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# OPINION ON THE DRAFT LAW

# ON PROPERTY RIGHTS AND OTHER REAL RIGHTS

# OF THE REPUBLIC OF SERBIA

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**Prepared by**

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## GENERAL OBSERVATIONS

The Draft Law on Property Rights and Other Real Rights (hereinafter: Draft) is a comprehensive legal document with a number of very specific legislative solutions. To understand its content it is necessary to observe the historical background and developments. The Serbian legal system is historically classical Continental legal system with strong influence of German and Austrian legal system. In these as in many other European countries the field of property relations is regulated as a part of a comprehensive Civil Code. The background in Serbia as in other independent states deriving from former Yugoslavia is a little different. The Constitution of SFRY (Socialistic Federal Republic of Yugoslavia) divided the legislative competence in field of Civil Law among the Federal State and its Republics. Therefore the Federal State didn't have legislative competence to adopt the comprehensive Civil Code and adopted separate and different Laws regulating the traditional fields of civil law. The most important of them were the Law on Obligations Relations (1978) and the Law on the Basics of Ownership Relationships (hereinafter: LoBoOR -1980). All new states deriving from former Yugoslavia in first step took over the existing Laws and later adopted the new regulation of these fields. None of new states decided to change the legislative approach and adopt a comprehensive civil code in a manner of the classical European codifications. The main fields of the civil law remain regulated separately in different Laws, what causes some problems, where to put some basic principles and definitions. So, the Draft can be compared with the part of classical Civil Code regulating the Property (Sachenrecht).

The main legal source in field of Property in Serbia is still LoBoOR from 1980. Although it was adopted in the environment of socialism and social (some kind of state) property, the LoBoOR brought mainly the rules comparable with the solutions in traditional legal systems. Even the socialist state was not in position to completely abolish the private property and ownership right as its main legal phenomena among the individuals. It only prohibited or strictly limited the ownership right on the real estates. Therefore the rules of LoBoOR in field of movables were very traditional and also in accordance with basic principles of Property right in meaning of the ECHR and its Protocol Nr. 1. On the other hand the regulation of the real estate was extremely weak with number of gaps and insufficient rules. The second important gap in legal framework of LoBoOR was absence of mechanisms for the real security of loans. The LoBoOR offered some basic rules of mortgage, but only as a security for the loan of individuals (physical persons). The economic circumstances demanded the prior adoption of supplement legislation in the field of real security, what was done in Serbia with the Law on Hypothec and the Law on Liens on Registered Movables.
One can totally agree with the explanatory notes to Draft that it is not possible to only amend the current LoBoOR and with reasoning that Serbia needs a new regulation in the field of property. One can also agree with the explanation that gathering together the solutions from different laws in a single place makes the legal system much more transparent and visible, what is not an unimportant piece in aim to fulfill the basic principles of property as a basic human right. The new comprehensive law as provided in the Draft is without any doubt a major step forward in the development of the state of law, but it can be asked if it is necessary to implement the new solutions also in fields, where the current legislation, mainly in LoBoOR provides traditional and verified rules. One should be very careful with changes in established rules only with the reason that they derive from a former socialist environment. An important legal source is also the court decisions and it would be good to be able to use the established court praxis also in the future.

The next general observation is connected with the legislative technique of the Draft. The traditional legal rule in field of Property Law is general (abstract). So are the main rules of the current LoBoOR and also the rules in comparable legal systems with comprehensive Civil Codes. In the Draft we can find a number of very concrete and specific rules with cross references. But such approach is more convenient for public and not for private law.
Last but not least, the Draft regulates as real rights also some rights, which are traditional obligation rights as lease and right of prior acquisition. The regulation of these rights in the framework of comprehensive property law should not be see as a weakness, but it could cause the theoretical dispute about the borders between real rights and obligations.

## Part I - Main Provisions (Art 1 to 35)

Section 1 - Art. 1 defines the scope of the law. It is of a descriptive nature and therefore cannot oppose the right to free possession of property from ECHR Protocol 1.

Section 2 - Art. 2 specifies twelve types of real rights. Most of them are already known, but some are new for Serbia, namely: real encumbrance, real charge as well as "entrusted and anticipated ownership" (= fiduciary transfer of ownership on movable and immovable things). On other matters provisions already exist in the LOblR which are replaced resp. supplemented by provisions of the Draft, namely: lease, the right of prior acquisition and certain aspects of the sale with reserving the right of ownership. These novelties will be discussed in the respective context.

One of the main characteristics of the Draft is the introduction of the principle of *superficies solo cedit*, which is expressed in Art. 3(4) and (5) as well as in Art. 25. Practically all countries from South East Europe have adopted this principle (with Bulgaria as an exception). Establishing the legal unity of the land and all things permanently attached to it will contribute to the clarification of property relations and enhance legal security. The introduction of this principle should therefore be considered as a substantial contribution to peaceful enjoyment of property as guaranteed by the ECHR.

The English translation of para.(6) of Art. 3 is not correct, it should read: "Unless otherwise provided by law, provisions of paras. 1, 2, 4 and 5 shall apply…"

Art. 4 reflects the well-known principle of "closed system of real rights". Art. 11 comprises basic rules for the acquisition, transfer and cessation of real rights. A general provision on restriction of real rights can be found in Art. 13. There are also provisions on the restriction of specific reals rights scattered over other parts of the Draft.

Art. 14 regulates in detail the prohibition of the misuse of rights. When a new provision on such basic principle is introduced within the framework of one part of the civil law (in this case: the property law) this cannot be seen only from the narrow perspective of property law alone but must also be considered in the context of the legal order in general. Art. 14 of the Draft would not be the first provision on misuse in the Serbian law. A parallel provision can be found in Art. 13 of the Basic principles of the Law on Obligations Relations (LOblR), according to which "the realization of a right arising from obligation relations contrary to the purpose established or recognized by law regarding such right, shall be prohibited." In addition to this, Art. 14 LOblR postulates the principle of "good faith and honesty" which in many countries is also used in the context of prohibition of misuse. Serbia has no Civil Code, and accordingly no codified general part of the Civil Law. It is entirely conceivable that the Articles 13 and 14 of LOblR are de lege lata considered as general principles of the civil law with an application beyond the law of obligations. In this context it should be mentioned that the Law on property rights of the Republika Srpska of Bosnia and Herzegovina in Art. 4 simply repeats the Art. 13 of the LOblR of 1978.

The social dimension of property is defined in the Draft in an unusual way. Pursuant to Art. 80, the owner shall "not exercise ownership powers in a manner detrimental to another, infringe another´s rights or narrow his powers" (for comment see below III B). In addition to that the owner is bound by the principle of "good neighbour relations and mutual considerateness" (Art. 279 which constitutes a positive innovation), and has to observe the specific provisions on the neighbour right.

When examining paragraph (1) of Art. 14 of the Draft in detail it catches the eye that the structure is unusual, in so far as it begins with a number of specific rules (namely numbers 1 to 6) and ends with (several) general clauses. Normally, the order is the other way round. As

regards the (altogether nine) categories of Art. 14(1), the number 6 (acting contrary to the right`s purpose) reflects the already mentioned Art. 13 LOblR; all others are new for the Serbian codified law. The specific clauses of Art. 14(1) include, in addition to the one already mentioned, the (classical) prohibition of chicanery; the absence of justified own interest; disproportionality; a criteria connected with the necessity of the behavior ("harming another more than he would if acting otherwise and still achieving his interest") and the well-known principle of *venire contra factum proprium*. The way in which these six case-groups are combined follows no apparent inner logic. Thus, the delineation between no. 1 (prohibition of chicanery) and no. 2 (absence of justified own interest) remains in the dark. It is equally difficult to draw the line between no. 3 (disproportionality) and no. 4 (harming another more that he would if acting otherwise and still achieving his interest). Various elements of Art. 14(1) can be found in the one or the other foreign piece of legislation, or in court practice, but not in any known foreign act in this combined form.

In addition Art. 14(1) contains two rather wide general clauses and one subsidiary clause. No. 7 prohibits the exercise of rights "contrary to socialist morality" (a similar expression can be found in Art. 9 of the Macedonian Property Act, but also in section 15(2) of the Civil Code of the former German Democratic Republic). Another general clause (namely no. 8) prohibits "acting contrary to what is just"; this clause is particularly difficult to interpret because it is formulated in an entirely broad and vague manner. In view of the above it is difficult to understand why in addition no. 9 of Art. 14(1) prohibits "other events of misuse" – such can hardly be imagined.

Taken as a whole, the restrictions on owners imposed by Art. 14(1) of the Draft appear unusually far-reaching. The non-consistent, and partially vague text could make the application of the prohibition of the misuse of rights rather unpredictable. The courts might understand the provision as an invitation to apply it in cases where this is not really justified. There is a real possibility that the right to peaceful enjoyment of property as guaranteed in Art. 1/1/1 of the First Protocol to the ECHR may be affected.

It should be added that the concept of misuse from para.(1) of Art. 14 of the Draft fundamentally differs from that of all other countries of the region. The Croatian law has two different provisions on misuse, the one for obligations (Art. 6 of the Croatian LOblR of 2005 repeats Art. 13 of the LOblR 1978) and the other for property law relations. Art. 31 of the Croatian Law on property and other real rights on "general restrictions" begins with a general clause stating the duty of the owner to contribute to the general welfare and to respect the collective interests and the interests of others which are not opposed to his own rights, and then enumerates three special case-groups of misuse which are, however, very limited in scope (prohibition of chicanery, plus two case-groups specific for the property law, with limited scope of application). In Art. 31, there is no mention of "acting contrary to the purpose of the law (as in the Croatian LOblR). The Montenegrin Law on property relations from 2009 is similar to the Croatian solution insofar as Art. 9 regulating the social function of property also provides two specific restrictions on the exercise of property rights, but Art. 5 on misuse of rights is entirely focused on the acting contrary to purpose (not chicanery). The social obligation of property is also emphasized in Art. 3 of the Macedonian Law on property and other real rights from 2001. Art. 9 of the Macedonian Property Act defines the general restrictions of the property rights; a comprehensive reform of the Macedonian civil law is currently on the way. The Slovenian Property Act deals with the prohibition against abuse in Art. 12 in a brief and efficient way (general clause plus prohibition of chicanery). In view of the above, a more general and flexible solution should be preferable also for the purposes of the Draft.

Para.(2) of Art. 14 provides for two types of sanctions in cases of abuse (to my knowledge, no other country of the region has a special provision on the legal consequences of misuse).

Namely, the abuser of right shall not enjoy protection (this corresponds to Swiss law), and shall furthermore be liable for the consequences of his behavior. What is meant by these sanctions is not obvious at first sight. Possibly, the act constituting a misuse shall be considered null and void. The misuse might give a right to compensation to the other party, but if this shall be the case, is not said under which conditions. In particular it remains unclear whether liability would depend on fault or not. In the context of liability the general question arises how Art. 14(2) of the Draft relates to the law of obligations (that is: provisions on tort in Art. 154 et seqq. LOblR).

In view of the above it is recommended to reconsider Art. 14(1) and (2) of the Draft because the existing text could be in opposition with the free possession of property from ECHR Protocol 1.

Section 3 (not 2, as in the English translation) – With regard to Art. 25 see above. The section on things inter alia contains some legal definitions which are missing in the existing law and should prove useful. It is also positive that basic provisions on rights related to the human body are introduced. I have not found any provisions which could oppose the right of free possession of property from ECHR Protocol 1.

Section 4 – The rights of foreigners are in several respects improved. Thus. expatriates shall under the conditions of Art. 31 of the Draft receive equal treatment with nationals as to the right to acquire ownership and to have real rights on immovables. Other foreigners are excluded from ownership on certain types of immovables but may have other real rights on them, including long-term lease. No provisions could be found which would oppose the right of free possession of property from ECHR Protocol 1.

## Part II - Possession and detention (Art. 36 to 78)

As in other parts, the Draft is very complex and detailed. The possession, which is defined in a particularly comprehensive way, is protected in various ways. Presumably the provisions of part II are not new as regards content but reflect the hitherto existing court practice and legal science. No provisions have been found which would oppose the right of free possession of property from ECHR Protocol 1.

## Part III - Ownership (Art 79 to 276)

### Chapter A (Art. 79)

The provision of Article 79 provides the definition of ownership. The definition is very broad and stresses all dimension of ownership as the most important property right and as basic human right. The interpretation of the right of possession in the meaning of the Protocol 1 to ECHR is even broader, but it covers also other economic values, which are not part of the traditional property law (movables and real estate) regulating in the Civil Code. From this point of view no discrepancy is apparent. The proposed definition may even be called one of the best ever seen in comparable documents.

### Chapter B (Art. 80 to 86)

Even though the ownership is the broadest right over the thing as an object it is a restricted right. The general framework of the restrictions derives from the definition of the ownership (Art. 79; see above). The right shall be implemented within legal boundaries and legal order. The provisions of Chapter B determine more specific rules about the restrictions. In the explanatory notes we can find the statement, that the rules serve for implementing the basic obligations from Serbian Constitution and Protocol 1 to ECHR.

The first provision in this Chapter (Art.80) imposes general restrictions of owner by exercising his right. If we take into account, that the ownership is general and all-embracing right, the

restrictions should be imposed very carefully. It is perfectly true, that the owner must also respect the interest of other owners and individuals, but the balance among different interest is very sensitive. The first Paragraph of Article 80 sets very broad boundaries for the owner. He is not allowed to exercise his powers in the manner detrimental to another, infringe another's rights, or narrow his powers. However, exercising the ownership powers could easily touch the interest of other person, especially in legal system with very broad definition of damage. If the land owner plants a tree on his land, such tree could harm the neighbour´s enjoyment of his garden. It is suggest removing the Sub-paragraph1 of Paragraph 1 of Article 80 from the draft, because the general principle that prohibits the abuse of right is sufficient. Even Article 14, which introduces the principle of abuse is very broad and could be in opposition with free possession of property from ECHR Protocol 1. The rest of Article 80 could be accepted. The Sub-Paragraph 2 of Paragraph 1 establishes the restriction of ownership, but also provides the proper compensation.

In the Chapter B. we also find provisions (Art. 81 to 84) concerning public restrictions of ownership. The Civil Code normally deals only with private restrictions. The borders of public restrictions are more or less matter of the constitutional provisions. Art. 58 of the Constitution of the Republic Serbia contains only very general and abstract provision about the public restrictions of ownership. Some provisions of this Chapter could be seen as supplement of the constitutional principles. Such clarification could look as a step forward in the implementation of the basic principles of property right, but is limited with the effect of the Law. These provisions are not addressed to the individuals and they are not obliged them. They are more or less the guideline for the legislative body, how to act in the further legislative process adopting the new rules concerning the restrictions of ownership. In state of law the boundaries of the legislative body should be set by the constitutional provisions. Therefore most of the provisions of Chapter B. don't have a direct effect and the principles deriving from them shall be implemented by the legislative body in further legal acts.

The last two provisions in Chapter B are not of significant importance. It is obvious, that the owner can restrict his right by his will by entering in legal relationship with other person. Art 86 introduces a concept, which enables owner to obtain other real right on a thing in his ownership. This concept is not very common, but it could be accepted.

**Chapter C (Art. 87 to 181)**

Chapter C is a very extensive part of the Draft. It regulates the acquisition of ownership. At the beginning of the Chapter a systematical presentation of different sources of acquisition is missing. It is true, that in the Chapter A we can find Art. 11, that regulates the acquisition of all types of real rights. Nevertheless the different types of acquisition of ownership should be represented in the first provision of the Chapter. There should also be a more detailed regulation of the acquisition by means of inheritance and by the decision of the state body. The clear and doubtless regulation of the acquisition of ownership should be seen as one of the most important issue in implementation of main principle of free possession of property from ECHR Protocol 1.

Section 1 - Acquisition by virtue of legal transaction – Art. 87 regulates the transfer of ownership on movables. The provision demands the valid legal title (*iustus titulus*) and surrender of thing (tradition) as *modus aquirendi*. In this provision there is apparently no detailed regulation of different types of tradition. It is true, that we can find this question partially regulated in Art. 54 (Transfer of possession), but these rules seem insufficient and don't give us the clear answer, when the ownership is acquired. One misses especially the clear definition of traditional legal institutes known in comparative law as *traditio brevi manu* and *constitutum possessorium*. It is also not possible to understand the last words of paragraph 2 of Art.87: "unless the acquirer or a third party acquires the ownership on other grounds in the meantime." In my opinion these words are simply illogical. Finally the solution seems unreasonable, that paragraph 1 mentions a valid contract and the paragraph 2 a valid

contract or such unilateral expression of will. The expression “legal transaction” as in the name of Section 1 should be seen as the most suitable one.

Art. 89 regulates the multiple alienation of a movable thing. It provides a new solution in comparison with current LoBoOR. In the explanation of the Draft we can find the statement, that the new solution makes a step forward. In comparative law the ownership is mostly acquired by a person to whom the possession was transferred first. To our knowledge the provisions don’t take into account the knowledge of prior legal title which obliges the person who disposes to transfer the ownership. One can have some doubts about such solution and it is suggested considering it once again. It is the fundamental question about the relation between Law on Property and Obligation Law. Look just the following situation. The owner has already concluded the sale with the first buyer, but he hasn’t fulfilled his obligation to deliver and he hasn’t transferred the property yet. After the first sale he gets a much better offer. The owner could conclude the second contract and take the risk of consequences of breach of the prior contract. The same rule is also stated in Art. 90 concerning the real estate and the same doubts come up. Beside this attention must be drawn to the differences in text of the provisions mentioned above. In Art. 89 we find the following: “unless at that time such person was aware or could have been aware of other disposition.” In Art. 90 the text is as follow: “such person could not have been aware of former disposition at the moment his request was submitted.”

Section 2 – preemption right – We don’t see preemption right as real property right. It is well-known that some legal scholars in Serbia understood preemption as real right, but this does not seem to be a statement in comparative law. Hence it is suggested to omit this section as a whole from the Draft. As is known the preemption right is regulated in Law on Obligation quite well. On the other hand the Draft is unclear in defining the offer and some other legal actions from the field of obligations. Very unusual is also the provision of Art. 100 demanding the preemption right holder to fulfill his obligation of payment by the court in the moment of giving the offer. No such solution is known from comparative law. Most of the regulations of the preemption right demand the immediate payment at the time, when the contract is concluded. The proposed solution from the Draft is a logical consequence of different positions of offer and the acceptance in the development of legal relationship between the owner and the preemption right holder. The proposed changes and supplements of the current regulation wouldn’t provide more legal security for the parties. On the opposite they can lead to confusion.

Section 3 (Art. 112 to 116) -The provisions of this section regulate the acquisition from unauthorised party. The acquisition from unauthorised party is special restriction of ownership right in the interest of trust in legal transactions. Therefore this legal institute is justified in comparative law and does not object the principle of free possession of property. Nevertheless attention shall be drawn to some rules, which could be disputed.

The general provision about acquisition from unauthorised party is Article 112. It is difficult to understand the reasons for the difference in wording of Paragraph 1 and Paragraph 2. The provision of Paragraph 1 sounds: “… he was not aware that the alienator does not have the power of disposition.” It would seem much better to reformulate Paragraph 2 as follows: “was not aware and could not have been aware that the alienator does not have the power of disposition...” It is practically impossible to prove the knowledge of individual person, so it is much better to designate legal standard that “someone could know”. The explanatory notes describe as one of the advantages in comparison with current legislation the rule, which provides a possibility to acquire when the owner, through negligence, contributed to the loss of the possession. This opinion cannot be shared, the rule should rather be considered as a disadvantage and unjustified restriction of ownership. If the thing is stolen, there is no reason, why the third party, even if he is good faith, could acquire an ownership on the legal transaction with thief. The owner’s negligence by safe keeping shouldn’t lead him in position that he would lose his right. The situation is different, if he transfers the possession to

another person by his will. It this case the restriction is justified, because the owner shall take the risk of choosing a person, who does not deserve his trust. It is also impossible to understand why the acquirer in good faith shall be free of the rights of third parties only, if such right was acquired without reimbursement.

Section 4 (Art. 117 to 126) - Acquisition by prescription is an established legal ground to obtain the ownership. The provisions of this section regulate the statutory requirements in respect of the qualities of possession and lapse of time. The period of time of 2 years and 6 months (Art. 117 (1)) as a condition for the prescription is very unusual, but this is question of opinion. The legal rule allowing for the possibility that the ownership right could be acquired on the base of only possession in good faith seems very problematic, particularly if the definition of possession in good faith is taken into account. The definition is regulated by Article 47 and the possessor is in good faith, if he is not aware and cannot be aware that he does not have right, or obligation, to which his acting is appropriate in respect of a thing. So the possessor in good faith is also a lease holder, who has a perfect title for his possession. But under no condition he is eligible for acquiring the ownership by prescription. It should be stated very clearly the ownership by prescription can acquire only possessor in good faith, who does not know and cannot know, that he did not acquire the ownership. The provision of Article 122 has the same wording and meaning as Article 113 and the same concerns exist. Finally no necessity can be seen for a special regulation of standstill and interruption of the prescription. Both institutes are regulated in the Obligation Code and these provisions could be used mutatis mutandi as in current law. The new rules, which differ from the established regulation, could lead to confusion.

Section 5 to 15 and 17 to 20 – In the number of sections the provisions of the Draft regulate different types of acquisition of ownership directly by meaning of the law. Many of them regulate the same situation as the current LoBoOR. Many of them are new for the Serbian law as a consequence that LoBoOR regulates only basic ownership relations. The legal rules deriving from these provisions are more or less traditional and comparable with the solutions in other legal systems. Some of these provisions which in modern times have lost the economic relevance, for example the rules about bee swarms. In general the provisions from these Sections don't affect directly the right of free possession of ownership from ECHR Protocol 1. Some of them could be discussed, especially those changing the current solutions from LoBoOR. As has already been mentioned the legal rules from LoBoOR are comparable with other legal systems and no need can be seen to change or supplement the current solutions, which don't cause any legal problems. In this case it is suggested to open a discussion with practicing lawyers, whether the current legal rules demand such changes. Finally the Art. 141 and 142 should be mentioned which operate with the expression public area. I understand the reason for the special rule, but the expression public area should be defined more precisely. These rules have a legal nature of public law and it would be much more convenient to regulate the issue in the public law concerning the public roads.

Section 16 – The provisions of Section 16 regulate building on another's land. The proposed rules are in principle the same as the rules of LoBoOR with some supplements and clarifications. Some of them could be very useful for the praxis, especially the definition of building and the presumption when the building is finished. The terminology of the section is not consequent. It is suggested to remove the expression of ownership on the building (Art. 160), what is in opposite with the principle of *superficies solo cedit*. The expression "request that the building becomes his" seems much more convenient. There are also some doubts as to the last part of Paragraph 1 of the Article 159, which provides the builder in good faith a claim against the land owner to pay a monetary compensation of the average price for building. Even in case that the land owner is in bad faith and he hasn't opposed the building the claim (obligation) should be seen as something what is not in line with the content of land ownership. Further the provision of Art. 163 seems very strange. Namely, the rules on building on another's land shall also apply when the builder, without authorisation, used a

third party's material in the building process. Even if land owner is in bad faith and he uses the others material (e.g. bricks), the mere ownership of the material without any other contribution should not provide the claim on ownership of land plot. The compensation claim should be quite sufficient in such case. Therefore a change of wording is suggested. It seems that the loss of property on the land plot could mean the breach of free possession of property in meaning of ECHR Protocol 1. The rules about building on another's land shall also apply for adding on, or to, the building, and reconstruction. The same doubts may be raised as before. In this case the proposed solution seems a little bit better. Nevertheless it is suggested to amend the rule with forming the co-ownership between builder and land owner. It is also unclear, what is the meaning of reconstruction. Finally the rules about building on another's land don't apply to building on the land in public ownership (Art.168). Such exemption does not seem reasonable. Besides this, no definition of public ownership could be found. Certainly also the legal entities of public law shall defend their ownership, so they should be treated equally as other individuals.

**Chapter D (Art. 182 to 183)**

Two provisions in this Chapter regulate the termination of ownership by the will of the owner. Both are in line with common rules. In the Draft no provision could be found that ownership is terminated, if the thing is destroyed or consumed. It should be useful to add such provision somewhere. In this Chapter no provisions could be found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter E (Art. 184 to 201)**

The provisions in this Chapter regulate Protection of ownership. The proposed regulation provides all necessary remedies for the effective protection of ownership. The concept of the regulation follows the current legislation, but it is more systematic, what can be seen as a step forward. Some new solutions have been identified in Article 188, concerning the protection on stronger ground. The proposed solutions seem adequate and better as in current law. In this Chapter no provisions could be found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter F (Art. 202 to 225)**

The provisions of this Chapter completely regulate the institute of Co-ownership. The provisions follow each other systematically and protect the legal position of co-owners. The possibility given to co-owners to conclude a contract among them (Art. 205) can be regarded a very good solution. It is important that the contract among co-owners effects also on the successors to the contracting party. For the legal position of the co-owner it is further very important, that he can claim the conclusion of mutual contract by the decision of the court (Art. 206). As a good solution in comparison with current law also the Art. 207 can be seen, which provides the co-owners a legal - pledge on the share of other co-owner for their claims on covering the expenses from the maintaining the thing in co-ownership. It is important that such pledge does not oppose the legal position of the other holders of the real rights on the co-owners share (Paragraph 3 of Art. 207). In this Chapter no provisions could be found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter G (Art. 226 to 240)**

The provisions of this Chapter regulate the Joint ownership. In comparison with current law the Draft contains more detailed regulation of mutual relations among the members of joint-owner community. The provisions from Section 6 (Art. 232 to 234) seem very important. These provisions regulate the unauthorized disposal with the thing in joint ownership. The legal rules offer protection to third person in good faith and ensure the principle of trust in legal transaction. A very interesting solution is provided in Art. 233, concerning the possibility that the former joint owner can claim his right back against the payment. In this provision the

meaning of Paragraph 3 remains unclear. Apparently, the joint owner who disposed with a thing in bad faith doesn't need any additional remedy, because he has already got the compensation with his disposal. It is suggested considering this provision. In this Chapter no provisions have been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter H (Articles 241 to 276)**

The provisions in this Chapter regulate the right of condominium ownership. The right of condominium ownership made a lot of troubles and opened a number of problems in all legal systems deriving from former Yugoslavia. We don't know the current situation in Serbia, but from the explanatory notes the very similar situation can be established. It is very important to deal with these problems in two ways. First the Law shall regulate a right of condominium ownership de futuro. In this regulation the provisions must follow the general principles of property law, especially the principle of *superficies solo cedit*. The second important issue is the question, how to deal with the current situation. The legal system of former Yugoslavia introduced the condominium ownership, but the regulation derived from co-existence of social (state) and private property. The principle of *superficie solo cedit* wasn't implemented and the condominium ownership was established without proper legal documents. The intention expressed in the explanatory notes, that the Law shall impose the regulation, which is the adjustment of the classical ways of regulation in this field to local circumstances can only be strongly supported.

The regulation of condominium ownership in the Draft is very specific and it can't be compared with other legal system. The proposed regulation seems a little bit complicated and inconsistent. Because the local circumstances are not exactly known, it is difficult to asses if the proposed solutions are justified. The proposed regulation is based on the ownership on a specific part of the building. We find the same approach to the condominium ownership in Slovenian Law and it works well. We believe that such approach is the only right way, having in mind the fact that the condominium ownership factually exists without proper legal base. An essential part of every condominium ownership relation is also the land parcel and the common parts of the building. In Slovenian law with the same approach to the condominium ownership the legal status of land parcel and common parts of the building is the same. They are in co-ownership of the owners of specific part of the building. In the Draft they have different legal status. On the land parcel in which the building in condominium ownership is located, condominium owners shall have the right of co-ownership (Art. 252). On common parts of the building the condominium owner's association has the ownership right. The reason for such distinction remains in the dark. No explanation could be found in the notes. The legal status of condominium owner's association is very specific. It has the status of legal entity. The status of legal entity could bring some advantages. Especially it could simplify the legal relations with third parties. The main problem lies with the condominium owner's association in the provisions, regulating the decision-making (Art. 271). The decision making process is based on the principle of equal voice. Every owner of the specific part has one voice irrespective of its size. The owner of a small flat has the same power as the owner of a big apartment. Because of this it is suggested to consider another solution. The decision-making procedure could be based on the principle of proportionality as in the general co-ownership relation. The problem is of extreme importance, because of the competences granted to the association. The association has relatively important competences (Art. 272). The exercise of them without any doubt has an influence on the property of the owner of the specific part. The association has the right to determine the level of a monthly amount to be paid by the condominium owners for the needs of performing the tasks falling within the competences of the condominium association. It is strongly believed that the association should adopt some most important decisions with the consent of all owners. Therefore it is really suggested here to transform the basic principle of co-ownership also to the condominium ownership relations. There could be some exceptions, but the main

principles of co-ownership should be respected. The solution proposed in the Draft could opposes the principle of free possession of property from ECHR Protocol 1. There is another argument for this statement. The Draft regulates in Art. 273 the liability of the condominium association. All members of the association are jointly liable in respect of third persons for the performance of the condominium association's contractual and non-contractual obligations, in the case of non-performance of obligations by the condominium association. That means, that one owner would be liable for the debt, which couldn't be covered, because other owners haven't fulfilled their obligation. Such a solution is in our opinion also in the opposition wit basic principles of consumer protection.

Another problem in the proposed regulation can be seen in the provisions regulating the condominiumisation. Especially in the provision of Art. 253 the legal steps seem a little bit confused. In effect, the first step is the expression of the owner's will and the last step the entry in the public register. It is also not possible to see the way, how the co-ownership shares on the land parcel are designated.

**Part IV - Use of swards or pasturelands (Art. 277 to 278)**

No comments are made on this part.

**Part V - Neighbour right (Art. 279 to 295)**

Art. 279 conveys the established principle of good neighbourly relations and mutual considerateness in neighbor relations. This principle may also be seen as a form of appearance of the general principle of good faith and honesty, which is not as such mentioned in the Draft but might be understood as a general principle of the civil law. The neighbour rights are regulated in some detail; it can be supposed that the regulation is in accordance with the domestic traditions. No provisions have been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Part VI – Servitudes (Articles 296 to 392)**

**Chapter A (Art. 296)**

The only provision in this Chapter determines the different types of servitudes. There are four different types of them: real servitudes, personal servitudes, real-personal servitudes and servitudes to build. The servitudes are a classical institute of property law and there are no big disputes about their regulation. Servitude is by its nature the restriction of ownership. If the servitude is established by the will of the owner of the servient thing, such restriction is unproblematic from the point of principle of free possession of ownership. Problematic could be only measures which establish or broaden the servitude by the law or the decision of the competent authority against the will of the owner of the servient thing. Such measures are more or less object of the public law and are not part of the Draft. In comparative law the legal systems regulate mostly only real and personal servitudes. The other two types are not something specific. Some systems regulate real-personal servitudes as a type of real servitudes and servitudes to build as a special real right. The different classification in the Draft does not have practical consequences and does not affect the content of ownership.

**Chapter B (Art. 297 to 329)**

The real servitude (easement) is the most important type and also serves as a model for the other servitudes. The Draft provides two basic types of real servitudes, the positive and the negative. The definition of both doesn't differ much from the definitions in comparative law. They are regulated in a classical manner, with rectification of some imprecision in current regulation, what means a step forward. Nevertheless some provisions were found, which could be disputed, because they are inconsistent with some basic legal principles.

In the explanatory notes a statement could be found about Article 298. The provision shall allow the existence of ownership on real servitude. The provision should be read and understood differently. Namely, it provides that one person may establish the servitude on his own thing. Such solution is completely acceptable, but very strong doubts must be expressed in regard to the concept, that the servitude could be an object of ownership.

The provision of Paragraph 2 of Art. 297 seems problematic. It regulates the ownership of whatever is necessary for the exercise of real servitude. This ownership belongs to the owner of a dominant estate. This solution is in my opinion in opposition with superficies solo cedit principle. The things in or on the servient estate are its part.

Very unusual is also the provision of Paragraph 2 of Art. 299. The servitude means restriction of ownership and as such it should be considered very restricted. In case of doubt the holder of servitude shall have less powers and he shall exercise his right in a way that the least interferes the servient estate. The mentioned provision allows extending the scope of real servitude in accordance with the altered needs of the dominant estate as produced by the normal development of the manner of its use, unless such extension is disproportionately more encumbering the servient estate than benefitting the dominant estate. In my opinion this provision unsuccessfully balances the interests of both owners and provides too many benefits to the owner of the dominant estate. If he needs the extension of his servitude, he shall start negotiations with the owner of the servient estate. If they can not reach anagreement, he shall use the remedy from Art. 289 (access to and use of neighbouring immovable thing), if all the requirements are fulfilled. Otherwise the extension is not justified. The broad possibility to extend the scope of servitude could oppose the free possession of property from ECHR Protocol 1.

Besides, the meaning of Art. 300 is incomprehensible. A more detailed regulation would be required on establishment of real servitude with the contract in Section 7.

**Chapter C (Art. 330 to 335)**

Real-personal servitudes are the rights which, with regard to the content of powers, correspond to real servitudes, but, contrary to them, they belong to an individually designated person. Their definition does not relate to the needs of the dominant estate but rather to the needs of its right holder. With such definition one wonders what the distinction between them and personal servitudes is. In any case the solution, which allows for real-personal servitudes without time limitation seems very doubtful. The real-personal servitude in favour of individual is limited by the end of his life, but there are no limitations, if the right holder is a legal entity. The most problematic provision in this Chapter is Art. 334, according to which in case of doubt, the scope of real-personal servitude shall be determined based on the personal needs of its right holder. For this, a change of the presumption is proposed. Namely, in case of doubt, the scope of the real-personal servitude should be determined so that it least restricts the servient estate. Such solution much more respects the ownership right. It shall have an advantage before the personal interest of the servitude right holder.

**Chapter D (Art. 336 to 347)**

This Chapter regulates the right of the servitude to build. Its content corresponds to the right of independent building right in comparative law. Regulation of the building right as servitude does not have significant consequences. In this Chapter no provisions have been found which could oppose the right of free possession of property from ECHR Protocol 1. Nevertheless two issues shall be pointed out. First, the regulation is not completely in accordance with *superficies solo cedit* principle, in so far as it is defined that the building is object of ownership. It is more in line with *superficies solo cedit* principle, if the building is part of building right (servitude to build). Second issue is the provision of Art. 343. It surprisingly does not demand the entry in public register as a condition of establishment of servitude of building.

**Chapter E (Art. 348 to 390)**

This Chapter regulates right of usufruct. The regulation is more or less classical and balanced between the interest of owner and usufruct holder. Here, only the Art. 360 regulating transfer of usufruct shall be mentioned. In comparative law the personal servitudes are mostly untransferable. It is possible to support the transfer of the usufruct with the consent of the owner of the servient thing. Otherwise the transfer of usufruct without consent is problematic. It is true, that such transfer is limited with the conditions under which the first right holder has his usufruct. Supposedly, this limitation also covers the cessation. In such case the usufruct shall cease under the condition established with the first right holder. In this Chapter no provisions has been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter F (Art. 391)**

The Chapter has only one provision. The servitude to enjoy is a diminutive usufruct servitude and the legal rules of usufruct are mutatis mutandi applicable. In this Chapter no provisions have been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Chapter G (Art. 392)**

The Chapter has only one provision. The servitude of residence is a diminutive usufruct servitude and the legal rules of usufruct are mutatis mutandi applicable. In this Chapter no provision has been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Part VII - Lease (Art. 393 to 438)**

The lease is de lege lata regulated in its entirety in Art. 567 to 599 LOblR. The Draft transposes from it, fully or partially, three provisions relating to the lease as real right, but the remaining provisions of the LOblR shall stay in force. Taken together, the provisions on lease in property law and in law of obligations are conspicuously numerous and detailed. They also seem to sometimes overlap and it may seem difficult to understand all the details of the concept. The separation of the proprietary aspects of lease from the aspects under the law of obligations seems to be a specialty of the present Draft, as compared with other countries of the region. Whether this will facilitate the application or not remains to be seen. In substance, no provision has been found which could oppose the right of free possession of property from ECHR Protocol 1.

**Part VIII - Real encumbrance (Art. 423 to 438)**

Part VIII of the Draft introduces a new type of security right into the Serbian law, namely the real encumbrance. A similar development can be noticed in Croatia as well as in Macedonia.

More recently, the real encumbrance has also been introduced in the Republika Srpska of Bosnia and Herzegovina. By way of real encumbrance, an immovable may be encumbered in such a way that recurring acts of performance are to be made from it to the person in whose favour the encumbrance is created. The real encumbrance may also be created in favour of the current owner of another immovable. Only one aspect of the real encumbrance is discussed here, namely, whether the right is in the Draft sufficiently determined in scope.

According to Art. 428 of the Draft "[t]he scope of the beneficiary´s powers shall be determined by the deed of establishment, according to the entry in the public register, *and if it is so defined by the deed of establishment or it is so agreed, it shall depend on the level of needs of the dominant estate, or the level of needs of the beneficiary."* This already indicates that the needs of the dominant estate, resp. of the beneficiary shall not necessarily remain the same as at the time of creation of the real encumbrance but may be subject to subsequent changes. In view of the fact that the right of real encumbrance subsists until the death of the beneficiary as a natural person, and if the beneficiary is a legal person, for a maximum of 30 years (Art. 432(2) of Draft) the subsequent changes of needs may turn out to be very substantial.

In the public register, the total value of personal or real encumbrance shall be entered (Art. 430(1) of the Draft). It does not seem clear from the wording of the law how this total value is registered in case it is provided that the scope of the beneficiary´s powers shall depend on the respective level of needs of the dominant estate or of the beneficiary. From the perspective of the right to peaceful enjoyment of property from ECHR Protocol 1 it seems important that the rights and obligations of the parties to the real encumbrance are defined in a clear and definite way in the law.

For example, the German law requires that in case the real encumbrance provides for an adjustment to changed circumstances, the type and scope of the encumbrance can be determined based on the requirements stipulated in the agreement. In other words, in the interest of legal security, the criteria for adjustment must be recognizable from the entry of the real encumbrance in the register. A similar provision can be found in the Croatian Law on Property and other real rights where it is said that content of real encumbrance can only be a determined, or at least determinable performance (Art. 249(2). A similar solution can be found in Art. 270(1) of the Property Act of the Repubika Srpska of Bosnia and Herzegovina.

By way of conclusion, the introduction of real encumbrance into the Serbia law can be evaluated as generally positive because it creates new possibilities in relation to immovable property. However, legal certainty would be enhanced by a clarification in Art. 428 of the Draft in the sense that the scope of the beneficiary´s powers must be determined, or at least be determinable at the time of the establishment of the right. Apart from this, in this part no possible opposition to the free possession of property from ECHR Protocol 1 could be found.

## Part IX - Pledge (Art. 439 to 583)

### Chapter A (Art. 439 to 449)

Following general tendencies in the former socialist countries, the right of pledge is transferred from LOblR to the property law, which can only be regarded a positive development. The pledges include not only the traditional *pignus*, registered pledge, pledge of rights and hypothec but also the right of retention (Art. 439(4) of the Draft).

In the general provisions for all kind of pledges which are concentrated in this chapter no provisions could be found which oppose the right to free possession of property from ECHR Protocol 1.

**Chapter B (Art. 450 to 486)**

No comments are made on the provisions on possessory pledge. The provisions on it apparently follow traditional concepts. In particular, no provisions have been found which could oppose the right to free possession of property from ECHR Protocol 1.

**Chapter C (Art. 487 to 521)**

The modern concept of non-possessory (registered) pledge has been introduced for the first time in Serbia some ten years ago, by way of a separate act. The division of property law into one general act which is then supplemented by various pieces of special legislation seems in the region wide-spread, but experience shows that this may impair the inner consistency of property law. The integration of registered pledges into the Draft should therefore be considered a definite advantage. As before, registered pledges may only be created on movables, including sets of movable things (Art. 488 of the Draft). The solutions of the Draft are based on experience from comparative law. No provisions have been found in this chapter which could oppose the right to free possession of property from ECHR Protocol 1.

**Chapter D (Art. 522 to 527)**

The right of retention is de lege lata regulated in the LOblR (Art. 286 et seqq.). The Draft transfers the matter to the property law and also introduces some changes. In the substance the right of retention may be considered a proprietary right because it provides a right to satisfaction from the value of the retained debtor´s thing (Art. 522(1)) and is effective also against third parties. Therefore there are no principle objections with regard to the transfer to the property law. Some provisions that are related to the right of retention will remain in the LOblR but this should not be in conflict with Chap. D.

The retentor is in the Draft given the right of retention on the debtor´s things regardless whether they are connected with the legal relationship from which the receivable arose, unless it is otherwise agreed (Art. 522(4)). Apparently, this amounts to a mere clarification and confirmation of the previous practice in Serbia. In any case, this appears a possible option. Under appropriate conditions the right of retention can be acquired in good faith from an unauthorized party (Art. 524). It can also be acquired by acquisitive prescription (Art. 525). No provisions have been found which could oppose the right to free possession of property from ECHR Protocol 1.

**Chapter E (Art. 528 to 542)**

The pledge of receivables and other rights is regulated in the Draft in more detail than in the Articles 989-996 LOblR. This corresponds to the growing importance of the pledge of rights in the practice. The pledge of receivable shall be entered in the public register at the request of the pledgee and shall produce effects towards third parties from the moment of the entry (para.(7) of Art. 532). No comments are made with regard to pledge of rights. In particular, no provisions have been found which could oppose the right to free possession of property from ECHR Protocol 1.

**Chapter F (Art. 543 to 583)**

Hypothecs have received only a rudimentary regulation in the LoBoOR (1980). A first comprehensive reform has been implemented in 2005. De lege lata, there are no other security rights which serve a similar purpose as the hypothec. The Draft reintegrates hypothecs into the general act on property law and improves their legal regime. The main novelty is that the Draft, in addition to the hypothec, regulates also two alternative security rights in immovables, namely the real charge [or land debt] and the right of entrusted securing ownership/anticipated securing ownership [or fiduciary transfer of ownership] (for details see X and XI below).

The hypothec is defined in the classical way in Art. 543 of the Draft. The possible hypothecated immovables are enumerated in Art. 544(1) to (10). The contents of Chap. F can be characterized as providing a modern hypothec law which namely allows for the necessary flexibility (maximum hypothec, disposition of undeleted hypothec, note on retaining the order of priority, conditional entry of new hypothec). Chap. F covers also the settlement of the hypothec. Special protection is provided in case that the pledgor is a natural person concluding the hypothec contract outside the framework of business activity and that the hypothec is for dwelling purposes. The sale of the hypothecated immovable may in such cases only take place with intermediation of a court (Art. 563(4), 570(2) of the Draft). Art. 561(2) of the Draft stating that the hypothec shall not have the quality of enforceable document unless it meets the requirements laid down by a specific law (meaning that as a precondition of out-of-court implementation, the due date and payment obligation of the secured receivable must be determined in an enforceable court decision or equivalent document) must also be considered an improvement. These amendments would noticeably enhance legal security in the settlement process. For facilitating the procedure, the hypothec can be made in the form of an enforceable notarial deed, or the notary may affix a certificate of enforceability (see Art. 570).

As a resume it can be said that the provisions on hypothec seem well elaborated. No provisions have been found which could oppose the right to free possession of property from ECHR Protocol 1.

**Part X - Real charge (Art. 584 to 632)**

The introduction of real charge (or land debt) is remarkable in itself. The way in which this is accomplished in the Draft seems to me without parallel in comparative law and rather fascinating.
It should be remembered that the land debt is normally associated with the German law ("Grundschuld", or land debt). Art. 584 et seqq of the Draft indeed more or less transpose today´s concept in Germany of a non-accessory security right in immovables, taking into account also the Swiss law which has a similar legal institute. But the Draft also takes into due consideration the highly complex nature of the land debt which makes its use as legal transplant problematic. For example, the Hungarian counterpart to the real charge, which is called *önálló zálog* (independent pledge), is in the Hungarian Draft Civil Code of 2012 replaced by a new type of hypothec, from which it may be concluded that the existing provisions are considered unsatisfactory.
The aim of the present Serbian Draft appears to be to adjust the real charge as much as possible to the domestic legal, social and economic environment. In order to achieve this aim, the Draft goes much more into detail than the models on which it is based. This is really important, because in contrast to Germany and Switzerland, Serbian jurist cannot resort to established court practice. Due to the fact that like the hypothec, the real charge is normally used for securing a receivable (and is in that case considered a "securing real charge"), the proper protection of the debtor is a crucial aspect. The debtor is in the Draft protected as much as reasonably possible. In this context it can inter alia be referred to the provisions on the security agreement in Art. 589 and to the provision on collectability of securing real debt in Art. 618 of the Draft.
Like the German BGB (and also the Slovenian Property Act 2002 which includes a set of rules on the land debt), the Draft recognizes two types of right, namely registered real charge and letter of real charge (see Art. 584(2), 605, 608). The latter possibility substantially facilitates the transfer of the real charge. Seen as a whole, the part X of the Draft demonstrates a rich experience in comparative law. One could argue that the hypothec and the real charge should better be regulated in the same part of the Draft, because they have a lot in common. The Draft could be shortened by abstracting general provisions for both hypothec and real charge. The particular features of the real charge could then be regulated

subsequently. But this is a matter of opinion and does not affect the quality of concept of real charge.
The introduction of real charge may have a very positive influence on the development of the Serbian credit market and may facilitate investments. It should be regarded as a major achievement of the Draft. No provisions have been found which could oppose the right to free possession of property from ECHR Protocol 1.

***Part XI - Other Security rights (Art. 633 to 671)***

**Chapter A (Art. 633 to 654)**

The chapter regulates the "right of entrusted securing ownership and right of anticipated securing ownership", in other words - the fiduciary transfer of ownership, including the expectancy right of the trustor as the provider of the security. The institute is not regulated in the LoBoOR. The Draft tolerates fiduciary transfer on movable as well as on immovable things. The right on a movable may be registered or not, as the case may be. Rights on immovables must always be registered (Art. 633 and 634).
As regards movable things, a well-developed non-possessory security right already exists in the shape of registered pledges. For immovables, three security rights would compete with one another (hypothec, real charge and entrusted securing ownership). It is legitimate to ask whether the right of entrusted securing ownership is really needed in view of existing alternatives which may appear more modern (and also more functional). On the other hand, it cannot be denied that fiduciary transfer of ownership has become popular in the region. Thus, all countries in South East Europe have introduced registered pledges. And yet, Slovenia has in parallel introduced fiduciary transfer of ownership on movables. A fiduciary transfer of ownership on movables as well as on immovables is possible under the Croatian law, but also in Macedonia and Montenegro.
The Draft differs from the provisions of other countries on fiduciary transfer in so far as it not only regulates the entrusted securing ownership of the trustee (=creditor), but also the "anticipated securing ownership" of the so-called trustor, as his right to reacquisition of ownership at the cession of the secured receivable. This addition will make the fiduciary transfer safer for the trustor. No provision has been found which could oppose the right to free possession of property from ECHR Protocol 1.

**Chapter B (Art. 655 to 671)**

Retention of ownership as a proprietary right is regulated in Art. 655 et seqq of the Draft, whereas for the contractual aspect, Art. 540(1) and Art. 541 LOblR shall remain in force. This change does not seem implausible. However, once again, the number of pertinent provisions is multiplied by the Draft. This is inter alia due to the fact that Chap.B covers not only the right of retained ownership of the seller, but also the right of anticipated ownership of the buyer in various contexts. No provisions have been found in the chapter which could oppose the right to free possession of property from ECHR Protocol 1.

**Part XII - Transitional and final provisions (Art. 672 to 685)**
The real rights acquired before the coming into force of the Law shall not cease. Likewise, the ground for acquisition, transfer or cessation of a right which were created before the coming into force of the Law shall remain valid (for details see Art. 672 of the Draft). No provision has been found in this final part which could oppose the right to free possession of property from ECHR Protocol 1.

## EXECUTIVE SUMMARY

For Serbia, the adoption of a new regulation in the field of property law is a necessity since the main source of the existing property law stems from socialist times and is not enough developed to fulfill present-day needs. The integration of matters which have so far been regulated by special laws (hypothecs, registered pledges) will make the system more transparent and consistent.

In the Draft, only few provisions could be found which would be in opposition with the free possession of property from ECHR Protocol 1. These are marked as such. In a number of cases, suggestions are made, namely where the Draft is not sufficiently clear or lacks proper balance.

## RECOMMENDATIONS

- The reform of the property law should be implemented in a way that as much as expedient, the established court practice could also be used in the future.
- Art. 14 of the Draft on prohibition of misuse should be revised.
- Art. 80 paragraph (1) sub-paragraph 1 should be revised.
- At the beginning of Part III Chapter C, a systematical presentation of the different sources of acquisition should be inserted, including acquisition by means of inheritance and by decision of state body.
- Art. 87 should be rendered more precisely.
- Art. 89 should be considered once again.
- Similar considerations hold true for Art. 90.
- The section on pre-emption right (Art. 91 to 111) should be omitted as a whole from the Draft; the matter should remain in the law of obligation.
- Art. 112 should be revised.
- Art. 113 should be discussed.
- Art. 117 should be revised
- Similar considerations as for Art. 113 hold true for Art. 122.
- The articles 125 and 126 should be omitted from the Draft.
- In Articles 141 and 142, the notion “public area” should be defined more precisely. Regulating the issue in the public law concerning the public roads should be discusses as an alternative.
- In Art. 160, the expression “ownership on a building” should be avoided.
- The last part of paragraph (1) of Art. 159 should be revised.
- Art. 163 should be revised.
- Art. 168 should be revised.
- In the Chapter on abandoning the thing (Art. 182 to 183), a provision should be inserted that ownership is terminated in case the thing is destroyed or consumed.
- Paragraph 3 of Art. 233 should be reconsidered.
- The regulation on condominium ownership should be made more consistent.
- Art. 271 on decision-making of the association of condominium owners should be revised, also in view of Art. 273.
- Art. 253 should be revised.
- Paragraph (2) of Art. 297 should be brought in line with the principle of *superficies solo cedit*.
- Art. 298 should be interpreted as meaning that a person may establish the servitude on the own things.
- Paragraph (2) of Art. 299 should be revised.
- Art. 300 should be reformulated in a comprehensible way.
- In the section on acquisition of real servitude (Art. 313 to 320), a more detailed regulation should be inserted on establishment of real servitude with contract.
- In the chapter on real-personal servitude (Art. 330 to 335), the admissibility of such servitudes which are not limited in time should be reconsidered, namely as regards legal entities as right-holders.
- Art. 334 should be revised.
- In Chapter on the right of servitude to build (Art. 336 to 347), the terminology should be fully harmonized with the *superficies solo cedit* principle
- Art. 343 should be rendered more precise.
- Paragraph (1) of Art. 360 could be discussed.
- Articles 428 resp. 430 should be supplemented as to the determination of the scope of the encumbrance.