live together. It is hard to draw a conclusion on the nature of the relationship of two people sharing the same lodgings solely on the bases of this term cohabitation. See Draskic M., Quasi Marital Cohabitation, Legal Effects of Joint Living Outside Wedlock, Belgrade 1988, p. 61
14 In French law, the term accepted in the Treaty on Civil Solidarity in Concubinage (Du Pact Civil de Solidarité e du Concubinage (PACS)), is not precise enough because it refers to life communion of two persons, it was found that one out of eight couples live outside wedlock. 23% of women ages between 18 and 49 were living in unmarried cohabitation. During the year 2002, 40% of children were born to unmarried cohabitations. See Herring J., Family Law, op. cit. p. 59
16 In legal theory a unanimously accepted standpoint is that the constitutive element for unmarried cohabitation is joint living, because there are no other visible elements (such as form in marriage), based on which it could be differentiated from other similar situations that only look like unmarried cohabitation. See Stevanov M., Quasi Marital Cohabitation, Collection of Zagreb Faculty of Law, No. 1-2/1978, p. 82. See also Ponjavic Z., Family Law, op. cit., p. 131, Kovacek-Stanic G., Family Law, op. cit., p. 177, Draskic M., Family Law and the Rights of a Child, op. cit., p. 162.
17 Slovenian legislation determines unmarried cohabitation descriptively in Art. 12 of the Marital and Family Law (Zakon o zakonski zvezi in družinskih razmerjih, “Uradni list RS”, No. 16/2004) as a lasting life cohabitation of a man and a woman who are not married. The basic aim, i.e. legal need for
such a solution is to prevent exploitation of the weaker partner. See Zupancic K., Druzinsko pravo, Ljubljana 1999, p. 98

In English legislation, unmarried cohabitation is not regulated by the law. However, legal effects of unmarried cohabitation are reflected in the area of social security, namely, partners can only use these rights if they fulfill the category of joint living, i.e. if a couple is living together as if they were married. In the case Kimber vs. Kimber (2000) 1 FLR 232, the criteria which determine the existence of a joint living: joint living of the partners in the same household; sharing everyday chores and duties (i.e. cooking, cleaning); when their relationship is stable and obvious; if the partners have joint finances; if they have regular sex; if they have a child in such a relationship; if they are responsible individuals with normal understanding of joint living of a couple. See more at Herring J., Family Law, op. cit., p. 59-60

In comparative law, the duration of unmarried cohabitation is a bases for granting or deprivation of certain rights of unmarried partners in the domain of alimony and joint assets.

Art. 197 of SCL: “A major who performs rape or a sexual intercourse equalized to it with a minor blood relation in direct line or a minor brother or sister, shall be sentenced to up to three years of imprisonment.”

According to the Art. 190 of the Criminal Law of Serbia (Official Gazette of RS”, No. 85/05) unmarried cohabitation with a minor is a criminal offence when:

1) “A major who is living in unmarried cohabitation with a minor, shall be sentenced to up to three years of imprisonment
2) A parent, adopting parent or a guardian who enables a minor to live in unmarried cohabitation with another person or advises him/her to do so shall also be sentenced according to the par 1 of this Article
3) If the act from par. 2 of this Article is done for mercenary, the proprietor is to be sentence to imprisonment for the duration of between six months and five years.
4) If a marriage is concluded, prosecution shall not be exercised, and if it is exercised, it shall be stopped.”

However, Art. 23 par. 2 of the FL prescribes the conditions when minority as a marital impediment can be removed: ‘court can, for justifiable reasons, allow a minor to get married if he/she is aged 16, and reached physical and emotional maturity necessary to perform marital rights and duties”. If our starting point is the fact that the conditions for recognition of unmarried cohabitation are equalized with the conditions for validity of marriage, then we can conclude that there is no obstruction to, in cases when unmarried cohabitation is recognized, apply the provision Art 23 of the Serbian Family Law

Art. 197 of SCL: “A major who performs rape or a sexual intercourse equalized to it with a minor blood relation in direct line or a minor brother or sister, shall be sentenced to up to three years of imprisonment.”

Thus, for example statutory concept adopted in Serbian, Slovenian, Croatian, Macedonian and Swedish laws, as well as the legal systems of the countries of Middle and South America, whereas contractual concept is present in French, Dutch and German law. See more on this topic at Draskic Quasi marital cohabitation: informal marriage or alternative marriage?, Collection ‘Reform of Family Law’, Belgrade, Faculty of Law, Serbian social law lawyers’ society, 1996, p. 119-124

See more on ratification of void marriages at Cvejic-Jancic O., Family Law, book I – Marital Law, op. cit., p. 169-171

See Draskic M., Family Law and Children’s Rights, op. cit., p. 164

See Ponjavic Z., Family Law, op. cit., p. 134-135


See Kovacek-Stanic G., Family Law, op. cit., p. 175

The jurisdiction for marital procedure can be subject, local and functional. In Serbian law, subject matter jurisdiction for marriages is the municipality where the register is kept. As for local jurisdiction, persons who wish to get married are free to choose the municipality where they wish to declare their
consent to get married. Functional jurisdiction means that a registrar is entitled to contract marriage, on behalf of the municipality.

38 See more at Cvejic-Jancic O., Family Law), book I – marital law, op. cit., p. 207

39 Ibid.