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RIGHT OF RETENTION OF POSSESSION AS A REAL RIGHT OF ENSURING THE CLAIM IN SERBIAN AND COMPARATIVE LAW

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Abstract
The author discusses the problem of determining the legal nature of retention of possession (ius retentionis), as one of the most controversial issues in legal doctrine in relation to this civil law institute. The research sample in the work consists of: positive Serbian law; regulation of 11 European countries; two drafts that pretend to become the future civil law of the Republic of Serbia; and finally, the solution of the Draft Common Frame of Reference for European Private Law (DCFR), which is a potential framework for the future Serbian solution. By using a comparative and axiological method, the author concludes that the right place for retention of possession de lege ferenda is in the part of the law that regulates real rights, specifically the rights of real security of claims, instead of the Law on Obligations, which is now the case. He estimates that, although right of retention does not have all the elements of the rights of real guarantees (in particular, it lacks the right to follow the object), it nevertheless, functionally, with its object and effect, belongs to this group of subjective civil rights. For this reason, the author determines its legal nature as - sui generis real right of securing claims that is incomplete, and which is realized by authentic technique, through self-help.

Keywords*: real right; the right of real securing claims; right of retention; right of settlement; self-protection*

1. Introduction

Retention[1] is a specific civil right institute indirectly emerging on the basis of law and authorizing the creditor (the retinent) of due and outstanding claims to retain the debtor's thing, already in his hands, until the settlement; as well as to get settled in the value of the thing[2] under conditions prescribed by the law. The aforementioned institute causes numerous controversies within the Eurocontinental doctrine, where the legal nature of retention is one of the most disputable issues. Given the fact that different countries' legal texts are not dealing with this issue (which is quite logical, since it does not fall under the legal dogma domain), we have to look for an answer in domestic and foreign

[1] See more: Pavićević, A., *Pojam retencije u domaćem i uporednom pravu*, Pravni život, knj. 576, No. 10, 2015, pp. 505-521.

[2] The right of settling the retinent exists in Serbian law, as well as in the majority of European regulations, but not in all legislations encompassed by our research sample. This is why the legal nature of retention is differently qualified in those countries' doctrines.

lawwriters' positions. Formerly, but also nowadays, understandings of what is the legal nature of retention have varied, and determinations differ to such extent that the retention is not always explained as a subjective civil right[3], but also as an authorization[4]; as a legal power[5]; as an ordinary instrument for protection of rights; or via general self-help theory[6].

Even though the position, according to which the retention is a subjective civil right, is a predominant issue in contemporary legal theory[7], interpretations do not defer much as of today. Apart from some authors who deprive the retention of having subjective civil right feature (thus reducing it to the level of substantial legal objections), it is of no surprise to compare retention with the legal power (as the two hold certain common characteristics). Finally, within the hypothesis defining the legal nature of retention as a subjective right, it must be further precised whether it refers to: the real right or to the obligation right, or to the so called „negative right". Additionally, it is important to ascertain whether such qualification substantially denies understanding of retention as a self-help or its nature might be defined as complex.

There are also some opinions in the doctrine (admittedly not many of them present) that each attempt of determining the legal nature of retention is vain, substantially unnecessary and practically irrelevant, given the fact that the institute is as such-operational in practice. Nevertheless, we believe that this is an ungrounded position, since the scientific task is to give an explanation for each of the institute in a legal and dogmatic way, locate it in a legal system as adequately as possible and link it to the similar allied institutes. Due to that, determining the legal nature of retention is an unavoidable and even a substantial issue with regards to this institute. Legal provisions regulating retention are understated, by the rule, thus leaving a lot of legal leaks that must be fulfilled in practice, where, to that end, the most helpful one proved to be the doctrine with its interpretation. Besides that, science will contribute to more even practice and to a legal certainty by offering its regular and generally acknowledged interpretation of the legal nature of retention.

The issue of determining the legal nature of retention is even far more complex if we take into account that our research sample consists of diverse European regulations that: a) have different concepts of retention (ordinary or qualified); then those b) even if having the same concept, they know numerous retention modalities[8] (different from the basic general model), and whose legal nature varies. Thus, grounds for our comparative analysis might be found in a regulation that has a form of retention, most widely accepted in our research sample, where the qualification of retention is underlined not only

[3] *Pravna enciklopedija*, Beograd, 1979, p. 454; *Enciklopedija imovinskog prava i prava udruženog rada*, Tom drugi, Beograd, 1978, p. 1272; *Leksikon građanskog prava*, Beograd, 1996, p. 167; *Pravna enciklopedija 1*, Beograd, 1985, p. 527; Vizner, B., *Komentar zakona o obveznim (obligacionim) odnosima*, Knjiga 2, 1978, p. 1138; Lorenc, R., *Pravo zadržanja (ius retentionis)*, doktorska disertacija, Beograd, 1966, p. 24; Rašović, Z., *Založno pravo na pokretnim stvarima*, doktorska disertacija, Beograd, 1991, p. 160; Gams, A., *Osnovi stvarnog prava*, Beograd,1971, p. 192; Lazić, M., *Prava realnog obezbeđenja*, Niš, 2009, p. 93; Planojević, N., *Stvarno pravo u praksi*, Kragujevac, 2012, p. 420; Stanković, O.; Orlić, M., *Stvarno pravo*, Beograd, 1996, p. 261; Babić, I., *Leksikon obligacionog prava*, Službeni glasnik, 2008, p. 280.

[4] Volmer, M., *Unterschied des kaufmännisches Retentionsrechtes von dem des gemeinen Rechtes*, Inaugural-Dissertation, Berlin, 1895, p. 11; Coppel, A., *Pfandrecht und Retentionsrecht des Frachtführers*, Inaugural-Dissertation, Würzburg, 1896, p. 12; Basso, P., *Il diritto di ritenzione*, Giuffré Editore, Milano, 2010, p. 32; Vedriš, M.; Klarić, P., *Građansko pravo, Opći dio imovinskog prava, stvarno, obvezno i nasljedno pravo*, Zagreb, 1976, p. 416.

[5] Bandrac, M., Crocq, P., *Droit de retention, Nature juridique, Qualification de sûreté ou de garantie*, Revue trimestrielle de droit civil, No. 4., 1995, p. 933; Aynes, M., *Les sûretés – la publicité foncière,* 1995-1996, p. 452; Gardani, D. L., *Voce Ritenzione, in Digesto delle discipline privatistiche- sezione civile*, Torino, Utet, vol. III, 1998, p. 65; Semiani Bignardi, F., *Ritenzione o no*, Rivista di diritto processualle, 1962, p. 5.

[6] Basso, *op. cit*. note 4, p. 26.

[7] Hiber, D.; Živković, M., *Obezbeđenje i učvršćenje potraživanja,* Pravni fakultet u Beogradu, 2015, p. 160.

[8] More about civil and commercial right of retention: Pavićević, A., *Građanska i trgovačka retencija*, Pravni život, knj. 601, No. 11, 2017, pp. 185-202.

in our domestic legislation, but also in the Draft Common Frame of Reference for European Private Law (DCFR), being a representation of the original framework for the future Serbian solution.[9] In addition to that, grounds for the analysis are found in domestic and foreign lawwriters' positions, comprised in the most relevant literature from this scientific field. Given that the issue of the legal nature of retention is broad and disputable, we will focus in our work on looking at one of its significant segments. The purpose of this comparative analysis is to verify the hypothesis established in our work, stating that it refers to the real right and not to the obligations, i.e- that it concretely refers to the private right of real securing claims.[10]

2. Retention standardization in different European regulations

One of potentially significant aspects for determining the legal nature of this civil right institute is its standardization in certain legislations. Therefore, systematical interpretation of the legal term of retention can be added to its linguistic interpretation, via its placement in the civil right system. We will start from the Serbian law in taking an overview of the legal solutions, following by standardization of retention in some comparative European solutions and then looking into the drafts that pretend to become future Serbian law with a final reference to the *Draft Common Frame of Reference (DCFR)* from 2008.[11]

2.1. In Serbian law

When it comes to the positive law in Serbia, the retention is regulated in the Article 286 of the Law on Obligations[12] by the following definition: "A creditor of due claims who holds some debtor's things in his hands, has the right to retain it until the claims are paid." Part of the said law in which the retention is standardized is the chapter III that regulates creditor's rights and effects of debtor's obligations (section 3.), along with inpugnment debtor's legal transactions and the right to making amends (sections 2. and 1.).

By analyzing legal systematics, one can get the impression that the domestic legislator intended to qualify retention exactly as an institute of obligations, of relative right effect *(inter partes),* with the aforementioned institutes – as the most allied ones. Therefore, it might be *a priori* concluded that the retention is not one of the real rights, since it is not regulated by the Law on the basics of property right relations,[13] and is not a part of the *numerus clausus* of the real rights of the Republic of Serbia. However,

[9] By signing the SAA (the Association and stabilisation agreement) with the EU, the Republic of Serbia has, inter alia, taken over the obligation to harmonize its national legal system (comparative and future) with the EU acquis. Harmonization of regulations in the field of civil and other property rights, has been mainly carried out in the sphere of the *Soft law,* encompassing different legally nonbinding acts. EU real right rules are given in the form of drafts for the time being, composed of the *Draft Common Frame of Reference (DCFR)* from 2008. This document is significant as being the basis for planned introduction of the European Civil Code. Hereinafter: DCFR.

[10] See more: Pavićević, A., *Pravo retencije,* doktorska disertacija, Pravni fakultet u Kragujevcu, Kragujevac, 2016, pp. 432-468.

[11] More about reasons for creating this document, definitions of terms and explanations see more: von Bar, C., *Principles, Definitions and Model Rules of European private Law (CCBE).* URL: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf. Accessed: 14. 05. 2019.

[12] Law on obligations of the Republic of Serbia „Official Gazette of the Socialist Federal Republic of Yugoslavia", no. 29/1978, 39/1985, 45/1989, 57/1989; „Official Gazette of the Federal Republic of Yugoslavia", no. 31/1993; „Official Gazette of Serbia and Montenegro", no. 1/2003.

[13] Law on the basics of property right relations of the Republic of Serbia („Official Gazette of the Socialist Federal Republic of Yugoslavia", no. 6/1980, 36/1990; „Official Gazette of the Federal Republic of Yugoslavia", no. 29/1996; „Official Gazette of the Republic of Serbia", no. 115/2005).

we have the impression that such conclusion is not likely to be drawn prior to the assessment of this institute's key elements, such as: the object it refers to, the function it holds, its contents and effects. In our opinion, current standardization of retention in Serbian law is the exact indicator how insufficiently clear is the interpretation of the legal nature of the institute that is "on the verge" between the real right and the obligation right.

2.2. In the neighboring countries sharing the common legal tradition with Serbia

In national legislations of the countries emerged after the breakup of Former Yugoslavia, the right of retention is standardized in a similar way as in the Serbian law. Namely, in Croatian, Slovenian, Macedonian, Montenegrin and in laws of Federation of Bosnia and Herzegovina and Republic Srpska, the retention is also regulated in the existing Law on Obligations, not in the real right regulations. In so doing, only the titles of this institute vary in the said regulations[14]: "*pravo zadržavanja";[15] "pravo zadržanja";[16]* „*pravo na zadržuvanje*"[17] and *"pridržna pravica".[18]*
Contents of retention envisaged by these regulations is almost alike, and as well as in the Serbian law states that: the creditor of due but outstanding claims is authorized to *retain* the debtor's thing in his possession, until the claims are settled, and that, after timely notifying the debtor, *gets settled* in the value realized from selling the thing-in accordance with the rule of settling the pledgee". So, the choice of the said lawwriters to standardize retention among institutes of the Law of Obligations, simultaneously attributing to it similar contents as in pledge, has undoubtedly caused a dilemma in these countries' legal doctrine, and totally hindered determination of its higher gender term (*genus proximum*). Therefore, it is of no surprise that a part of the Croatian doctrine[19] concludes that it refers to *sui generis* institute with "dual legal nature", in which the elements of the real right and the obligation right overlap.

2.3. In certain European regulations with long-standing Civil Code tradition

A. German and Austrian laws are traditionally familiar with the concept of general civil right retention of reduced, obligation right effect (opposite to the retention of local commercial law).

In German Civil Code[20], the right of retention is regulated in the part of the Code dealing with the Law of obligations, together with the retention of commission (a sub-kind of retention in general) and is standardized as a private objection of the creditor against delinquent debtor. Namely, in § 273

[14] More on different terms as names for this institute in domestic and comparative law, and on reasons for choosing the term "right of retention" as the most adequate see: Pavićević, *Pojam retencije…, op. cit.* note 1, pp. 505-521.

[15] See: art. 293-296 Law on obligations of the Republic of Montenegro „Oficial Gazette of Montenegro", бр. 47/08, 04/11; Law on Obligations of the Federation of Bosnia and Herzegovina and Republic Srpska, „Official Gazette of the Socialist Federal Republic of Yugoslavia", no. 29/78, 39/85, 45/89 i 57/89; "Official Gazette of Republic of Bosnia and Herzegovina", no. 2/92, 13/93 i 13/94; "Official Gazette of the Federation of Bosnia and Herzegovina", no. 29/2003 i 42/2011); "Official Gazette of the Republic of Srpska", no. 17/93 i 3/96, 37/2001, 39/2003 i 74/2004.

[16] See: art. 72-75 Law on obligations of the Republic of Croatia, Official Gazette no. 35/05, 41/08, 125/11, 78/2015, 29/2018.

[17] See: art. 275-278 Law on obligations of the Republic of North Macedonia, "Official Gazette of the Republic of Macedonia", no. 18/2001.

[18] See: 261 Obligatory Code of the Republic of Slovenia, "Official Gazette of Republic of Slovenia", no. 97/07.

[19] Petrić, S., *Institut prava retencije u hrvatskom i usporednom pravu,* Split, 2004, p. 439.

[20] German Civil Code from 1896. with later edits (Bürgerliches Gesetzbuch - BGB). URL: http://www.gesetze-im-internet.de/englisch_bgb/). Accessed: 15. 04. 2019.

determination of the institute *Zurückbehaltungsrecht,*[21] was described as the right with pure relative right effect *inter partes*; of private character; affecting only the creditor and the debtor, without third parties.[22] German doctrine[23] treats this institute – in a systematic, normatively technical way, defining its effect and contents as an obligation right in deprivation of owed commission. Therefore, the nature of German civil retention amongst local lawwriters is not initially under dispute. Its exclusive role is to strengthen legal creditor's position in relation *inter partes,* and in the function of protecting general principles: conscientiousness and good faith *(bona fides praestare)* and broadly – prohibition of abuse of rights.[24]

The retention is similarly determined in the Article 471 of the Austrian Civil Code[25], but only in the cases of existence of substantive interconnection.[26] It is interesting that in Austrian doctrine, there is a conclusion of majority that the nature of retention corresponds to the obligation right, despite the place it takes within the Austrian Civil Code system.

B. French and Italian law. French (Article 2286 of the French Civil Code)[27] and Italian regulations[28] initially adopt the model of obligation right retention. A part of the localdoctrine[29] emphasizes that the retention *(droit de reténtion)*[30] has mostly relative right effect; it represents the means of exerting pressure on the debtor by refusing restitution of things; without typical real right effects: right to follow; right of settlement and right of priority. Nevertheless, these legislators are trying to provide stronger effects to retention than the originally weaker one, in *an indirect way.*

C. Swiss law. This regulation is a specific one as it is the only substantial law from our sample according to which the retention *(Retentionsrecht*) in the Article 895-898 of the Swiss Civil Code[31] is unequivocally determined as the real right institute, i.e. as a part of *numerus clausus.* Thus, logically, it is, as such, regulated in the part of the Civil Code standardizing real rights of securing claims as a subtype of chattel mortgage (in movable property). Significance of this Swiss solution lies in the fact

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[21] The meaning of German term *Zurückbehaltungsrecht: Creifelds Rechtswörterbuch,* C. H. Beck´sche Verlangsbuchhandlung, München, 1997, p. 1549.

[22] Lorenc, *Pravo zadržanja…*, *op. cit*. note 3, p. 133.

[23] Söergel, S., *Bürgerliches Gesetzbuch, III Band, Sachenrecht*, Stuttgart und Köln, 1955, p. 543; Volmer, M., *op. cit*. note 4, pp. 12-13; Korn, F., *Das Kaufmänische Retentionsrecht nach dem Deutschen Handelgesetzbuch*, Inaugural-Dissertation, Tübingen, 1881, p. 7.

[24] Söergel, *op. cit*. note 23, p. 543.

[25] Austrian Civil Code from 1811. (Allgemeines bürgerliches Gesetzbuch - ABGB).
URL: https://www.jusline.at/gesetz/abgb/paragraf/471. Accessed: 01. 05. 2019.

[26] It corresponds to the situations when the debtor's thing is retained as a security for due claims on the account of expenses the creditor endured for the damage caused by the thing.

[27] French Civil Code from 1804. (CC).
URL:http://www.legifrance.gouv.fr/affichCode.do;jsessionid=4560B3C16E1F5CB8B5FF3973362C8F4E.tpdila23v_1?idSectionTA=LEGISCTA000006150114&cidTexte=LEGITEXT000006070721&dateTexte=20150626. Accessed: 01. 12. 2018.

[28] Italian Civil Code from 1942. (Codice Civile).
URL: http://www.jus.unitn.it/cardozo/Obiter_Dictum/codciv/Codciv.htm. Accessed: 05. 05. 2019.

[29] In French doctrine: Malaurie Aynes, *Cours de droit civil, Les sûretés*, Ėdition Cujas, Paris, 1986, p. 111; Scapel, C., *Le droit de rétention en droit positif,* Revue trimestrielle de droit civil, No. 3, 1981, p. 540. In Italian doctrine: Barba, A., *Voce Ritenzione, in Enciclopedia del dirrito*, Milano, Giuffré, 1989, p. 1378. In Austrian doctrine: Koziol, H.; Welsser, R., *Gründriss des bürgerlichen Rechts,* Wien, 1988, p. 89-90; Klang, H., *Gründriss des bürgerlichen Rechts*, Wien, 1988, p. 542. In Croatian doctrine: Vuković, M., *Pravo trgovačke retencije*, "Spomenica Mauroviću", p. 223; Klarić, P., *Pravo zadržanja*, Informator, No. 4073, 1993, p. 6. In Slovenian doctrine: Cigoj, S., *Institucije obligacij, Posebni del obligacijskega prava kontrakti in reparacije*, Ljubljana, 1989, p. 224.

[30] Guillouard, L., *Traités de nantissement et du droit de rétention*, Paris, 1896.

[31] Swiss Civil Code from 1907. (Schweizerisches Zivilgesetzbuch).
URL: https://www.admin.ch/opc/de/classified-compilation/19070042/201407010000/210.pdf. Accessed: 25. 04. 2019.

that exactly this regulation was a paragon for Serbian legislator to set up the general model of retention when it comes to its contents (the right of retention and settlement), but obviously not when it comes to the place of its standardization within the civil right system.

2.4. In two domestic drafts solutions pretending to become future Serbian law

As far as future Serbian regulation is concerned, two existing drafts' solutions foresee different place in the system, and even partially different contents of the right of retention. Namely, solution of the Preliminary draft of Serbian Civil Code[32] with public debate underway, maintains the retention in the same place in the civil rights system – in the obligations, not in the real right part of the Code.[33] However, solution of the Draft of the Law on property and other real rights of Serbia, from 2011, explicitly standardizes retention along with pledge, as one of the real rights of securing claims, i.e. as a part of the *numerus clausus* [34] of the future real rights *iura in re aliena*.[35] The proposal for the future regulation is completely harmonized with the idea of the Swiss model and in our assessment, adequately reflects the legal nature of this institute.

2.5. In the text of DCFR

DCFR's solution[36], i.e. draft's solution of the model rule within the Acquis Communitaire, explicitly qualifies retention as one of the rights of real securing claims in movable property. This solution is, together with the Draft from 2011., the only one from our research sample that explicitly determines the retention as the real right of securing claims. Besides that, it is a part of the *soft law* within the EU legislation that domestic law should be harmonized with, so it is even more important to have this solution considered in details, in comparison to the previous ones.

Precise systematics within the draft emphasizes the fact according to which the retention, even though not a classical real right of securing, is a sort of a real guarantee falling under the special subgroup of the rights of real securing, concretely under: „other real rights that are considered as rights of real securing according to the book IX of DCFR".

Hence, creators of the Draft respect the fact that the retention is not a classical real right of securing, but it „acts" as such a right, and is surely one of the recognized *security rights in movable property.* The said characteristic is obvious in the following qualification of retention: *„*this right of retention leads to creation of the possessory title of real securing of claims".[37] In addition to pledge and retaining property as a guarantee, it is the third standardized form of the real guarantee in movable property; of strictly ancillary nature (with the function of providing the main right - the right of claim); of possessory (possessory title's character)[38]. Thus, retention within the DCFR[39] is determined as one of the three possible ways (techniques) of constituting real guarantee: 1) by providing security; 2) by retaining possession over the sold item; and 3) by creditor's ability to secure himself by the right of

[32] Preliminary Draft of Serbian Civil Code URL:https://www.paragraf.rs/nacrti_i_predlozi/260615-nacrt_gradjanskog_zakonika.html. Accessed: 10. 05. 2019.

[33] The right of retention is regulated in the second book that adresses contracts and torts, the chapter VI, titled as - Creditor's rights and debtor's obligations, section 3 of the Article 477 - 480 in the Preliminary Draft.

[34] Draft Code of property and other real rights of Serbia from 2006. (latter version from 2011.). Section 2. Real rights, art. 2. See: Ka novom stvarnom pravu Srbije (*Auf dem Wege zu einem neun Sachenrecht Serbiens*), Beograd, 2007, p. 17.

[35] See: part IX Plegde, chapter G. „Right of retention ", art. 535-539 of Draft.

[36] DCFR, *IX. – 1:102: Security right in movable asset*

[37] DCFR, IX. – 2: 114: *Right of retention of possession.*

[38] „Possessory title of securing is the right of securing for which possession actual of the encumbered tangible asset is indebted, or by secured creditor or by the second party (other than the debtor) who retains that thing for the secured creditor". DCFR, IX. – 1: 201: Definitions

[39] DCFR, X. – 2:101: *Methods of creation of security rights*

retaining possession over the debtor's thing. Retaining the possession over tangible assets reflects one of the three ways of obtaining real guarantee of the creditor on his debtor's things.[40]

In this way, in our opinion, it is not disputable that the retention within the DCFR is regulated as the real right of securing claims in movable property, according to which even its legal nature of the real guarantee is – indisputable. However, this confirms the fact that its effect towards third parties endures certain limitations. General (original) limitations of retention's effect towards some categories of the third parties are given in the DCFR,[41] encompassing even legal limits when it comes to „breaching" third parties' interests, with some sort of „stronger" right over the retained thing. [42]

3. Doctrine understandings on retention as a real right

Real rights are a sub-kind of the absolute rights with all their characteristics, but they also have a range of their own. Specific characteristics of the real rights are stated in the doctrine as follows: their object is a tangible asset (movable or immovable property), which is why they are called „rights in things" *(ius in re)*;[43] according to the rule, rights in things, depending on the kind, authorize titular to a range of positive authorizations such as: right in possession actual, exploitation, usage and possession of the thing (factual and legal); they give the right to follow; contain right of priority; the principle *numerus clausus* applies to them.[44] Besides these generally accepted principles, some authors[45] are mentioning specialty and publicity. Subjective real rights emerge for the sake of some thing, providing titular with an indirect legal power, and his authorizations originate indirectly on the basis of law. Power's scope and contents depend on the kind of the real right - so it may be a complete (property) or a limited (other real rights, a.k.a. *iura in re aliena*).

By comparing retention's characteristics with the real right elements, we note numerous common, but also a few different characteristics. Thus, the retention has a majority of the aforementioned real right characteristics, *but not the right to follow*, which simultaneously represents an important feature of this absolute rights group. Apart from that, positive attributes within the contents of the right of retention are disputable in some regulations, as well in the part of the doctrine defining this right in a strictly negative way, like: the right to say no to anyone who wants livery of the retained thing. In this way, part of the Italian doctrine[46] points out that the major obstacle when it comes to classifying retention among the group of the real rights of security – is exactly *numerus clausus* principle, as well as the absence of positive retinent's authorization to the thing (the right to use, products appropriation and alike), especially the right of priority settlement. Nevertheless, there is a specific relation in Italian law between the so called „simple retention"(ordinary retention of things) and „preferential retention"- as a means for applying legal privileges. In this way, the first is a classical institute of law on obligations, while the latter is „of undoubtedly more real nature".

In domestic law and in laws that acknowledge qualified retention (and possibly indicate to proper application of some or of all provisions of pledge for unregulated issues), the existence of numerous

[40] DCFR, IX. – 3:102: *Methods of achieving effectiveness*

[41] DCFR, Chapter 3: Effectiveness as against third parties, Section1: General rules, IX. – 3:101: *Effectiveness as against third parties*

[42] Limitations of retention's effect (namely, DCFR's feature) thus exists towards: titulars of other real rights on better ranged retained thing, then towards the creditor, who had already started performance on the retained thing; and towards the receiver.

[43] Due to distinguishing object, these rights have so called internal side - indirect physical relation of the titular towards the thing and external - exclusion of all third parties from making an influence on the thing.

[44] This refers to the principle of limited number of the real rights envisaged by the law, as well as limited real rights contents envisaged by the law.

[45] Stojanović, D., *Stvarno pravo*, Kragujevac, 1998, pp. 7-8; Popov, D.; Cvetić, R.; Nikolić, D., *Praktikum za građansko pravo, knj. 2 Stvarno pravo*, Beograd, 1992, p. 8; Planojević, *op. cit.* note 3, p. 4.

[46] See more: Basso, *op. cit.* note 4, pp. 35-36.

retinent's prerogatives is yet certain. Those imply: right in possession actual of the retained thing; right of settlement, right of priority, secured right in bankruptcy, and so on. On the other side, the retinent is neither authorized to use the thing during duration of retention's relation, nor authorized to actual possession, or his right in the thing.[47]

Apart from that, like other real rights, the retention also does not lapse;[48] being also a sole right, so there cannot be two rights of retention of different titular on the same thing. Disputable fact in the legal theory is retention's effect *erga omnes* – as real rights are absolute in nature. A part of the doctrine considers retention's effect *erga omnes* disputable, while the other part of the doctrine even rejects its effect towards third parties.[49] Stands of Croatian doctrine regard the retention as an „independent real right in alien thing", with key argumentation that the retention is „generally opposing right". Another Croatian author[50], advocating the stand that the retention is of absolute and real right nature, adduces to the identical argumentation and to the fact that the retinent is settled according to the rules on settling the pledgee.

A part of the French doctrine[51] also recognizes real right with the effect *erga omnes* in retention, even despite: an absence of explicit legal norm in this context; a lack of parallel with pledge; and a lack of right of settlement and right of priority in that legal system. In this way, the retention is determined as precarious possession effect, and as such is generally opposing, so, it is the right of the real right nature, though without the right to follow. Also, some Italian authors define retention as the real right (a kind of legal privilege) reflecting the narrowest relation between the retinent and the thing, that is generally opposing, and does not lose any of its real right characteristics, even when *ius distrahendi*[52] is not recognized to this right's titular.

What can be concluded is that retention's effect is indisputably broader then the relative one, as it acts towards the debtor, and towards all third parties that have pretentions over the thing. It refers to: universal and singular successors of the debtor as the thing's owner, his other creditors, as well as to the thing's owner if the retention is obtained in accordance with rules on obtaining from unauthorized person. According to its effect, the retinent can reject their request for livery of the things, out-of court or in-court, by retention's objection (or by countercharge). Yet, the retention does not offer the possibility for the retinent to protect himself with petitory charge in a situation where any third party (including the debtor) disables or impedes the exercise of this right. The only protection he can get is possessory.

Along with that, there is, conditionally speaking, an issue of locating the retention in a system given the principle *numerus clausus* of the real rights,[53] that can be understood in two ways: 1) a circle of these rights has been assigned in advance and is impossible to be expanded or 2) *numerus clausus* of the real rights is not once – and for all determined and unchangeable, but dictated by the legislator. Another approach is, as it seems, generally accepted, primarily when real means of security are concerned, whose number has been growing over latest decades. Therefore, given the fact that even the right of retention also contains key real rights elements, we are of opinion that there is no disturbance

[47] Authorization to use the thing is not a key feature of all real rights. Concretely, mortgage and registered pledge, in law and in doctrine, are mainly seen as real rights in the alien thing, even though they do not provide titular the possession of the pledged thing, or authorize the pledgee to use it.

[48] In spite of secured claims' lapse, once enforceable retention survives, even though it is a collateral right.

[49] See more: Perić, Ž., *Specijalni deo Građanskoga prava, Stvarno pravo,* Beograd, 1920, p. 205.

[50] Mintas-Hodak, Lj., *Retencija u pomorskom pravu*, Uporedno pomorsko pravo, No. 1, vol. 31, 1989, p. 108.

[51] Guilouard, *op. cit*. note 30, p. 303; Marty, Raynaud, *Droit civil, Tome III, Les sûretés la publicité foncière,* Paris, 1971, p. 778.

[52] Caravelli, C., *Teoria della compensazione e di dirrito di ritenzione*, Milano, 1940, p. 294.

[53] According to the conception of the Draft Law on property and other real rights of Serbia from 2011. version, the proposal *numerus clausus* of domestic real rights has been considerably extended. This encompasses different kinds of pledge such as: chattel mortgage; registered plegde; equitable and legal mortgage; legal mortgage; ***retention;*** pledge of rights; mortgage. See: Ka novom stvarnom pravu Srbije, *op. cit*. note 34, p. 17.

for this right also to enter the *numerus clausus* of domestic real right. What is considered as even more significant is the other aspect of this principle-that the retention cannot be conceived in different contents other than those prescribed by the law.

Out of the aforementioned we can conclude that the retention is the real right, even though it lacks a real right attribute – *right to follow retained object*, as a possibility to exercise its right against any third party who holds the thing in his hands (with or without legal grounds). Namely, according to our assessment, it is not a disturbance, given the other characteristics, that the retention is marked as the real right, and to the very least as the quasi real right, an expression used by some of the authors for registered possessory liens and the right of prior purchase[54]. Finally, in our opinion, the retention has more real right characteristics, if possible to say so, then of the registered possessory liens, lacking in possession actual, that, let's say, have no positive authorizations.

3.1. Understanding the retention as one of the real rights of securing claims

Authors who determine retention as the real right and, according to the rule, locate it next to the pledge as one of the allied institute whose *genus proximum* – is the right of real securing claims. In this way, as substantial arguments for this systematics, lawwriters[55] cite the following: this right has the function of securing claims; secured object is the thing (real guarantee) which is, according to the rule, earnable, necessarily alien; possession actual of the thing provides publicity of the real right; the right acts even towards the third parties; the retinent is the titular of the right of settlement and the right of priority (who has the feature of secured creditor in bankruptcy), settled the same way as a pledger (even when such a right is not explicitly acknowledged to him by the law, he again has it like a titular of a kind of „over privilege"[56]). In addition to that, Swiss doctrine considers that the transferability of the retention is also permitted, along with the cesser of secured claim.[57]

Such understanding is primarily advocated by the lawwriters of the countries knowing retention as: 1) explicitly regulated in the law as one of the real right of security, and those are Swiss authors[58] (who see the nature of this institute as not at all disputable or least disputable);[59] 2) then, authors of the countries whose legislator regulated the retention on the basis of the Swiss unique model of civil and commercial law retention, i.e those who are familiar with the qualified retention (including some domestic authors and authors from neighboring countries[60]); and 3) part of the doctrine [61] of those countries which do not standardize retention among the real right, or it is adjusted by the pledges, or they explicitly acknowledge to it the real right character, and to a less extent, regulate it as the right of priority settlement.

First two said groups of authors recognize this nature of the retention in the countries adopting the qualified retention concept. In this way some authors point out that: „the retention is not a typical right

[54] Stanković, O.; Orlić, M., *Stvarno pravo*, Beograd, 1994, p. 4.

[55] Yet, the existance of some other rights of private nature is highlighted as a disadvantage of this theory in Italian doctrine. Those rights are generally opposed, as a pledge, for example. On such understanding in Italian doctrine see more at: Basso, *op. cit.* note 4, p. 34.

[56] See: Caravelli, *op. cit*. note 54, p. 294.

[57] More about analogy between right of retention and pledge see more: Oftinger, K., *Kommentar zum Schweizerichen Zivilgesetzbuch*, Zürich, 1952, p. 391.

[58] Tuor, P.; Schnyder, B.; Schmidt, J., *Das Schweizerische Zivilgesetzbuch*, 11. Aufl., Zürich, 1995, p. 877.

[59] However, even though in the Swiss Civil Code, real right retention stands as a rule, it is also possible to regulate so called obligative retention, as an exception (that exclusively acts *inter partes).* Same as: Lorenc, *op. cit.* note 3, p. 143.

[60] More on arguments in favour of partial „reality" of retention of Croatian law see: Petrić, *op. cit*. note 19, pp. 434-436.

[61] On reasons for accepting real right nature of retention in the French law (but also on the critics of the said) see more at: Marty, Raynaud, *op. cit.* note 53, p. 778; Mauger, Ch. *De la nature de droit de retention*, Paris, 1900, p. 143.

of the real securing claims", but certainly is one of them, even though atypical, analyzed within the group of the real right of security.[62] Other domestic authors[63] highlight that the retention is: „*ius in re*, even though it does not give the right of settlement from the retained thing" (this retention effect existed in pre-war legal rules, prior to Law of Obligations was adopted, but the author, even such-weakened retention in contents, undoubtedly determines as the right in things, and not between the parties).
That assessment is completely justified, as this retention, according to our assessment is a limited real right, most alike to the legal pledge. Yet, the last group of authors is considerably more audacious in such assessments, mostly because they are in minority among local lawwriters. Namely, part of the French doctrine and legal practice,[64] as well as Austrian lawwriters,[65] qualify the retention as a real securing claims, having general opposition and effect *erga omnes,* which is why it is undoubtedly both absolute and real right, and not the obligation right.[66] However, critics of this position, on the other side, highlight that broader opposition of the retention, „is not the consequence of its real nature, but only the obligation of the third parties to *de iure* respect the state created *de facto".*
On the other side, in Italian law, where the ordinary retention exists (only the keeping of the debtor's thing) in one situation all the Italian authors acknowledge to it the real right character: that is the case when the retention is connected to the legal privilege on movable property, when the legal owner of the so called preferential retention has also the right of priority settlement.[67]

4. Conclusion

Based on previous analysis of diverse legal solutions and doctrine stands on the legal nature of retention, we can conclude that the retention is a subjective civil right that primarily contains real right elements and whose nature might be defined by applying criterion „of a prevailing element" in its complex structure. Dominant segments, according to our assessment: emergence for particular thing, in which titular has immediate legal (also marked with possession actual); his authorizations emerge immediately on the basis of law and are positive in principle; with the right of priority (in all obligation rights; but also in real rights in the same thing that later emerged); debtor and third parties are obliged to act in a passive way, i.e. act of omission in relation to the thing. The retention falls under limited real rights in alien thing, when it comes to the group of real rights because of the said. Yet, retention is in our opinion, incomplete real right (deprived of the right to follow), thus making it a unique institute.
Key points of the right of securing claims are: 1. Rights of security are linked to the main right they secure, i.e. they are secondary, serving no purpose without the main one. That is the case with retention as well – it is the accessory of the claim and no one disputes it. It is an explanation that right of security is in question. 2. That this is real, and not personal security is explained by the fact that its object is the thing, that the thing owes, and not that an individual guarantees, which no one disputes when it comes to retention. In the dominant model of regulations, the retention is conceived as a right of real securing claims, most alike to the pledge. Given the fact that this refers to the real right of securing claims, and not to the Laws of obligations, according to that idea, the retention should be standardized in the upcoming Serbian Civil Code. Not only is this the choice of the Swiss Civil Code's creator (as the most contemporary codex from our sample), but also, at the same time (that is even more significant), the choice of DCFR's creator.

[62] It is interesting to note that even though retention is regulated in the Serbian Law similarly as in the articles 895-898 of the Swiss Civil Code, small part of domestic doctrine exclusively qualify retention as a real right (contrary to Swiss authors, who consider it indisputable). See: Lazić, M., Prava realnog obezbeđenja, Niš, 2009, p. 95. The said author sees retention as one of „traditional real right of securing claims".
[63] Bartoš, M.; Marković, L., *Građansko pravo – prvi deo, Stvarno pravo,* Beograd, 1936, p. 128.
[64] This understanding is advocated by local author, Rodier, which is also confirmed by French legal practice.
[65] The most prominent supporter of the stand according to which the retention is a real right, not a private right in the Austrian doctrine is Gschnitzer.
[66] See more: Petrić, *op. cit.* note 19, pp. 417-418.
[67] See: Semiani-Bignardi, F., *Ritenzione o no,* Rivista di diritto processualle, 1962, p. 136.

Higher gender concept of retention (genus proximum) is the right of real securing claims, while its specific difference (differentia specifica) is the way of its exercise - self-protection. In this way, by merging characteristics of the right of real security and self-protection, it is possible to design original qualification of retention, that in the best way reflects its specific legal nature, and that is: authentic right of the real self-insurance. Contrary to the other rights from this group, retention is not emerging on the basis of will of the obligatory party, but immediately on the basis of law, in narrower sense; and exactly because of that (because it emerges against the will of the party whose assets it affects), it is not standardized as fully shaped real right (it lacks the right to follow), but as an incomplete real right. The way it is realized is personal – like a self-protection, which is its main feature for easy differentiation from contractual lien.

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