

Pavićević Aleksandra*
<https://orcid.org/0000-0002-7915-6408>

UDC: 347.28
Review article
DOI 10.5937/ptp2401132P
Received on: February 21, 2024
Approved for publication on:
March 19, 2024
Pages: 132–150

STRUCTURE AND RATIO LEGIS OF RETENTION RIGHT IN CONTEMPORARY CIVIL LAW

ABSTRACT: The subject of this work is critical analysis of key segments of the civil law institute of retention, i.e., the right to retain the debtor's property – primarily in positive Serbian law, but also in European regulations with the longest tradition of civil codes. Through the application of various scientific methods, particularly axiological and comparative law, the author analyzes and evaluates the following segments of *Ius retentionis*: definition, content and effect, forms, conditions for establishment, protection, and termination, with demarcation from related institutes. Commenting on various positive legislative solutions, the author also reflects on: the solutions of two previously drafted drafts that embody potential proposals for future Serbian civil law; as well as the model-rule DCFR, which constitutes part of the “soft” law of the EU, with which the domestic solution is useful to harmonize in the future, with the aim of determining the direction of further development of this institute. By providing explanation of some doctrinal and disputed retention issues (such as: permitted object, scope, legal nature), the author provides an authentic picture of this useful, but controversial institute. The author concludes that retention can be described as unfinished real right *sui generis*, an atypical legal real guarantee authentically exercised by self-protection technique, whose *ratio legis* is threefold: social, material and procedural justification. All of this finally outlines the direction of its further affirmation, i.e., the

* LLD, Assistant Professor, University of Kragujevac, Faculty of Law, Kragujevac, Serbia,
e-mail: apavicevic@jura.kg.ac.rs

 © 2024 by the authors. This article is an open access article distributed under the terms and conditions of the Creative Commons Attribution (CC BY) license (<https://creativecommons.org/licenses/by/4.0/>).

strengthening of retention in all segments of the institute, regarding: effect, content, expansion of the object, simplified conditions for establishment, as well as an increasing number of modalities.

Keywords: *security right for claims, right of retention of possession and settlement, structure and ratio legis of Ius retentionis, self-protection.*

1. Introduction

Retention, (*Ius retentionis*), as a legal phenomenon, dates back from the Roman law and represents the right of the plaintiff's creditor to refuse to return the object he retains, until his claim to the plaintiff has been settled (Lorenc, 1966, p. 10). The requirement of fairness (*aequitas*) was used by the praetor as a basis for recognizing general "bad faith objection" to the creditor (accused for returning the object), as some kind of a sanction to the negligent party, who is not returning the property he owes, while simultaneously trying to vindicate it from the creditor, contrary to the principle of good faith – *bona fides* (Pavićević, 2019b).

From the moment of its genesis, and its further evolution, until now, in contemporary civil law systems, the right to retain the debtor's property has been functioning as a developed *sui generis* legal means for protecting the interest of endangered creditor (due, but outstanding claim), which in both doctrine and practice causes numerous perplexities and questionable judicial and doctrinal interpretation. Therefore, the subject of this work is a comprehensive study of the physiognomy of this peculiar institute, viewed from its key elements such as: concept, content and effect, the way it differentiates from another related institutes, conditions for its establishment, modalities, protection and termination. This issue is the subject of the author's axiological analysis – not only in our positive, but also in comparative law, aimed at setting the trace for the institute's further development, by explaining *ratio legis* of this atypical right of real securing claims.

Namely, despite obvious usefulness of this security right (from the viewpoint of creditor's endangered property interests) disputable is that the privilege for one party – is at the same time – direct, seemingly inexplicable violation of another party's right within this obligation relation. From the debtor's perspective, retention is a burden, independently originating from the will of the person on whose property rights it has been constituted, conditioning unequal treatment of the parties, whose relation should have been coordinated. The autonomy of the debtor's will can be unilaterally eliminated by retention,

with legally imposed obligation to sustain the creditor's choice (non-issuing the debtor's property, with potential loss of ownership); while simultaneously, the creditor's autonomy stays intact – he can exercise retention, but does not have to. Secondly, it implies stepping out from the rule according to which protection of violated subjective right might be demanded only by the state authority (the court) and cannot be exercised in person (in a private way), via so called "primitive justice" institute.

This imposes the question: why does such a security right which is limiting, unwanted and coercive for the debtor, even exist, when it endangers some basic postulates of the civil law and dramatically violates the private interest, i.e. the debtor's absolute property right? (Pavićević, 2016, p. 492). We will try to respond to this and other significant, but controversial questions (outreach, legal nature and similar) in this research, by critically analysing retention's physiognomy – in different European-continental type positive law regulations, through legal practice, but also through so far conceived future solutions draft proposals.¹ Additionally, in this work we are reviewing the solution of the so-called "soft" EU law, which domestic regulation *de lege lata* and *de lege ferenda* is to be usefully harmonized with, with reference to ongoing harmonization with European law on supranational level (DCFR, 2008).²

2. Definition of the right of retaining possession

General rules of right of retaining possession in domestic law, contained in the Art. 286 Law on obligations from 1978 in the Chapter III, regulate creditor's rights and effects of the debtor's obligations, while special rules of particular retention modalities are contained in special laws. Original Latin term for this institute is *Ius retentionis*, while the term *retention* is used as a Serbanized foreign word, as well as right of retaining possession as translation

¹ 2011 Draft of Serbian Property Law and other real rights and Preliminary Draft of the Civil code of the Republic of Serbia with 2019 amendments are so far drafted legal proposals for the future Serbian civil law, created by two different commissions. Although they did not become statutory in the meantime, they are significant for the analysis because they are showing potential (but different) directions in which further Serbian civil law should go, which is why their solutions are important to be commented on.

² The Draft Common Frame of Reference (DCFR) from 2008 is a model-rule, i.e. a foundation for drafting the planned European civil code and a part of the so-called "soft" EU law, whose nature is not legally binding, but serves more as a recommendation, a guideline for domestic lawmakers.

from Latin, with the same meaning as retention.³ Retention is a legal real security right authorizing the creditor (retainer) to retain debtor's property, that had not come into his possession against the debtor's will, until the debtor settled due, enforceable claim, and if the debtor failed to do so, to collect the claim at the value of the retained property prior to all unsecured and secured creditors whose lien arose subsequently (Pavićević, 2015a).

It is possible to derive following elements from the aforementioned definition: 1. higher gender concept of retention as – particular real right of possession for securing claim (of appurtenance nature with securing function); and 2. key quality retention differences with regards to the other security rights: 1) *content*: this right authorizes the creditor *to retain* debtor's property already in his possession, but to primarily settle at the value of the property (if the property is movable); 2) *timeline dimension*: it refers to timely unlimited authorization to hold someone else's property (until the final settlement of its secured claim); 3) *object* (broader concept of the object of retention – it can be movable or immovable property); 4) *subject*: creditor in the capacity of a *retainer*; and the debtor, at the same time the owner of the retained property in the capacity of *retention opponent*; 5) *particular technique to exercise the right*: protection of rights by private means – to retain the property the debtor wants to be handed over, as a kind of permitted self-help; and 6) *legal basis* for establishment – law in narrower sense (regardless the debtor's will).

Observed from comparative law point, European regulations know two different ways of standardizing retention: general and casuistic. The general term of this institute is described in the doctrine as the existence of general legal definition of retention, valid for each creditor, in a situation where the required legal conditions are collectively fulfilled. This group of regulations is consisted in: Austrian, German, Swiss, domestic and many others (§ 471 of Austrian Civil Code, 1811; § 273 of German Civil Code, 1896; Art. 895 of Swiss Civil Code, 1907). Contrary to previous, smaller number of European regulations acknowledge retention only in certain cases, within certain institutes, which is referred to as "casuistic" standardization, traditionally including Italian, and until more recently French regulation (Colin & Capitant, 1935; Simler & Delebecque, 1989; Basso, 2010).

³ In comparative law retention is named as: *droit de retention* (French law); *diritto di ritenzione* (Italian law); *Retentionsrecht* (Swiss and Austrian law), *Zurückbehaltungsrecht* (German law).

3. Contents of the right of retaining possession

Retention is the right, that, in a qualified form, can be exercised in two stages: 1. A stage when the debtor is under pressure; and 2. A Settlement stage, so the rights and obligations of the parties within their relation can be exercised. It can be divided in two groups (Stanković & Orlić, 1996, p. 265). The first group is consisted of mutual authorizations and obligations of the retainer and retention opponent during the retention stage (a debtor is pressurized to settle his debt), and the second group is consisted of authorizations and obligations in the settlement stage.

The contents of this right in domestic legal solution (via two aforementioned stages) consists two creditor's authorizations – retainer: to retain and settle (Koziol & Welser, 1988, pp. 89–90; Babić, 2005, p. 7; Hiber & Živković, 2015, p. 169). *A. Retaining of object:* The right of possession is legally recognized to the retainer, accompanied by mere factual ownership over the property. This authorization represents a kind of pressure on the debtor to repay the debt, the success of which depends on many circumstances (how much the debtor is in the need of it, what is its value, what are the costs of keeping and maintaining, and so on) and might last until it is repaid (Paunović, 2008, p. 68). The consequence of retainer's legal authorization to possession, is the right to reject debtor's request to return the property, by making an objection in the lawsuit triggered under petitory or possessory suit.

B. Settlement at the value of the retained property implies judicial or extrajudicial sale of the property (only for the claims in economic contract), and it can follow only after the debtor has been informed (art. 898 of Swiss Civil Code, 1907; Art. 289 and 980 of Law on Obligations, 1978). This is the greatest change of this institute's structure in relation to domestic pre-war law, where retention in the civil law was only the means to exert pressure on delinquent debtor, unlike in commercial retention, back then. The only difference that has remained between these two categories of retainers is the way of settlement: by court for non-merchants (court decision on public sale or at the current price); i.e. out-of-court for merchants (after 8 days period from the debtor's notification on intended sale expires). The authorization for settlement comes into force in the second stage of retention exercise and according to domestic and our neighbouring countries rights, the retainer is settled the same way as the pledgee, in order of precedence (Petrić, 2004, p. 39).

The right of *priority* settlement implies the retainer's right to primarily settle at the price acquired by selling previously retained property prior to:

1. all ordinary, unsecured creditors; and 2. all secured creditors over that property whose real rights have emerged later. The order of settlement of several diverse security rights on the same property with multiple pledges has been regulated according to the principle *prior tempore potior iure* (Art. 985 Law on Obligations, 1978). Retention rank is defined according to the moment of acquisition of this right, which is to say – the moment of fulfilling the last condition (cumulatively) determined by the law.

In the stage of exerting the pressure on the debtor, retainer is obliged to: 1. take a good care of the property as a good host, i.e. good businessman (otherwise he will be held accountable for crookback destruction, damage or loss of its value); 2. Refrain from using the property, as retention does not mean one has the right to use someone else's property (only in exceptional cases if the debtor agrees to that); 3. Return the property to the debtor after the debt is repaid (which is the consequence of appurtenance of retention in termination); and to 4. Return the property to the debtor only if he previously provided other suitable means for securing claim (which is authentic, alternative, but "attractive" way for the debtor to get his property back, without settling the claim).

In the second stage of exercising retention right, retainer is obliged to: 1. notify the debtor on the intended property sale in a timely manner (as a concession to the debtor who is opposing to retention, by giving him additional deadline to settle already due claim, aimed at protecting him from easy loss of ownership over property without prior warning); and 2. Refund money surplus that exceeds the value of the settled claim (otherwise retainer would be unjustly enriched).

4. Rights with similar function

In literature, retention is compared to particular Law on obligations institutes – with the objection of unfulfilled contract and compensation, but is justifiably more frequent paralleled with real rights, having the function of real security of claims (Colin & Capitant, 1935; Catala-Franjou, 1967; Pavićević, 2015b).

In most regulations, even in domestic one, retention as the right of real securing is most similar to the pledge – namely pledge of chattels,⁴ and in that context it is possible to name both numerous similarities and differences

⁴ In Swiss and Austrian regulation, retention is standardized directly like the pledge on movable property, as its most similar real right.

between these two institutes. Key similarities with the pledge of chattels are: – possession is essential for both rights; – same rules are applied when it comes to settlement; – principles of appurtenance, indivisibility, specialty, primacy (Planojević, 2012, p. 421). On the other side, there are important *differences such as*: – possession with retention must be immediate; – retention does not contain the right to follow, and terminates with the loss of possession; – retention is possible only for due claim (except when the debtor is insolvent); – retention is not voluntary securing; – retention cannot be transferred to another person; – retention is possible with immovable property, and so on.

Unlike other rights from the group of real guarantees, retention does not originate on the basis of the obligee's will, but is directly based on the law; and for the sake of that (because it occurs against the will of the person whose property is affected), it is not standardized as a fully formed real right (it lacks the right to follow), but as an *incomplete, truncated* real right. The way it is exercised is peculiar – as a self-protection, being the main trait by which it can be easily distinguished from contractual right of lien. On the other side, retention also resembles a legal pledge, which especially refers to commercial retention. Nevertheless, retention is a general rule, which can secure any claim with certain legal qualities, unlike classic legal pledge, protecting itemized determined claim, and exactly determined subjects, making retention the right with equally intense effect, but a wider spectrum.

5. Types of the right of retaining possession

Based on different division criteria, literature knows following types of retention: 1. legal and contractual, according to legal grounds on which retention originates – legal retention is a rule in comparative law, and contractual is most often unregulated case (Stipković, 1972, p. 287). 2. General and special, according to criterion whether in concrete regulation, that type represents a rule or an exception. Thus, a general rule in domestic law – Art. 286 of Law on Obligations, special types of retention are for example: retention of conscientious holder of someone else's object, a caterer and irregular deposit (Art. 38 par. 7 of the Law on the Basics of Property Relations, 1980; Art. 728 and 722 of Law on Obligations, 1978). 3. Civil and commercial retention, and a criterion for division is: turnover to which these modalities are applied, i.e. according to the occupation of creditor-retainer. 4. Regular and emergency retention, according to the criterion of due claim, as a condition for establishing retention – regular retention implies due claim, which is the rule, while by emergency retention, undue claim due

to debtor's insolvency can be exceptionally provided (Art. 286 par. 2 Law on Obligations, 1978). 5. Ordinary and qualified, according to the content of authorities granted to the retainer (only retention of the debtor's property, as in German civil law for example; or retention plus settlement as in domestic solution). Besides the abovementioned common ones, the doctrine divides them into: retention in the narrower or broader sense; classic retention and the so-called *pignus gordianum*; related to real right and obligation; judicial or extrajudicial; material and formal; and materialized and dematerialized (specific for French law).

6. Conditions for acquiring the right of retaining possession

Positive (objective) general conditions for retention emergence are: 1. a claim with proper characteristics; 2. a thing with appropriate properties, as an object; and 3. possession of object (Gucunja, 1979). Except for these positive conditions, one negative subjective condition is also necessary, namely that: retention in concrete case is not excluded by creditor's will (creditor may or may not be a retainer).

1. *Claim with certain qualities, as a condition.* Secured claim is the main right and the reason for constituting retention as appurtenance. In order to be suitable for securing by retention, the claim (of any kind), must cumulatively possess following qualities: – to exist; – to be valid; – to be sufficiently determined or at least determinable; – due (with the exception of emergency, if the debtor is insolvent); – enforceable⁵ (therefore, not natural; but can be statute-barred, provided that the statute of limitations occurred only after retention over the object had been established); ultimately, the claim has to be – outstanding, for retention's constitution to be meaningful.
2. *An object with certain qualities, as a condition.* The object of retention right in comparative law can be a physical thing (as a rule), but in a broader sense as well – performance (as an exception).⁶ When it comes to the kinds of things being the objects of retention in comparative law, *movable property* is originally the object of retention in all regulations, while different rules are applied to immovable property. Namely, all movable property could be divided in three

⁵ This condition is logical, because what the creditor cannot get through court (by pending litigation), he cannot also get indirectly out-of-court (by retention).

⁶ Performance as a permitted object of retention right can be found in German and Swiss civil law.

groups: 1. one that *cannot be the object of retention* (things within legal transaction, e.g. personal documents, human body parts, and so on; then, collection of things and future things; 2. one that *can be* the object of retention, *with some extra conditions* (generic things, such as money, on condition they are individualized); securities, on condition that they are materialized; expendable and replaceable things, on condition that they are not perishable); and 3. movable property that *can always* be the object of retention – in regulations of the so-called commercial concept of the object of retention, additional condition for retention is monetization of a movable object. Domestic solution of qualified retention (with the right of settlement), refers to a commercial object, i.e. negotiable movable thing and cash, while personal documents, correspondence and similar documents are not eligible for retention, as they cannot be monetized.

With regards to immovable property as a potential object of retention in comparative law, two basic models of regulations can be distinguished: 1. the one prohibiting retention over immovable property as a general rule (e.g. Swiss solution); and 2. the one permitting retention over immovable property (domestic solution).⁷ It is possible to divide the second mentioned model into the following subtypes: a) regulations that standardize *content-unlimited* retention of immovable property (retention of somebody else's immovable property, with the possibility of settlement at its value), and b) the ones with *content-limited* retention of immovable property (retention only, without authorization for settlement from retained immovable property).

The formulation of the object of retention in domestic law, as well as in regulations in our neighbouring states which we share our legal tradition with, is unequally interpreted in the doctrine and in judicial practice, notwithstanding the clarity of language expression: “*any debtor's thing*”, designating each thing as permitted object of retention – not only movable, but also immovable property (Verdict of Supreme court of Bosnia and Herzegovina, no. Rev. – 402/80. dated 10. 30. 1980; A Supreme court decision of the Republic of Croatia no. Rev-933/00 dated 01. 29. 2002; A verdict of District court in Valjevo,

⁷ Majority of European regulations in its legal formulations does not limit the object of retention to a movable property (e.g. in domestic, in our neighbouring countries regulation, in German and French regulation, and so on).

no. 1619/2003 dated 12. 05. 2003).⁸ Thus, there are interpretations according to which the retention of immovable property is prohibited in domestic law or is content-limited (reduced to the means of pressure, without the right to settle). However, a valid standard literally enables equal retention of both categories of things, namely qualified ones, since the immovable property is, in principle, fulfilling general condition – that it is a thing, even though the technique of primary settlement of retainer is considered problematic (Hiber & Živković, 2015, p. 169).

Finally, in the context of *ownership of things* as an object of retention in domestic right the retained thing must be owned by the debtor from the main obligation relation (retention opponent). In case it is debtor's property, it might be retained when it is co-owned, but not when it is jointly owned. On the other hand, in comparative law, the owner of the retained thing can exceptionally be: a third party (not being a debtor), which is not legally regulated in our country; and creditor-retainer (which is not in the spirit of domestic institute, whose primary goal is to settle at the value of the retained property).

3. *Possession*. The immediate possession of things is necessary for establishing retention in domestic law, which can be acquired prior or after due claim by debtor's voluntary handing over. Speaking about qualities of retainer's possession, conscientiousness is not a legal condition for establishing retention according to the general rule (except for retention of conscientious holder who has lost the claim dispute). In regards to the legality of possession, retention is excluded if certain contracts are a legal basis for handing over the thing to the creditor, meaning for the things given to: 1) safekeeping, i.e. depositing (exceptions are catering and irregular deposit) and 2) borrowing, only if the debtor requests those things to be returned – for the reason of protecting his trust and because those are contracts with charities (Art. 287 par. 1 of Law on Obligations, 1978).

Speaking about the way of obtaining possession, retention is excluded if possession is flawed, i.e. obtained by force, or misuse of trust (Art. 287 par. 2 of Law on Obligations, 1978). Regarding potential types of possession, under formulation: “creditor...in whose hands is some debtor's thing“... domestic

⁸ The inconsistency of judicial practice on this issue is evident from the following court decisions: A verdict of Supreme court of Bosnia and Herzegovina, Rev. – 402/80. from 10. 30. 1980., *Bulletin of the Supreme court of BiH*, 1/81, p. 5; Supreme court decision of the Republic of Croatia number Rev-933/00 from 29. January 2002.; Verdict of District Court in Valjevo no. 1619/2003 from 12. 05. 2003., *ParagrafLex*.

law implies immediate possession of the retained thing,⁹ while in some foreign regulations, such as German, the mediate possession is also permitted (Westermann, 1960, p. 165).

7. Retention effect

Retention has three directions effect: 1. *depending on the property sphere of the creditor itself, retainer* – manifests as the right of temporary delay of owed performance; 2. *towards debtor-retention opponent* – as the way of exerting pressure on unduly debtor to settle the secured claim, with the possibility of primary settlement of the retainer at the value of the retained thing, the same way the pledgee is settled. Out of bankruptcy, it means settlement prior to all ordinary creditors, and all other real secured creditors over that thing, whose lien arose later, under the principle *prior tempore potior iure* (Art 200 of Law on Execution and Security, 2015). In bankruptcy, retention operates as *secured right*, enabling the holder to put out the retained thing from bankruptcy estate and guarantees the right to primary, separate settlement (Art. 49 par. 1 of Bankruptcy Law, 2008). 3. Eventually, retention effects *third parties* – with concrete right over the retained thing, but also effects all third parties in general.

Retention as a “power to block” the request to the debtor to hand over his property, implies the possibility of contested right of retention for third parties, making retainer the holder of a “factual privilege”. In that way the private retainer’s interest is ahead of all other conflicted private interests. Nevertheless, as being already stated, retainer has no right to follow, but only the right to reject to hand over the property to any person who demands it from the holder. This kind of effect on third parties surely overcomes the scopes of effect *inter partes*, and neither can be considered as effect *erga omnes* in a true sense of the word, as a significant limitation.

8. Protection and termination of the right of retaining possession

The right of retention is an “unfinished” real right, because it does not contain the right to follow for retainer, so its holder lacks real legal protection,

⁹ The existing formulation in the Article 286 of Domestic Law on Obligations: “*creditor...in whose hands is some debtor's thing...*” in our estimate is not optimal and should be precised by future law.

unlike a lien (which is provided with a special petitionary action, *vindicatio pignoris*). Retention can only be protected by possession lawsuits, through the courts, and application of possession self-help, out-of-court, in legally provisioned deadlines (Art. 77 of Law on the Basics of Property Relations). Only with permanent and unwanted loss of possession of retained thing, the possibility for retention terminates, because it is the right strictly related to the possession of things (Oftinger, 1952; Tuor & Schnyder, 1979).

Reasons to terminate retention can be: 1. *immediate* (termination of retention along with the termination of a claim as the main right) and 2. *indirect* (regardless the existence of claim). As an appurtenance, retention terminates indirectly by the rule, with the termination of secured claim as the main right, namely: 1. *fulfilment* of claim, as the basic and the most common way; and 2. *all other ways*, whose effect is the same as the fulfilment of claim¹⁰ (Kovačević-Kuštrimović & Lazić, 2009, p. 248).

Regardless the fate of its secured claim, retention terminates when: 1. other suitable securing (on debtor's request) is obtained; 2. property is destroyed; 3. involuntary (and permanent) loss of possession of things took place; 4. creditor unilaterally wavered retention right (voluntary returned the retained thing to the owner); 5. ownership over the retained (movable) thing is renounced by its owner (debtor); 6. consolidation happened, i.e. owner's personality and retainer are unified in one person.

9. Draft proposals de lege ferenda

1. *Two domestic draft proposals.* In Preliminary draft of the Serbian Civil Code (Art. 429–432), the retention right is identically regulated as in the current solution – is it systematically located within the Law of obligations institutes. However, by solution of previously prepared 2011 Draft of Property law and other real rights (Art. 522–527), retention right is for the first time systematically and formally integrated into real rights of secured claim, as real legal guarantee containing authorization for exerting pressure and primary settlement with *erga omnes* effect, as the right most similar to the pledge of movable property. This solution is more elaborate and more innovative than Preliminary draft solution, since it has changed the

¹⁰ Those other ways to terminate the claim, are: giving instead of fulfilling, compensation, debt relief, novation, confusion, time lapse, debtor's death in case of obligations *intuitu personae*, impossibility of fulfilment, etc.

physiognomy of the institute, including resolution of some significant, doctrinally disputed issues. Concretely, this text specifies: retention's legal nature (real right, not the obligation, relative right); effect (*erga omnes*, not *inter partes*); permitted object for establishment (exclusively referring to movable property, as a significant specification), etc., which we consider as advantage.

2. *Solution of Draft Common Frame of Reference for European private law (DCFR)*. Right of retention of possession is located in the Chapter IX – *Proprietary security rights in movable assets* namely as: an atypical real means of securing claim over movable property (DCFR, Subsection 4, IX. – 2:114). The effect of this right is determined as: “amplified to the classical *iura in re aliena*” (Von Bar et al., 2009, p. 5448; Faber, 2014, p. 27). It is of appurtenance and of possession right character; with the content of retaining debtor's property, and settling the retainer at its value; the grounds for its origin is a law or a contract; specifically effecting third parties – as a super privilege (Faber & Lurger, 2011). It provides primary settlement to the holder even before holders of other real guarantees over that thing, that had existed prior to retention, disrupting the order of settlement, confirmed by the rule *prior tempore potior iure* (Pavićević, 2019a).

10. Conclusion

During its evolution, retention in European regulations has passed through different developmental phases – from Roman obligation objection of dolus, whose fate depended on the praetor's estimate in each single case; from prohibition in former Austrian regulation (before novels), then in casuistically recognized exceptions,¹¹ until contemporary general institutionalized subjective civil law. In that regard, continuity of one general idea of fairness protection and equivalence of mutual giving between the parties is obvious, reflected by the most common *ratio* of retention starting from Roman, up to the modern concept.

The fact that retention has been continuously existing in various European-continental (but also in Anglo-American regulations, in a specific form of *lien* institute), indicates its irreplaceability with any other means of

¹¹ In pre-war law of the Kingdom of Serbia, retention was only casuistically recognized, on the level of exception: Art. 471 ABGB from 1811, § 220 Civil Code for the Kingdom of Serbia, from 1844; and § 101 General Property Code for Montenegro from 1888.

securing claim. Retention is the right of securing *sui generis*, which does not have its counterpart, due to which, logically, earns a special place in civil law domestic system. Answer to the initial question in this research – what justifies its existence lies in the fact that *general interests* are those which prevail over private debtor's interest, who is genuinely affected by exercising retention right, but are simultaneously overlapping with creditor's private interest – who gets "rewarded" by such legal outcome.

Despite negative and unwanted consequences caused by retention in property-right debtor's sphere, it also has a couple of various justifications, that legitimize and make its existence purpose-serving in contemporary conditions, namely: 1) *material law* (it is a security right that has been acquired independently of the debtor's will, in order to protect creditor's interest, endangered by unsettled claims by unruly debtor; it ensures reestablishment of disrupted balance, protecting not only individual's personal interest in obligation relation, but also a general one, embodied by the principles of fairness, conscientiousness and honesty); 2) *procedural* (implemented as an objection in a litigation, contributing to the rationalisation of time and costs, resulting in conducting only one, instead of two litigations, in accordance to procedural economy principles); and 3) *general social* – embodied by protection of rights through permitted self-help, and not through autocracy (Pavićević, 2016, p. 493).

The issue of retention's legal nature is justifiably considered in the doctrine as the most disputed one. Contemporary retention is the institute that contains certain similarities with legal power, in which subjective civil law elements are more dominant (Bandrac & Crocq, 1995, p. 933; Laurent Aynes, 1995, p. 452; Paunović, 2008, p. 65).

This is the right with legal effect that prevails relation *inter partes*, on real right of (self)securing claim, not on the law of obligations,¹² that mostly resembles a lien (possessory and legal lien). It mainly contains real right elements, in its complex structure, in precise words – retention is incomplete (truncated) real right, as it is deprived of the right to follow, but systematically belongs to the real right within civil law system, concretely to the group of real guarantees (Stojanović, 1998, p. 7; Stanković & Vodinelić, 2007, p. 108; Planojević, 2012, p. 4). Due to all these characteristics, one should not be surprised by the fact that direction of development of this "super-privilege", justifiably named by the French doctrine: "the queen of real security" – is strengthening in all the segments of the institute being: legally recognized

¹² This is the solution of Swiss Civil Code (which is one of the most modern European civil codes).

contents, effect, expansion of permitted object, mitigated conditions for its establishment and increasing number of emerging modalities.

Pavićević Aleksandra

Univerzitet u Kragujevcu, Pravni fakultet, Kragujevac, Srbija

STRUKTURA I RATIO LEGIS RETENCIJE U SAVREMENOM GRAĐANSKOM PRAVU

APSTRAKT: Predmet kritičke analize u ovom radu su ključni segmenti građanskopravnog instituta retencije, tj. prava zadržavanja dužnikove stvari – prevashodno u pozitivnoj domaćoj, kao i evropskim regulativama sa najdužom tradicijom građanskih zakonika. Autor u radu primenom različitih naučnih metoda, a prevashodno aksiološkog i uporednopravnog, analizira i ocenjuje sledeće segmente instituta *Ius retentionis*: definiciju, sadržinu i dejstvo, oblike, uslove za zasnivanje, zaštitu i prestanak, uz razgraničenje od srodnih instituta. Komentarišući različita zakonodavna rešenja *de lege lata*, autor čini osvrt i na: rešenja dva dosad izrađena nacrta koji olicavaju potencijalne predloge budućeg srpskog građanskog prava (Nacrt zakonika o svojini iz 2011. godine i Prednacrt Građanskog zakonika Srbije); kao i na – model-pravilo DCFR, koje čini deo „mekog“ prava EU, sa kojim je domaće rešenje korisno u budućnosti harmonizovati – a sa ciljem utvrđivanja smera daljeg razvoja ovog instituta. Uz argumentovano objašnjenje pojedinih doktrinarno i praktično spornih pitanja o retenciji (poput: dozvoljenog objekta, domašaja, pravne prirode i sl.), autor daje autentično obrazloženje značaja ovog korisnog, ali i kontroverznog instituta. Autor zaključuje da je retencija nedovršeno („krnje“) stvarno pravo *sui generis*, atipična zakonska realna garancija koja se autentično realizuje tehnikom samozaštite, a čiji je *ratio legis* trostruk: opštedruštveno, materijalno i procesno opravdanje. Sve ovo konačno trasira smer njene dalje afirmacije, tj. jačanje retencije u svim segmentima instituta i to u pogledu: dejstva, sadržine, proširenja objekta, olakšanih uslova za zasnivanje, kao i sve većeg broja modaliteta.

Ključne reči: realno obezbeđenje potraživanja, pravo zadržavanja i namirenja, struktura i ratio legis retencije, samozaštita.

References

1. Austrijski građanski zakonik, Allgemeines bürgerliches Gesetzbuch from 1811. [Austrian Civil Code]. Downloaded 2023, December 10 from https://www.trans-lex.org/602100/_/austrian-civil-code/
2. Babić, I. (2005). Založno pravo (Stvarnopravno obezbeđenje potraživanja) [Lien (Real security of claims)]. In: Radovanov, A. (ured.) *Primena novih zakona u oblasti privrede, pravosuđa i radnih odnosa* [Application of new laws in the field of economy, justice and labor relations] (pp. 4–45). Novi Sad: Privredna akademija: Pravo: Udruženje pravnika Vojvodine
3. Bandrac, M. & Crocq P. (1995). Droit de retention, Nature juridique, Qualification de sûreté ou de garantie [Right of retaining possession, Legal nature, Qualification of security right]. *Revue trimestrielle de droit civil* (4), pp. 931–934
4. Basso, P. (2010). *Il diritto di ritenzione*. Milano: Giuffré Editore
5. Catala-Franjou, N. (1967). De la nature juridique du droit de retention [The legal nature of the right of retention]. *Revue trimestrielle de droit civil* (65), Paris, pp. 9–44
6. Colin, A. & Capitant, H. (1935). *Cours élémentaire de droit civil français II* [Basic course in French Civil law II]. Paris: Dalloz
7. Faber, W. & Lurger, B. (2011). National reports on the Transfer of Movables in Europe, Downloaded 2023, December 5 from <https://www.weltbild.at/media/txt/pdf/9783866539099-028901971-national-reports-on-the-transfer-of.pdf>.
8. Faber, W. (2014). Proprietary Security Rights in Movables – European Developments: A Spotlight Approach to BOOK IX, DCFR, *Juridica International, Law Review*, (2), pp. 27–36
9. Gucunja, J. (1979). Uslovi za vršenje prava zadržavanja prema Zakonu o obligacionim odnosima [Conditions for exercising the right of retention according to the Law on Obligations]. *Glasnik Advokatske komore Vojvodine*, (9–10), pp. 17–31
10. Hiber, D. & Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja* [Securing and consolidation of claims]. Beograd: Pravni fakultet u Beogradu
11. Kovačević-Kuštrimović, R. & Lazić, M. (2009). *Stvarno pravo* [Real law]. Niš: Punta
12. Koziol, H. & Welser, R. (1988). *Gründriss des bürgerlichen Rechts* [Outline of civil law]. Wien: Manz

13. Laurent Aynes M. (1995). *Les sûretés – la publicité foncière [Securities – land advertising]*. Paris: Dalloz
14. Lorenc, R. (1966). *Pravo zadržanja (ius retentionis) – doktorska disertacija [Right of retaining possession – doctoral thesis]*. Beograd: Pravni fakultet Univerziteta u Beogradu.
15. Nacrt Zakonika o svojini i drugim stvarnim pravima Srbije iz 2011. Downloaded 2023, December 17 from <https://ius.bg.ac.rs/wp-content/uploads/2020/10/NACRT-ZAKONIKA-O-SVOJINI.pdf>.
16. Nemački građanski zakonik, *Bürgerliches Gesetzbuch* [German Civil Code] from 1896. Downloaded 2023, December 10 from https://www.gesetze-im-internet.de/englisch_bgb/.
17. Oftinger, K. (1952). *Kommentar zum Schweizerischen Zivilgesetzbuch [Commentary on the Swiss Civil Code]*. Zürich: Schulthess.
18. Opšti imovinski zakonik za Knjaževinu Crnu Goru iz 1888. [General Property Code for the Principality of Montenegro]. Downloaded 2024, January 5 from https://www.harmonius.org/sr/pravni-izvori/jugostocna-evropa/privatno-pravo/crna-gora/Opsti_imovinski_zakonik_CG.pdf
19. Paunović, S. (2008). Pravo zadržavanja – retencije (Ius retentionis) [Right of retention (Ius retentionis)]. *Sudska praksa*, (27), pp. 64–69
20. Pavićević, A. (2015). Pojam retencije u domaćem i uporednom pravu [The concept of retention in domestic and comparative law]. *Pravni život*, 64(10), pp. 505–521
21. Pavićević, A. (2015). Osvrt na sličnosti i razlike između zemljišnog duga i prava retencije [The review of similarities and differences between the land debt and right of retention]. *Pravo, teorija i praksa*, 32(7/9), pp. 25–36. Downloaded 2024, January 10 from <https://scindeks-clanci.ceon.rs/data/pdf/0352-3713/2015/0352-37131509025P.pdf>
22. Pavićević, A. (2016). *Pravo retencije – doktorska disertacija [Right of retaining possession – doctoral thesis]*. Kragujevac: Univerzitet u Kragujevcu, Pravni fakultet Downloaded 2023, December 20 from <http://phaidrakg.kg.ac.rs/o:842>
23. Pavićević, A. (2019). Retencija u srpskom pravu i u Nacrtu okvirnih pravila u oblasti privatnog prava [Right of Retaining Possession in Serbian Law and in the Draft Common Frame of Reference]. *Zbornik radova Pravnog fakulteta, Novi Sad*, 53(4), pp. 1287–1301 doi: 10.5937/zrpfins53-23746.
24. Pavićević, A. (2019). Similarities and differences between Ius Retentionis and related Institutes of Roman Law, *Ius Romanum*, (2), pp. 764–783.

Downloaded 2023, December 5 from http://iusromanum.info/wp-content/uploads/2020/10/IUS_ROMANUM_2019_2_OFFICIAL.pdf

- 25. Petrić, S. (2004). Institut prava retencije u hrvatskom i usporednom pravu [Institute of Retention in Croatian and Comparative Law]. Split: Pravni fakultet Sveučilišta u Splitu
- 26. Planojević, N. (2012). *Stvarno pravo u praksi* [Real law in practice]. Kragujevac: Univerzitet u Kragujevcu, Pravni fakultet
- 27. Prednacrt Građanskog zakonika Republike Srbije [Preliminary Draft of the Civil Code of the Republic of Serbia]. Downloaded 2023, December 18 from https://www.paragraf.rs/nacrti_i_predlozi/280519-prednacrt-gradjanskog-zakonika-republike-srbije.html
- 28. Simler, P. & Delebecque, P. (1989). *Droit civil: Les suretes; La publicité foncière*, [Civil law: Security Rights, Land advertising]. Paris: Dalloz
- 29. Srpski građanski zakonik iz 1844. [Serbian Civil Code from 1844]. Downloaded 2024, January 5 from https://www.harmonius.org/sr/pravni-izvori/jugostocna-evropa/privatno-pravo/srbija/Srpski_gradjanski_zakonik_1844.pdf
- 30. Stanković, O. & Orlić, M. (1996). *Stvarno pravo* [Real law]. Beograd: Nomos
- 31. Stanković, O. & Vodinelić, V. (2007). *Uvod u građansko pravo* [Introduction to Civil Law]. Beograd: Nomos
- 32. Stipković, Z. (1972). Pravo retencije i neki slični instituti [The right of retention and some similar institutes]. *Zbornik Pravnog fakulteta u Zagrebu*, 22(3), pp. 285–297
- 33. Stojanović, D. (1998). *Stvarno pravo* [Real law]. Kragujevac: Pravni fakultet
- 34. Švajcarski građanski zakonik, Schweizerisches Zivilgesetzbuch from 1907. [Swiss Civil Code]. Downloaded 2023, December 9 from https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en
- 35. Tuor, P. & Schnyder, B. (1979). *Das Schweizerische Zivilgesetzbuch* [Swiss Civil Code]. Zürich: Schulthess
- 36. Von Bar, C. et al. (2009). *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Full Edition, Vol. 5. Downloaded 2023, December 6 from: https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf
- 37. Westermann, H. (1960). *Sachenrecht*. [Real law]. Karlsruhe: C. F. Müller
- 38. Zakon o izvršenju i obezbeđenju [Law on Execution and Security]. *Službeni glasnik RS*, br. 106/15, 106/16 – autentično tumačenje, 113/17

– autentično tumačenje, 54/19, 9/20 – autentično tumačenje i 10/23 – dr. zakon

39. Zakon o obligacionim odnosima [Law on Obligations]. *Službeni list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Službeni list SRJ*, br. 31/93, *Službeni list SCG*, br. 1/2003 – Ustavna povelja i *Službeni glasnik RS*, br. 18/20

40. Zakon o osnovama svojinskopravnih odnosa [Law on the Basics of Property Relations]. *Službeni list SFRJ*, br. 6/80 i 36/90, *Službeni list SRJ*, br. 29/96 i *Službeni glasnik RS*, br. 115/05 – dr. zakon

41. Zakon o stečaju [Bankruptcy Law]. *Službeni glasnik RS*, br. 104/09, 99/11 – dr. zakon, 71/12 – odluka US, 83/14, 113/17, 44/18 i 95/18