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THE CONCEPT OF CONDOMINIUM IN THE PRELIMINARY DRAFT OF THE CIVIL CODE OF THE REPUBLIC OF SERBIA

Abstract

The author makes an observation that manner in which condominium is regulated in the law and its concept are very important because millions of people all over the world as well in Serbia live no longer in individual houses but in flats within multi-storey buildings. Subject of author's analysis in the paper is how is the issue of condominium regulated in the Preliminary Draft of Serbian Civil Code. First part of the paper deals with considerations of alternative solutions for definition of condominium to those proposed by the Preliminary Draft. Second part of the paper is dedicated to the concept of condominium adopted in the Preliminary Draft, while in the third part the author analyses novelties in regulations pertaining to the subject of condominium. Concluding part of the paper sums results of the analysis and presents evaluation of solutions brought by the Preliminary Draft and proposals for its corrections.

Key words: *property law, property, condominium, Serbian Civil Code.*

1. INTRODUCTION

Although we may say that each institute of the property law is relevant and indispensable, this statement is specifically applicable in the case of condominium since we can no longer imagine life without condominium in big cities and gradually even in smaller place. Millions of people all over the world live no longer in individual houses but in flats in multi-storey condominiums. Due to intensive growth of population in cities[1], as well due to lack of construction space and its high prices[2], construction of

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[1] G. Flattet, *Le retablisement de la propriete par etages dans la legislation Suisse,* Annales de la Faculte de droit d´Istanbul, No 23-24-25, T. XVI, Istanbul, 1966, 113; J. Limpens, *Copropriete par appartements et propriete horizontale en droit Belge,* Rapports Belges au VIII-e Congres international de droit compare, Pescara, 1970, 171-172.

[2] A. Meier-Hayoz, *Schweizerisches privatrecht V/I - Sachenrecht,* Basel-Stutgart, 1977, 87-88.

condominiums is spreading during last several decades. From an institute which was only "running harmony of the classic system"[3], it slowly became "formula of the present"[4]. Expansion of multi-storey buildings was also followed by corresponding regulations all over world.

Although practice of condominiums construction was evolving in our region in almost same pace as in other countries[5], situation with regulation(s) was specific. Construction of new condominiums was banned[6] before the IIWW as well during short period of time immediately after it. Some legal writers even referred to condominiums as „...perversion and exotic plant for which there is no fruitful soil here„[7]. Construction of this type of property was allowed just in 1959 and matter regarding it regulated by the Law on Ownership of Building Parts[8] which was initially enforced as federal law and latter, i.e. since 1971 as republic regulation in Serbia. The 1996 Decision of the Federal Constitutional Court[9] repeals this Law. Consequently, condominiums related issues are nowadays partially regulated in several legal acts: The Law on Fundaments of Ownership Relations[10] (hereinafter: ZOSPO), The Law on Habitation[11], The Law on Maintenance of Residential Buildings[12], The Law on Planning and Construction[13] and The Ordinance on

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[3] Data originate from: V. Krulj, *Svojina na delovima zgrada (etažna svojina) i izgradnja stambenih zgrada (stanova) neposredno za tržište,* Beograd, 1969, 6.

[4] A. Ionasco, *Copropriete par appartements et copropriete horizontale,* Academie internationale de droit compare, VIII-e congres, rapport general, Pescara, 1970, 16.

[5] More on this topic in: N. Planoevič, *Istoričeskoe razvitie sobstvennosti na žilbe,* Rossiĭskoe pravo v Internete, 4/2010.

[6] More on this topic in: N. Planojević, *Upis etažne svojine u zemljišnu knjigu i katastar nepokretnosti,* Anali Pravnog fakulteta u Beogradu, 1-6/2000, 189-221.

[7] Quotation from: R. Lenac, *Kućna communio pro diviso – Etažna svojina,* Zagreb, 1939, 34.

[8] Official Gazette of the Socialist Federal Republic of Yugoslavia (Službeni glasnik SFRJ), No. 16/59, 43/65, 57/65.

[9] Official Gazette of the Federal Republic of Yugoslavia (Službeni glasnik SRJ), No. 33/96, decision IU 23/95. The Law was repealed due to discrepancies of some provisions with the Constitution of FRY and federal laws.

[10] Official Gazette of the Socialist Federal Republic of Yugoslavia (Službeni glasnik SFRJ), No. 6/80, 36/90; Official Gazette of the Federal Republic of Yugoslavia (Službeni glasnik SRJ), No. 29/96, Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 115/2005.

[11] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 50/92, 76/92, 84/92, 33/93, 53/93, 67/93, 46/94, 47/94, 48/94, 44/95, 49/95, 16/97, 46/98, 26/01, 101/05, 99/11.

[12] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 44/95, 46/98, 1/01, 101/05, 27/11, 88/11.

Maintenance of Residential Buildings and Flats[14]. This is not only complex to manage, but these regulations are also incomplete and not in harmony, and this is inacceptable situation for a legal institute which is so represented and relevant in everyday life.

This is the reason why Preliminary Draft of the Civil Code of the Republic of Serbia got such attention of domestic experts (hereinafter: the Preliminary Draft): it regulates numerous legal institutes in a new manner[15], including also condominium related matters. After twenty years matter of condominiums is stipulated in one document, in a systematic and comprehensive manner. Since this is a massive text (condominium related matters are regulated in 35 articles of the Preliminary Draft), object of our considerations in this paper will be three most relevant issues regarding this institute. These are: notion, concept and subject of condominium. Due to limitations in the volume of the paper we will not deal with only one important issue in this area: regulations stipulating maintenance of buildings in condominium legal regime[16]. These issues will be analysed by comparison and comments of solutions from the Preliminary Draft and existing positive legal solutions, as well solutions given in comparative law. Our objective is to make evaluation of analysed regulation in the concluding part of the paper as well to give suggestions for potential corrections. Since public discussion of

[13] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 72/09, 81/09, 64/10, 24/11, 121/12, 42/13, 50/13, 98/13, 132/14, 145/14.

[14] Official Gazette of the Republic of Serbia (Službeni glasnik RS), No. 43/93.

[15] In the area of property law this specifically refers to rights to construction, gaining property from property non-owners, mortgage, etc. More on this topic in: N. Planojević, *Sticanje svojine od nevlasnika: glas protiv zabrane iz člana 1717 nacrta Građanskog zakonika Srbije,* u: Aktuelna pitanja savremenog zakonodavstva (ur. S. Perović), Savez udruženja pravnika Srbije i Republike Srpske, Beograd 2016, 55 - 71; N. Planojević, *Sticanje svojine od nevlasnika u Nacrtu zajedničkog pojmovnog okvira Studijske grupe za Evropski građanski zakonik,* Zbornik Matice srpske za društvene nauke, 135/2011, 279-291.

[16] More on this in: N. Planojević, *Održavanje stambenih zgrada: koncept, ciljevi i objekat (I deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2011, 491-506; N. Planojević, *Subjekti i sadržina usluge održavanja stambenih zgrada (II deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 2, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2011, 179 - 194; N. Planojević, *Raspodela troškova održavanja stambenih zgrada (III deo),* u: Pravo i usluge (ur. M. Mićović), Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2012, 923-935; N. Planojević, *Sankcionisanje neodržavanja stambenih zgrada (IV deo),* u: XXI vek - vek usluga i Uslužnog prava (ur. M. Mićović), knj. 3, Pravni fakultet Univerziteta u Kragujevcu, Institut za pravne i društvene nauke, Kragujevac 2012, 233-248.

the Preliminary Draft is still pending we see present time as appropriate to deal with this matter.

2. NOTION OF CONDOMINIUM

Condominium[17] is defined by article 1868 of the Preliminary Draft, but the Commission for Drafting of the Civil Code had a dilemma about the way how to define it; therefore, definition of the notion of this institute has four variants.

1. Variant presented by the Commission as first and the basic one says: „Two or more persons can have (ownership) right over a building as follows: each of the owners have exclusive right of ownership over individual part of the building and they all together have right of co-ownership over collective parts of the building and land (condominium).» Second version of the definition is identical to the first one in its content but only has different language formulation[18].

Common feature of these two variants of condominium definition (and at the same time feature which makes them different from following two versions) is that both discuss *ownership of the building held by two or more persons*, explaining further that this ownership is regulated in a way that each of them individually (again) owns separate part and they have co-ownership of other building parts and land. It stems from this formulation that within the ownership which several persons have over the building «there are» ownership of individual parts belonging to each of them and co-ownership of all owners on collective parts – this is impossible construction. Ownership consists of rights of possession, use and disposal of the property and cannot have different content; in particular it cannot include another exclusive ownership of different object (individual part) and co-ownership.

Secondly, thesis used as base for both versions of the definition - that building as a whole is the property of two or more persons - is not correct. Reading of the rest of the text in the Preliminary Draft regulating condominium related issues shows that all owners in the condominium or any of them individually or any other third person have no ownership or co-ownership right on the building as a whole. This does not mean that

[17] More in regard to terminology in: N. Planojević, *Terminološke dileme u vezi instituta etažne svojine,* Glasnik Pravnog fakulteta u Kragujevcu, 5/1996, 109-116.

[18] It reads: «Property of two or more person on building can be stipulated in a way that each of them has exclusive right of ownership on individual part of the building, and all together have co-ownership of collective parts of the building and land.»

condominium cannot also be organised as a unit with co-ownership of all owners in the condominium – as it is the case in Austria or Switzerland. But this is not the concept of condominium adopted in the Preliminary Draft and this is going to be discussed in the next part of our paper which will deal with condominium concepts in our and other countries of the world.

Condominium is regulated in the Preliminary Draft as a complex legal institute based on the assumption of ownership of individual (real) part of the building which each individual owner in condominium has and co-ownership of collective parts of building and land where building exists. We would add to this that condominium is not a simple sum of these two rights but new complex. As such it is, above all, complex of mentioned rights of *one person* which intrinsically bring new quality, and cannot be a form of ownership of several persons over one item, i.e. building[19]. Powers of (these) several subjects can be only discussed under provisional terms – in regard to collective parts of the building and land, but this is still not a central element of this institute in spite of its relevance which is not a matter of dispute at all. A *building as a whole* is not subject of any right of any entity both in our positive law and in the Preliminary Draft; therefore, community of condominium owners have no special rights on the building as a whole[20]. Descriptively saying, building is an object of a sum of all individual condominium ownerships having structures as earlier presented. Consequently, first two variants of condominium definition in the Preliminary Draft are not acceptable. These are not only based on incorrect thesis of ownership of two or more persons over the building, but are also entirely out of the context of the manner in which Preliminary Draft regulates condominium related issues[21].

2. Third and fourth variants of the definition do not contain shortcomings we have identified and pointed out with the other two versions, i.e. do not define condominium through any right over the building as a whole. These two definitions precisely pinpoint essence of the condominium, and the last version, i.e. fourth variant of the definition seems to be also the most

[19] See: N. Planojević, *Stvarno pravo u praksi,* Kragujevac, 2012, 154.

[20] On building as a whole in: M. K. Oguzman, *La propriete par etages en Torquie,* Annales de la Faculte de droit d´Istanbul, No 23-24-25, T. XVI, Istanbul, 1966, 145; K. Muller, *Sachenrecht,* Koln-Berlin-Bonn-Munchen, 1988, 574-575.

[21] In this case, article 1875 of the Preliminary Draft is explicitly unambiguous and reads: «Owner in the condominium can freely dispose of his individual part, jointly and inseparably with co-owned share in collective parts in the building and co-owned share in land (condominium unit / condominium share).»

acceptable one, saying: "*Condominium include exclusive ownership right over individual parts of the building and co-ownership right on common parts of the building as well co-ownership of the land on which building was constructed and land which serves to its regular use.*» In fact, this variant is ill-formulated (from linguistic point of view) endlessly repeating term «building» and superfluously using term «right» overwhelming the text and making it difficult to remember; but in essence it is the most adequate one. Everyone will agree that it is unacceptable to use the same word (building) so many times in one long sentence, plus use several times each of three more words: land, right and co-ownership – as if there are no pronouns or other terms to amalgamate the point. Precise (detailed) definition and proper language style are not necessarily mutually exclusive.

That's why we would suggest slight corrections in language and style of the definition; in our opinion, definition of condominium should read as follows: *Condominium for each owner individually includes ownership of individual part of the building and co-ownership of collective building parts and land where it stands.* Presented definition clearly marks structure of property in the condominium and its subject and content (in basic terms), but also clearly marks what each owner in it gains – at the same time, this is most important and most difficult for laymen to understand.

We believe it is not necessary to deal with further precise formulations of condominium subject already in the first article of its definition[22] and explain that it is a „...land where building is constructed and land serving to its regular use» (as it is the case with fourth variant of the definition). This explanation will follow in subsequent articles regulating subject of property in a condominium. Plus, in a way, it is assumed that it does not refer solely and strictly to the land under the building but also land needed for its access from the street and to use building at all. Another fact supporting position that definition should not be any further «extended» with so many words pertaining to land is that land is only one of elements making (threefold) subject of condominium property; and, it is senseless to define element related to land with precision and not do the same with other two elements of the subject of this right – individual and collective parts of the building. If we would do so definition would become too extensive and confusing. The definition[23] is a statement first to read when learning about regulations of

[22] On elements which need to be contained in the definition of condominium property more in: N. Planojević, *Etažna svojina,* Kragujevac, 1997, 174 – 182.

[23] Various definitions of condominium can be found in papers of domestic and foreign writers. In this context we refer to: G. Flattet, *op.cit.,* 117; H. P. Friedrich, *Zur rechtlichen*

certain institute, no matter if reader is layman or expert, and therefore it should be concise and well written – as nevertheless should be the case with any article in a law. Although it is correct – opposite to the first two versions of the definition, the fourth variant is everything but properly linguistically formulated and concise – unfortunately this seems to be the case with the style of the entire Preliminary Draft.

3. However, we find it's relevant to add another article - following the definition and before further regulation of condominium subject - which will give complete explanation to the reader what exactly condominium is and what it is not. The article would read:

The condominium building

(1) The condominium building consists of individual and collective parts.

(2) Legal regime in the condominium foreseen by this Law is applicable to buildings consisting of minimum two individual parts owned by two different persons.

(3) No individual is entitled to ownership of condominium building in its entirety.

Namely, two conditions which need to be cumulatively fulfilled in order to apply regime of condominium in one building are: to have *at least two* physically separated parts and these need to be owned by *different individuals*. This needs to be pointed out after the definition of condominium because it is not a generally known and understood matter. If one building is not divided into several separate units, or it is divided but these units are all owned by one and the same person – this is still individual property. This must be clear, as well as the fact that domestic concept of condominium does not mean anyone's ownership over the building in its entirety[24]. Since this was also a dilemma of the Preliminary Draft creators (as it is obvious from mistaken formulation of the first and second variant of the definition), we rightly assume similar omission might also be made by addressee of these regulations – especially if layman. We believe it is necessary to add article as proposed in order to prevent such situation.

Konstruktion des Stockwerkeigentums, Festgabe zur seibzigsten geburstag vom Max Gerwig, h. 55, Basel, 1960, 26; J. von Gierke, *Das Sachenrecht des Bugerrlichen Rechts,* Berlin-Frankfurt a.m., 1959, 131; A. Ionasco, *op.cit.,* 14-16; B. Vizner, *Građansko pravo u teoriji i praksi,* knj. III, Rijeka, 1969, 151; S. Aranđelović, *Enciklopedija imovinskog prava i prava udruženog rada (odrednica "Etažna svojina"),* Beograd, 1978, 341; A. Finžgar, *Komentar Zakona o svojini na delovima zgrada,* Beograd, 1960, 261, etc.

[24] On this topic more in: Z. Stefanović, *Etažna svojina,* magistarska teza odbranjena na Pravnom fakultetu u Beogradu 1992.

3. CONDOMINIUM CONCEPT

Hereinafter we will briefly at the beginning present concepts dealing with condominium related issues which exist in the world, and then we will identify which one is followed by the Preliminary Draft and comment on this determination.

1. There are several condominium concepts in comparative law[25] which can be narrowed down to two basic: unitary and dualistic.

According to the *unitary* concept, condominium is an single not complex right and this concept has two variants: *ownership* which is now an old-fashion phenomenon[26]; and *co-ownership*[27] which purports co-ownership of all owners in the building as a whole with certain shares in this ownership while keeping the exclusive individual rights to use solely one real part of the building. This right to use one part of the building (flat, office...) is (real) property right, similar to easements, but it is not ownership right (co-ownership in a building cannot include also ownership of individual parts of the building). This concept of condominium nowadays exists in Switzerland, Austria, etc.

Dualistic concept treats condominium as complex legal institute which for each individual owner in a condominium is a sum of two rights: ownership over individual parts and co-ownership of collective parts of the building and land. Dualistic concept further has two variants: Roman and German - depending on which of these two rights is considered primary and which is secondary.

According to the *Roman* variant[28], main right is ownership of individual part and it is present in most of the countries of the world including our

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[25] On legal nature of condominium as property more in: N. Planojević, *Pravna priroda etažne svojine*, Pravni život, 10/1995, 309-327.

[26] According to this version of unitary concept which originates in primary forms of condominiums in medieval times, building in a form of condominiums is about "harmony" of different individual properties just like vertically one storey is placed over another. On this concept more in: G. Marty, *Copropriete par etages et horizontale (droit Francais),* Session de droit compare, Pescara, 1968, 3; H. P. Friedrich, *op.cit.,* 14.

[27] On this concept more in: E. H. Kaden, *Das Wohnungseigentum im deutschen, schweizerischen und franzosischen Recht,* Zeitschrift fur Rechtsvergleichung, h. 4, Wien, 1969, 266; R. Sacco, *Copropriete par appartements et copropriete horizontale,* Congresso di Diritto Comparato, Relazione Nazionale Italiana, Pescara, 1970, 8-11.

[28] On this concept more in: S. Krneta, *Pravna priroda etažnog vlasništva,* otisak iz Godišnjaka Pravnog fakulteta u Sarajevu, Sarajevo, 1991, 58-60; M. Vedriš, *Vlasništvo stana,* Zbornik Pravnog fakulteta u Zagrebu, 3-4/55, Zagreb, 195-196.

positive law. According to *German* variant[29], principle right is co-ownership of collective parts of the building and ownership of individual part(s) is accessory. This is condominium concept present in Germany, Republic of Srpska etc.

Some countries with *common law tradition* recognize condominium as combination of property and law of obligations, i.e. combination of ownership of individual part and long-term leasehold of common parts of the building which are property of one individual – one of the owners in a condominium or a third person (as for example in the UK); or concept where owner of the building is shareholders group and shareholders are solely users of certain individual parts based on the right which is not ownership right (USA)[30].

2. Based on the definition of condominium (especially its third and fourth variant), as well on the basis of the entire part of the text regulating this institute in the Preliminary Draft, we can draw a conclusion that condominium is not treated as single right but as a complex legal instrument which has two elements pertaining to each individual owner in the condominium: ownership of individual part and co-ownership of collective part(s) and land, i.e. the Commission decided to follow dualistic condominium concept dominating in the world and in line with domestic legal tradition as this is the concept already existing in our positive law.

However, since it is not yet known which of four variants of condominium definitions will be accepted, adoption of the first two might create certain problems as these two definitions, as we have already explained, leave impression that there is even certain right of ownership on the building as a whole. This further leads to a conclusion that Preliminary Draft text follows unitary concept and this is not in line with remaining part of the text. Therefore, adoption of first two options of condominium definition should be avoided in order to avoid confusion.

Since dualistic concept (as we have already explained) has two variants – depending on which of two rights, i.e. its constitutive elements, is taken as the principal and which is accessory right – question to follow is: does the Preliminary Draft reflects Roman or German version. As this is important question, usually it needs to be regulated by the legislator in a separate provision or sometimes even within the definition of condominium itself; this

[29] On this concept more in: F. Baur, *Lehrbuch des Sachenrechts,* Munchen, 1977, 268-269; H. Eichler, *Institutionen des Sachenrechts,* 1. band, Berlin, 163-164.

[30] On this concept more in: J. Hazard, *Copropriete par etages et horizontale (droit des Etats-Unis),* Assotiation Internationale de Droit compare, Pescara, 1968, 4.

was not done in the Preliminary Draft. Based on the entire text of the Preliminary Draft and especially based on the article 1875 under the title «Disposal of Condominium», we can't yet certainly conclude that Preliminary Draft recognizes Roman variant of dualistic concept where ownership of individual parts is principle and co-ownership of collective is accessory right. Article 1875 of the Preliminary Draft reads: «Owner in the condominium can freely dispose of his individual part, jointly and inseparably with co-ownership share in collective parts of the building and co-ownership share in land (condominium unit, condominium part).» Conclusion that property is the principal right stems primarily from the fact that it is a principle object of disposal and disposal of co-owned part comes in addition to it – although, strictly interpreting, terms «commonly and inseparably» still do not indicate primacy of any of the two rights.

Therefore, new article should be added in the text of the Preliminary Draft to unambiguously give framework to condominium concept followed by the Preliminary Draft. This article could read:

Relation between rights on individual and collective parts of the building

Co-ownership of collective parts of the building and land is accessory right and it is inseparably linked to ownership of individual building part (principle right) treatment of which it shares (accessory relation).

3. Finally, we find it proper to follow Roman type of dualistic concept in the Preliminary Draft since it reflects real state of facts: an individual buys flat or other individual part for his personal cause – not to be able to use staircase, roof or other collective parts of the building; therefore, it is logical that this (ownership) right needs to be the principal while right to use collective parts and land needs to have accessory feature. Collective parts of the building are just necessities in their nature - an „infrastructure" required to use individual parts. German type of dualistic concept or co-ownership variant unitary concept perhaps can be acceptable in countries where is its origin, i.e. where condominium was spontaneously and since ever organised in such manner and where it is a part of the tradition – in Germany, Switzerland or Austria. But, in our opinion, these concepts should not be followed in countries where these did not exist earlier, like it is the case with our country, and especially because these do not reflect the reality: no one buys a flat to gain rights like easements or to become co-owner of the building. For this reason it is positive that the Commission did not follow the tendency which is popular

in some of former Yugoslavia countries: in entity of the Republic of Srpska[31] where German type dualistic concept was adopted.

4. CONDOMINIUM SUBJECT

Complex structure of condominium is consequence of the complexity of its subject. It is threefold, if we may say so, and linked to each owner in the condominium individually: 1) individual/physically separated part of the building; 2) collective parts of the building; and 3) land beneath the building and around it which is needed for its regular use. Presented reasoning of the subject of condominium ownership is not a matter of dispute both in domestic and foreign legislation and legal theory, but there are differences in regulations pertaining to the number and sorts of building parts which can be individual and what distinguishes them from collective parts. Further in the text we will firstly present regulations of these issues in other countries and Serbian positive law, and then we will identify which of these concepts are followed in the Preliminary Draft and comment on this determination.

4.1. Condominium Subject in Comparative Law

Based on analysis of legal documents of different countries there are at least four identified ways used to distinguish individual from collective parts of the building.

First method of separation is basically exhaustive list of building parts which are individual, and this consequently reflects introduction of the principle *numerus clausus*. List of collective parts is further negatively determined, i.e. collective part is the part which is not in the exhaustive inventory of individual building parts. This method of separation is applied in Serbia where individual parts are: flat, business premise (office), garage and parking lot in the garage; this was also (till recently) concept applied in Montenegrin law[32]. Its positive side is precision and simplicity of application, and negative side is that principle *numerus clausus* does not allow to extend

[31] More on this in: N. Planojević, *Koncept etažne svojine iz nacrta Zakona o stvarnim pravima Federeacije BIH i RS i koncepti drugih država,* Pravna riječ, 8/2006, 195-213; N. Planojević, *Karakteristike privatizacije stambenog fonda u Republici Srpskoj, sa osvrtom na rezultate ovog procesa u SRJ,* Pravni život, 5-6/2001, 131-149.

[32] More on this in: M. Lazić, N. Planojević, *Svojina i fiducijarna svojina u novom stvarnom pravu Crne Gore,* Pravni život, 10/2011, 511-528.

list of individual parts as needed due to modernisation of living which changes habits of people.

Second group of legislators solves this problem starting from the point which is contrary to the previously presented: they exhaustively determine list of parts which cannot be individual but always, *ex lege*, are collective parts. Other parts can be collective or individual and owners in the condominium define this list individually for each building. This is the method used, for example, by German and Swiss legislators. It eliminates static which is a fundamental shortcoming of above described system. A shortcoming of this system is that building parts which are not in a group of *ex lege* collective parts are separated based on the rules set by owners in the condominium - these rules are rarely complete and there's always a building part left «unallocated». Solution was found in introduction of presumption which in Germany says that these parts will be treated as collective, and in Switzerland as separate[33]. Shortcoming of this solution is that legal presumptions do not match real situation.

Third, the most numerous group are countries which regulate subject of condominium by creation of lists of, for example, typical individual and collective parts with no pretension to formulate criteria for its separation – like Belgium, Italy[34] and some other states. Having in mind (optional) guidelines given in the law, owners in a condominium (in their own rulebooks) further define parts which are collective and individual. It seems, however, that such guidelines are insufficient and that possibility of dispute is highest in these countries due to lack of separation criteria and as consequence of imperfection of regulations in the rulebook.

Fourth method of separation between collective building parts is presented in the French law. Separation criteria[35] are simple and efficient: it is *purpose* of certain part of the building (on what legal grounds part is used) to serve to all or to individual condominium owners; and/or nature of its *current use*. If it is a part of the building in question which by legal grounds is intended to individual use of an owner in the condominium – it is then individual part no matter if it is flat or elevator or something else. The same principle is applied for collective parts. When it comes to type of the item

[33] See: art. 712b, p.3 of the Swiss Civil Code and par. 1 and 5 of German WEG.

[34] See: par. 11 of Belgian Law on Condominiums from 1924 and art. 1117 of Italian Civil Code from 1942.

[35] This criteria was elaborated in: G. Marty, *Copropriete par etages et horizontale (droit Francais),* Session de droit compare, Pescara, 1968, 7-9; A. Ionasco, *op.cit.,* 68; A. Meier-Hayoz, *op.cit., etc.*

which can be separate or collective part, the law does not contain any limitations or suggestions. Only in the case of lack or opposition of legal grounds, the law sets a rule what obligatory needs to be treated as collective part (other parts can be individual as well) – until lack of legal grounds is fixed: this again «revives» will of owners in a condominium. French criteria of purpose and/or use is simple, precise, elastic and respects will of owners in the condominium; therefore, it is considered to be one of the most successful division criteria[36].

4.2. Condominium Subject within the Preliminary Draft

1. Arrangement. The Preliminary Draft gives two variants of regulations pertaining to condominium subject. First variant has three articles and first of them is titled «Individual part of the building», second is «Garage» and third one «Collective parts of the building and land». Second variant proposed by the Commission is to substitute these three articles with one containing more paragraphs under one title «Subject».

In our opinion, first proposed variant is more descriptive and, therefore, more adequate. However, we would merge article under the title «Garage» with article under the title «Individual part of the building». Namely, as the Preliminary Draft categorises garages as individual building parts it is not clear why this type of individual part needs to be regulated in a separate article since it is under the same legal regime as flats or offices for which rules are defined under the title «Individual parts of the building».

2. Notion of the individual part. Article 1869 of the Preliminary Draft says two terms need to be fulfilled in order to treat one part of the building as individual: 1) it must be independent functional unit, and 2) it must have separate entry. Our positive law defines flat in almost identical manner, but not other individual parts – this means that at the moment in Serbia it is not know what terms individual part needs to fulfil in order to be treated as business premise (office), garage or parking lot in a garage and these are *numerus clausus* separate parts' according to the article 19 of the ZOSPO. Therefore, it is good that the Preliminary Draft, first of all, defines notion of individual part in general, and then continues to determine types of these building parts. We would, however, add another element to two already foreseen elements in the Preliminary Draft: that it is part of the building which is suitable for *use in line with its purpose.* Namely, the sole fact that certain space has separate entry and that it represents the unit which is

[36] More on this in: N. Planojević, *Predmet etažne svojine,* Pravni život, 10/1996, 49-70.

functional is insufficient, and this unit necessarily needs to be suitable for the purpose it was bought for: living, vehicle keeping etc.

3. Types of individual parts. Method which the Preliminary Draft uses to distinguish individual parts from common is combination of third and fourth methods presented as classification in the paper above: third method defines individual and fourth defines collective parts of the building. Although we believe that such combination of regulation methods – where one is applicable on individual and the other on collective parts of the building – is not an ideal solution, the combination used in the Preliminary Draft is not inacceptable although it is clear from our earlier text that fourth method of regulation is perhaps the most successful one and as such might be the best to apply: not only to define collective but also individual parts of the building.

As we have explained, use of third method means that most usual types of building parts will be given in the text only as examples and they don't necessarily need to be individual parts. This is the way in which individual parts were defined both in article 1869 and article 1870 of the Preliminary Draft. The Commission proposed two variants to regulate types of individual parts of the building.

First variant, in article 1869 gives flat and business premise (office) as typical individual parts, and in the following article 1870 also adds garage, clearly marked garage lot, basement, terrace, atelier, warehouse, shelter (if not in public ownership) and other premises which have functional connection with the building.

Second variant given in article 1869 uses flat and office as examples of typical individual building parts and includes examples of some other independent premises. Article 1870 adds that individual part can also be self-contained premise or clearly marked area on the land and as an illustration for this it lists the same parts as in the first variant (garage, garage lot, basement, warehouse and shelter), with an exception of atelier and terrace which are left out.

First conclusion out the presented is that the Preliminary Draft entirely abandoned fairly criticized[37] method of exhaustive enumeration of individual parts applied in our positive law and does not limit parts which could have feature of individual part in number and type. In comparison with the comparative law, the Preliminary Draft contains one of the most

[37] See in: N. Planojević, *Model etažne svojine za budući građanski zakonik,* u: Građanska kodifikacija - Civil Codification (ur. R. Kovačević Kuštrimović), sv. 2, Pravni fakultet Univerziteta u Nišu, Centar za publikacije, Niš, 2003, 199-226.

comprehensive lists of building parts which can be individual including in the category almost each part of the building someone could think of as part in individual use of one condominium owner and not harming others or building as a whole. Since flat, office, garage and garage lot are individual parts which are not matter of dispute both in our and other countries, we will analyse in more details only the list of remaining parts given in the Preliminary Draft as potentially individual.

First observation we need to make is that each part of the building defined in the Preliminary Draft as part which could be individual is actually suitable for individual use of one owner in the condominium, and usually in practice this requires to allow exclusive ownership of such part to the owner; therefore, solution we can find in our positive law - where these parts are by the rule collective parts - is inadequate. However, all individual parts mentioned in the Preliminary Draft do not have same features and nature or do not have same level of independency, if it would be more proper to formulate it this way. Consequently, we would divide them in two categories which need to have different legal treatment. The first category would be ateliers and warehouses, while basement, terrace and shelter are the second group.

When it comes to *ateliers and warehouses*, these are premises which are in its nature very close to business premises (office). Atelier (or studio) is usually used as reference to a space where painters, fashion designers or architects work, while warehouse is mostly used by vendors or producers of some goods suitable to be stored within the area of condominium, i.e. building in condominium legal regime. These parts are really suitable not only to individual and sole use of certain individual, but also to be units which can be independently sold/purchased since they have independent function and purpose and can (but not necessarily) be connected to other individual part such as flat or office. The only question left open is their separation from business premise and determination of elements which will distinguish them as individual parts (if this is of any relevance in this context).

Basement, terrace and shelter within the building have different features then atelier and warehouse and, in our opinion, they need to be treated under different regime. *Common* feature for basement, terrace and shelter on one side and atelier and warehouse on the other side is that both can be individually used by one owner while other owners suffer no harm from that – which is not the case with staircase or elevator, for example. Namely, the fact is that there is no reason for single, separate basement unit solely used by one owner of certain flat within the condominium (which is commonly seen

practice in basements in our buildings) not to be in the property of that owner but to be collective property of all owners in the condominium as it is the current solution. The same case is with the terrace which is not integral part of a flat or shelter: if these are parts of the building which due to the position can be used only by one or several owners in the condominium (each uses certain part of it).

There is, however, *difference* between atelier and warehouse on one and basement, terrace and shelter on the other side: basement, terrace or shelter can be suitable for individual and exclusive use of one owner, but in our opinion are not suitable to be independently sold. While purchase of an atelier as individual building part is reasonable, it is not clear what sense it makes to buy basement, terrace or shelter separately from a flat or office used by their owners? These parts have functional connection with the flat and serve to facilitate its use and add quality to it, so it is senseless to treat them as individual parts only because they can be subjects of sole use by one owner – since this automatically means that it can be independently in use like any other individual part, i.e. flat or garage. These parts of a flat are in relation with it which is very similar to relation between main item and accessory where leading principle is «Accessorium sequitur principale"; therefore, exclusive ownership should be allowed to owners of flat or other individual part but should not be allowed to trade in these parts separately, as this would not make sense. Namely, it is difficult to find reasoning for someone to buy a terrace in a building (or separate basement or shelter) which is individually used by an owner in a condominium who also uses flat connected to these parts (although not necessarily its integral parts) and not to buy the entire flat.

The problem with different nature of building parts which are named as individual parts in the Preliminary Draft could be solved by introduction of another element in the notion of individual part. Any part which represents (1) independent functional unit, (2) has separate entry (already foreseen by the Preliminary Draft) and (3) is suitable for use in line with its purpose (addition we have earlier suggested), and has another feature: (4) it is *suitable for independent sale*, i.e. has no status similar to accessory to another individual part, can be treated as individual part. This would allow two types of separate building parts to be exclusive ownership in the condominium: a) those parts which have feature of individual part because they can be in independently sold, like flat, office, garage, garage lot, atelier, warehouse or similar premise; and b) those which have features similar to accessory to one of above mentioned individual parts but have no feature of individual part since they cannot be independently sold, i.e. separately to the part to purpose

of which they serve – like terrace, basement, shelter and similar premises. In this context, we need to have in mind that comparative law does not always discuss individual and collective parts of the building, but parts which can be subject of exclusive ownership and those which are subject of co-ownership regime.

It is of particular relevance to stress that second category of building parts with features similar to accessory does not belong to group of integral flat parts[38], i.e. parts which are exclusive property of flat owner exactly for that reason and cannot be in other ownership regime. We could use terrace as an example for such division: it can be integral part of a flat as individual part (kitchen balcony), but it can also be integral part of collective building parts (rooftop terrace) with the position which allows only one or several owners in the condominium to use it – for example, owners of flats on the top storey. Both described terraces can belong to a single owner but the first mentioned is always integral part of a flat, and second can but does not necessarily need to be exclusive ownership of a single person, according to the Preliminary Draft, and this depends on the agreement between owners in the condominium. Second describer terrace, according to regulations in force in Serbia, belongs always to group of collective building parts. According to the Preliminary Draft, it is not only exclusive property of one owner but also treated as individual part – this we find inacceptable since this would allow its potential independent sale and it would not be reasonable. Therefore, such terrace – no matter it is not integral part of a flat – must share same destiny of the flat in legal treatment; this is subject of agreement between owners within the condominium but terrace must not have status of an individual building part.

Finally, we would like to propose following regulation pertaining to individual parts of the building in the Preliminary Draft:

Individual building parts

(1) Individual part of the building is constructively and functionally separate unit composed of one or more premises, which has separate entry and which is suitable for independent use in line with its purpose and which is suitable for independent sale.

(2) Following belongs to a group of individual building parts: flat, business premise (office), garage, parking lot in a garage, atelier, warehouse, etc.

[38] More on difference between accessory and integral part of a complex item: O. Stanković, M. Orlić, *Stvarno pravo,* Beograd, 1994, 9 – 12.

(3) Devices and installations which serve solely to that individual part also belong to it, in spite the fact they are incorporated into collective parts of the building.

Parts of the building intended to use of individual part(s) can also belong to it as accessory, especially if subject parts are: separate terraces and balconies, separate basement, attic and similar premises, and if those are clearly separated from other parts of the building, and if those are accessible from the subject individual or collective parts of the building. Regulations of this Law applicable to accessory shall be applicable on described parts as well.

We believe regulation given in the Preliminary Draft in relation to individual parts of the building would be acceptable with suggested correction. Positive side of the regulation is that it is flexible and follows practical requirements, so parts in question can but do not necessarily have to be individual – this will depend on the will of owners in each condominium individually.

4. Notion and types of collective parts. Collective parts of a building were determined in the Preliminary Draft in line with the fourth method of classification presented in the previous part of the paper, i.e. there is no exhaustive list of collective parts in the Preliminary Draft and they are not even given as examples (unlike individual parts). Similar to the French legislator, the Preliminary Draft defines collective parts in line with their purpose: these are parts of a building which serve to collective use of owners in the condominium (article 1871). This manner of regulation and separation of individual from collective parts is clear and efficient because way of their use determines with no mistake to which part of the building it belong. Since collective parts are numerous, perhaps it is not necessary to present them as examples although it is possible that this would be more understandable for laymen in such a complex area. We'd add following text to regulations in this area:

(1) Part of the building which for its position is at the same time both individual and collective, i.e. serves to the building as a whole but also to certain individual part (for example: bearing wall of the building which is also wall in a flat, flat roof of the building which is also roof of a flat, etc.) shall be treated also as collective part.

(2) In the case of vagueness, part will be treated as collective not as an individual.

(3) Collective parts which are not needed in use of all or some individual parts of the building can be transformed into individual parts under terms prescribed by this Law.

5. Finally, the Preliminary Draft states that subject of condominium property is also land on which the building was constructed as well land needed for its daily use – which is correct definition of the third element of condominium subject.

5. CONCLUSION

Based on the above presented we can conclude that notion, concept and subject of condominium are in general well regulated in the Preliminary Draft. Yet, many solutions may be subjects of certain remarks and, therefore, their corrections as we presented in the paper are necessary. This means following:

1. In regard to the *notion* of condominium, we believe that the fourth definition variant should be chosen among four offered, with some corrections in language and style as it was discussed. Initial two variants are entirely inacceptable because they create wrong impression that anyone can have right of ownership on the entire building and this does not correspond with the concept of the Preliminary Draft.

2. The Preliminary Draft adopts Roman type dualistic *concept* of condominium which already exists in our positive law and which is predominantly accepted in the world – this we find an adequate determination. Introduction of a new article is, however, necessary to more directly highlight accessory character of the right on collective parts of the building and land in comparison to the right of owner in the condominium on individual part(s) of the building.

3. *Subject* of condominium is adequately determined as threefold. In our opinion it is positive that the Preliminary Draft abandons *numerus clausus* principle for individual parts. The only necessary correction refers to the notion of individual part - it needs addition of two more elements: that it is a unit suitable for use in line with its purpose; and which is suitable to be independently sold. This could further reflect on types of building parts which can be individual, i.e. it could not be any part which is solely owned by an owner in the condominium but only the part which is not considered accessory of another part offered for sale.

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