**Aleksandra Pavicevic***

*DOI: 10.46793/LawPG.375P*

# FINDING OF TREASURE TROVE IN COMPARATIVE LAW AND IN FUTURE SERBIAN LAW


## *Abstract*

*The subject of this work is comparative analysis and assessment of legal effects and legal nature of the finding of treasure trove in nine European regulations and in the Draft of Uniform Serbian Civil Code that impersonates the future Serbian law. Assessing the public or private property acquisition by finding the treasure trove, both relatively equally argumented, by observing this specific originary kind of finding, the author may come to the conclusion that the notice of the Draft is, in principle, pursuant to notices of neighbouring countries, aimed at harmonizing regulations on subregional level. Concurrently, the author accentuates how important it is that the bounty height and the cost of finding are properly determined for more optimal regulation de lege ferenda. Author also asks for the introduction of possibility of acquiring private ownership subsidiary, in the case when the state uses its abandon right.*


***Key words:*** *treasure trove; acquisition of property by finding; a bounty; legal nature of finding.*

## 1. INTRODUCTION

A way the property is acquired must be standardized in all legislations, representing the important issue that reflects the legislator`s assessment of acquisition`s justifiability in the given case and the legal conscience of how crucial it is that all real right effects of factual acts done by legal personalities are comprehensively regulated. The issue seems crucial in the case of originary property acquisition where the legislator prescribes the sequence of statutory facts whose set leads up to establishing the new law of property. Due to the characteristic of exclusiveness, new property displaces the former, if there was any; if an item had no owner, the new property right functions as

* Teaching Assistant, University of Kragujevac, Faculty of Law (e-mail: apavicevic@jura.kg.ac.rs).

a keeper of the item that can not be included in legal transactions as it lacks the subject of appropriation.

Finding of treasure trove is just such a way of acquisition where the item[1], hitherto hidden, is found by factual act and then newly introduced in the sphere of legal interest for the need of establishing its new owner[2]. Acquisition of property by this item is even more attractive in terms of economy, as we speak of valuables and precious chattels, so the legislator has to set a standard and make a balance between conflicting interests of parties participating in this legal relationship. The named interests include: interest of the finder, interest of the owner of the item in which the treasure trove was found and interest of the state.[3]

Complexity of these issues implies the importance of comparative law methods application in the study of legal effects and legal nature of the finding of treasure trove as a specific way of property acquisition. In substantive law of the Republic of Serbia the finding of treasure trove is not regulated, so domestic regulation system can not be our sample.[4] However, due to the fact that in Serbia the finding of treasure trove is standardized as the way of property acquisition in the Draft of Uniform Serbian Civil Code[5] which are the proposition for the future Serbian law[6], this text will be the subject of our study.

The subject of this work will be the analysis and comparison of legal effects of this kind of finding in 9 foreign significant European regulations: French, Austrian, German, Swiss, Slovenian, Croatian, Macedonian, the

---

[1] I. Babić *et al., Komentar Zakona o stvarnim pravima Republike Srpske*, Sarajevo, Privredna štampa, 2011., 125; B. Eisner, M. Horvat, *Rimsko pravo*, Zagreb, 1967, 248.

[2] J. L. Bergel, M. Bruschi, S. Cimamonti, *Traité de droit civil,* Les biens, Paris, 2000, 249.

[3] More about problems about legal concequences of finding a treasure trove in Serbian positive law see in: A. Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu,* Nova pravna revija, god. 5, br. 1-2/2015., 86-93.

[4] I. Babić, *Nalaz skrivenog blaga,* Zbornik radova Pravnog fakulteta u Nišu, br. 56/2010, 45; R. Kovačević - Kuštrimović, M. Lazić, *Stvarno pravo,* Niš, 2004, 151; D. Stojanović, *Stvarno pravo,* Kragujevac, 1998, 146; Ž. Perić, *Specijalni deo Građanskog prava i Stvarno pravo,* Beograd, 1920, 38; Z. Rašović, *Stvarno pravo,* Podgorica, 2010, 182; M. Bartoš, L. Marković, *Građansko pravo – prvi deo – Stvarno pravo,* Beograd, 1936, 47.

[5] The legal proposal for future serbian regulation of finding a treasure trove is contained in art. 1792 – 1797 Draft of Uniform Serbian Civil Code (Nacrt građanskog zakonika Srbije). See: The third book – Real rights, The first part, The second chapter – acquisition of property, Section VII. http://www.mpravde.gov.rs/files/NACRT.pdf, july 2016. In the following text: Draft. Currently, there are two different alternatives for this article (art. 1795).

[6] Alternative solutions proposed in other Drafts see in: A. Pavićević, *op. cit.*, 91-92.

Republic of Srpska and Montenegrian. The sample is consisted of regulation`s notices, either selected by a criterion of civil-law tradition`s relevance and duration, or by a criterion of fomer common legal tradition with ex- Yugoslavian countries that had set new real right laws.

Our first goal is to place the Draft in a particular group of regulations related to legal effects of the finding of treasure trove; define similarities and differences among regulations within the same group; determine and axiologically estimate the prevailing model in Eurocontinental legal systems based on 10 representative regulations. The second goal is to determine what is the legal nature of property acquisition by the finding of treasure trove, considering several existing concepts in legislations and legal theory.[7]

All these conclusions will be useful for: overviewing contemporary tendencies in regulating the finding of treasure trove in European law[8], and potentially more useful for harmonizing various solutions. The finding of treasure trove is not only archeologically, historically and culturally siginficant, but above all legally important not only for professional public, but also for each individual who could be found in a situation that is not frequent, but launches numerous legal issues[9]. The most important of them is undoubtedly the following: whose is the treasure now?

## 2. MODELS OF LEGAL EFFECTS OF THE FINDING

By summary analysis of ten notices of the named regulations, there are two basic models of legal effects of the finding of treasure trove, derived on the basis of a criterion - *possessory form* that arises from this kind of finding. The first group consists of regulations that standardize found treasure as a form of *private ownership* acquisition, found in the law of: France[10], Austria[11], Germany[12], Switzerland[13] and Slovenia.[14]

---

[7] Especially important is to distinguish legal nature of finding treasure trove frome acquiring property by finding someone else's lost movables. More about these differences in: A. Pavićević, *Pojam izgubljene stvari,* Pravni život, 5-6/2014, 103-116.

[8] X. Henry *et al., Code Civil,* Paris, 2010, 931; N.E. Palmer, *Treasure trove and the protection of antiquities,* The modern Law Review, 1981, vol. 44, Issue 2, 1981, 178-187.

[9] In French legal theory the importance of incidental finding is particularly emphasized versus the criterion of value of treasure trove, which, according to these authors, is not crucial for the institute. X. Henry *et al., op. cit.,* 931. Contrary to this, treasure hunting in technical (institutionally unorganized) sense is allowed in angloamerican literature. More about phenomenon „treasure hunting" see in: N.E. Palmer, *op. cit.,* 178.

[10] Art. 716 of French civil code - CC (Code civil des Français).
Web address: http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf, jun 2016.

The second group consists of systems that regulate the finding of treasure trove as a form of *state ownership* acquisition[15], found in the law of: Croatia, Macedonia, the Republic of Srpska, Montenegro and in the notice of Serbian Draft. By the fact of finding the treasure trove, the finder gets primary *legal duty* to keep the item for the state, whereby it later becomes the state ownership [16] (i.e. ownership of the local authority unit where the treasure trove is found).[17]

Conscientious finder and the owner of the estate[18] where the treasure is found, have only the obligation right to "appropriate bounty", which they share among themselves. The bounty is not less than anticipated for finding

---

[11] § 398 Austrian civil code – ACC (Allgemeines Bürgerliches Gesetzbuch - ABGB). Web address: http://www.ibiblio.org/ais/abgb1.htm, may 2016.

[12] § 984 German civil code – GCC (Bürgerliches Gesetzbuch - BGB). Web address: http://www.gesetze-im-internet.de/englisch_bgb/, july 2016.

[13] Art. 723 Swiss civil code – SCC (Schweizerisches Zivilgesetzbuch). Web address: http://www.admin.ch/ch/e/rs/2/210.en.pdf, july 2016.

[14] Art. 53 Real right code of Slovenia, hereinafter: RRC. (Stvarnopravni zakonik Republike Slovenije, „Uradni list Republike Slovenije" 87/2002).

[15] More about one similar kind of „finding" see in: A. Pavićević, *Pravne posledice nalaza izgubljene stvari u srpskom pravu de lege lata i de lege ferenda,* Glasnik prava, god., V, br. 1/2014., 35-51.

[16] See: art. 140 par. 2 Law of property and other real rights of the Republic of Croatia, hereinafter: LPRR (Zakon o vlasništvu i drugim stvarnim pravima Republike Hrvatske), Official Gazette of the Republic of Croatia (Narodne novine Službeni list Republike Hrvatske), No. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08, 143/2012. Also, see: art. 125 Law of real rights of the republic of Srpska, hereinafter: LRR (Zakon o stvarnim pravima Republike Srpske), Official Gazette of the Republic of Srpska (Sl.glasnik Republike Srpske, No. 124/2008, 58/09). See: art. 142 and 143 Law of property and other real rights of the Republic of Macedonia, hereinafter: LPRR (Zakon za sopstvenost i drugi stvarni prava), Official Gazette of the Republic of Macedonia (Sl. vesnik na Republika Makedonija), No. 18/2001. See: art. 103 Law of property relations of the Republic of Montenegro, hereinafter: LPRR (Zakon o svojinsko–pravnim odnosima Republike Crne Gore), Official Gazette of the Republic of Montenegro (Sl. list Crne Gore), No. 19/09. See: art. 184 Draft of law of property and other real rights of Serbia, Towards new real law of Serbia, Belgrade, 2007 (Nacrt zakonika o svojini i drugim stvarnim pravima Srbije), hereinafter: Draft.

[17] Art. 125 LRR

[18] Some authors consider that the treasure is only the one found in immovables. N. Gavella *et al., Stvarno pravo*, Zagreb, 1998, 376. Cf. Ž. Perić, *op. cit.*., 38; D. Stojanović, *op. cit.,* 147; A. Đorđević, *Nalazak izgubljenih stvari i blaga*, Arhiv za pravne i društvene nauke, 1-2/2006, 266.

of another`s lost property[19]: 10% (in Croatian and in law of the Republic of Srpska); 15% (in Macedonian law), 25% (in the law of Montenegro and in Serbian Draft). The bounty can not be *higher than the value of the found treasure (each gets ½)* in Croatian, in the Republic of Srpska and in Macedonian law.

Although the bounty, provided by the Draft and regulation of Montenegro is nominally higher than that provided by other laws, failure to envisage the option of full compensation in the draft is due. At first sight the higher bounty seems to be useful and theoretically justified, especially in the case when cultural property is found, when the public interest might justify giving counter compensation to the finder, so to stimulate reporting, i.e. prevent abstraction and black market selling. However, what seems to be an issue in real life practice is a potentially enormous value of the found treasure that has characteristics of cultural property, meaning that the obliged payment would be too high.[20]

What is common for all countries that emerged after disintegration of Republic of Yugoslavia, except Slovenia, is that they gave priority to the interest of the state upon determining whose interest is more important[21] (the one of the finder or that of the state), considering the interest of the finder is satisfied by receiving guaranteed bounty in the given amount and possible costs like a stimulation for reporting of the finding. This notice seems to be the consequence of the assessment of national budget`s needs, given the potentially high value of the found treasure and rationally overviewed possibility that the state`s budget is in a better position than the finder as there is a possibility for more adequate treasure care.

With regard to the last two basic regulation models, further division could be made within the group by applying the criterion of subject as the property acquiror. In such a way the first model - the model of private property could be divided in two subgroups, with the first one dominant: a) Acquisition of co-ownership by treasure trove, half of which goes to each (to the finder and to the owner of the item in which the treasure trove is found), i.e. individual property by the finder, in the hypothesis of the finder and in

[19] This is one more usual paralele with another kind of finding – by finding and taking possession into lost objects (properties). A. Pavićević, *Pravne posledice nalaza izgubljene stvari u srpskom pravu de lege lata i de lege ferenda*, 35-51.

[20] Thus, its amount would be disproportionately high compared to the real possibilities of the state`s budget. Moreover, it seems to be unfair to get rich at the expense of the state, even when the full compensation is not at least close to the amount possibly achieved by selling on black market.

[21] The exception is a solution of Draft which contains an alternative proposal, which means acquisition of private property by finding a treasure trove. Art. 1795 of Draft.

the role of the owner of the estate where the finding took place. This comprises all regulations of the first model, except SCC; b) Individual property aquisition by the owner of the item in which the treasure trove is found, where the finder is entitled to an appropriate bounty not higher than half of the treasure trove`s highest value. This notice of Swiss law is a lonely example in comparative law, atypical, and, in our view, inadequate to be a model for the future Serbian regulation, since it refutes the finder`s contribution, unduly favouring the owner of the item in which the treasure trove is found.

The second model - the model of state property acquisition by the treasure, can be divided in two subgroups, given the *possibility to acquire private property in a subsidiary way*. The first subgroup includes regulations of: Croatia, the Republic of Srpska and Macedonia. In the named countries, the law prescribes *the abandon right* for the sake of state – the possibility of disclaiming proprietory right, by which the state is free of paying the bounty and charges to the finder and estate owner. This regulation is seen as justified, since the state is not dutiful by its own will, but by force of law (*ipso iure*). The treasure is then handed over to these people like an *independent comprise*, with the purpose of acquiring property. Since there is a possibility of acquiring property by the treasure - subsidiary, this model can be defined as mixed (depending on the ownership form generated by the finding). Such notice, according to which the state may grant exemption from paying the bounty and charges to the finder (by renunciation of property) is very useful for poor countries, since the property is not imposed but offered – being just the right, but not the obligation when it is not in the interest of the state.

The second group includes regulations of: the Republic of Montenegro and notice of the Draft, in which this possibility is not even foreseen as a subsidiary one, so this model of state ownership can be called - *pure.*

## 2.1. Dominant model of legal effects of the finding

Dominant model of legal effects of the finding in comparative law is very difficult to determine, as in our research sample the result is uniform. In principle, a half of the analyzed regulations standardize the treasure as a state property, while the other half as a private property. FCC, ACC, GCC, SCC and Slovenian law standardize private property acquisition in a manner of: co-ownership or individual property.[22]

[22] All of them, except Slovenian, fall into older regulations, keeping up with the same tendency in determining the ownership form by the finding of treasure trove.

The second group of notices is found in the legislation systems of the former Yugoslavian countries, except Slovenian. They all have similar legal traditions, specific legal history, lower national state`s budget. Notices of most of Balkan countries take the other course with an emphasized protective attitude toward antiques and antiquities of all kinds, not only toward cultural property.

By comparing legal effects of the finding in the aforementioned regulations, we can notice that, with regard to the ownership form, there are two different factual sets resulting in the property acquisition by the finding. Based on the legal formulations analyses, we conclude that 2 elements are a condition *sine qua non* of factual set leading to property acquisition by this finding – in the systems that regulate the finding of treasure trove as a way of *state property acquisition*.

Those are: 1) factual discovering (finding) of treasure trove and 2) establishing the finder`s possession – by taking into possession.[23] Facts whose qualification is disputable include: reporting of the finding, treasure`s handing over by the finder, and determining whether the treasure is cultural property. They can be explained in two ways: 1) like facts also figuring in the factual set where the state acquires property by the finding; or 2) like facts legally irrelevant for state property acquisition, but legally relevant only for the action of the finder since it is a precondition to get the bounty.

In legal systems where the way of private property acquisition by the treasure trove is foreseen as a general rule, and that of the state as an exception (in case the treasure trove has characteristics of cultural property), there are extra conditions that have to be fulfilled, except the already named ones.

For the property acquisition by this kind of finding, these systems require cumulative fulfillment of the following facts: 1) the finding of treasure trove; 2) establishing the finder`s possession; 3) reporting of the finding; 4) handing over the thing to the competent authority for the purpose of determining if it is cultural property; 5) for private property acquisition when the treasure – *is not,* and for state property acquisition when the treasure - *is cultural property*.[24] These differences that legal effect have are considered as important ones, as they initiate the issue of legal nature of this property acquisition mode,

[23] Art. 140 par. 2 LPRR.

[24] H. Koziol, R. Welser, *Gründriss des bürgerlichen Rechts,* Wien, 1988, 61. More about cultural property see in: A., Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu,* 88.

particularly considering possible differences in the legal nature, depending on its acquirer (titular of private or state property).

## 3. THE LEGAL NATURE OF PROPERTY ACQUISITION BY FINDING THE TREASURE TROVE

The legal nature of this kind of property acquisition is disputable in theory, and due to that variously qualified in certain legislations. Legislators of different states treat the property acquired by the treasure like originary property acquisition, but *not always as the same form of originary acquisition,* which is confirmed by certain statements in legal theory.

Undoubtedly, the property is not derivatized from the former owner (since he is unknown and can not be identified). However, it is acquired on the basis of special legal facts stipulated by law. All regulations, analyzed in this study can be divided in three groups, according to the *kind of the originary acquisition* by this finding: 1) by positive prescription; 2) by occupation; 3) by specific kind of finding.

*1. Positive prescription,* as a way of property acquisition by the found treasure is explicitly provided for in regulations of Croatia, Macedonia and the Republic of Srpska. For the legislators of the named regulations the way of property acquisition by the treasure trove is the same as the way of property acquisition by the lost item. Legal nature is regulated in the same way in both cases, neglecting the fact that those are two different kinds of finding as they fall into different categories of movables.

Besides, the positive prescription, as the way of property acquisition by this kind of finding is impossible to be adequately legally explained for many reasons. The named legal solution foresee that in case the state uses its right to renounce the property acquired by the treasure (abandon right), the treasure is handed over to the finder and to the owner of the thing where the treasure is found, in the form of *independent co - possession*, so that the property can be acquired by positive prescription.[25] This possession`s qualities are: 1) *legal*, whereby the law itself (in narrower sense) is the lawful cause for getting possession by the finding; 2) *bona fide* (the law itself assigns that feature ); 3*) real* as it is not based on force, fraud, or trust abuse. The quality of possession in own right is assigned to the finder`s possession by law, so to enable property acquisition on the basis of possession of these qualities, by time passing.[26] From the moment of reporting of the finding to

[25] Art. 140 par. 2-8 LPRR

[26] Art. 139 par. 1 and 140 par. 7 LPRR

the state, persons get special legal status, and in order to get subjective civil right, they only wait for the time to pass as it is the last fact prescribed by law.

Chosen way of originary property acquisition by the found treasure trove is a «setting product» of possession`s quality and time passing conditions that have to comply with the legal construction of positive prescription institute. The finder is actually unscrupulous, illegal, real holder whose possession under general rules couldn`t lead to property acquisition by positive prescription. Hence, all legislators opted for conceiving required qualities of the finder`s possession independently, so that such a way of property acquisition can «be compared with» positive prescription institute.This is the reason why positive prescription is not considered as an adequate way to acquire property by the found treasure.

*2. Occupation* was considered as the way to acquire property by the treasure trove in one developing stage of Roman law, and in a section of foreign legal theory, too.[27] The finding of treasure trove in Roman law has surely represented one of the originary methods of property acquisition. Different opinions that legal writers have are reduced to their understanding of the acquisition`s legal nature. Some romanists see the treasure trove as abandoned item, over which the proprietory right is acquired by occupation.[28] Therefore, it is obvious that qualification of legal nature of the finding both in Roman and contemporay law, depends on whether the treasure trove is seen as abandoned item, or as a special category of items, whose finding also causes the special way of property acquisition.

Different opinions that legal writers have are reduced to their understanding of the acquisition`s legal nature. Concluding that the treasure trove is acquired by occupation is, today, based only on the attitudes of some legal writers claiming that the treasure trove is legally similar to dereliction – so the principle of occupation by analogy can be applied to its finding. According to that logic, the property by hidden, and then by found treasure is acquired on the principle of „immediate appropriation" of the treasure, the same as dereliction is acquired by occupation.

However, treasure trove is neither the same as abandoned item (despite some similarities), nor the same legal facts are prescribed by law for its appropriation. Those facts are not even the same for occupation of derelicted

[27] Stubenrauch, I, 493, Wachter, Pand. II, § 134 Beil, II. Cit.to: A. Đorđević, *op. cit.*, 270.
[28] D. Stojčević, *Rimsko privatno pravo*, Beograd, Naučna knjiga, 1981; O. Stanojević, *Rimsko pravo,* Beograd, Dosije, 2007, 257.

items[29]. Essentialy, in both cases appropriation of the found treasure is present, but under different legal requirements. So, regardless of similarities and differences between the concept of treasure trove and dereliction, what definately separates the legal regime of property acquisition by treasure trove from the occupation are *different legal facts prescribed by law*.

These facts make such method of property acquisition *special.* Hence dereliction between two mentioned categories, even important, is not yet essential for defining the legal nature of these two acquisition models. Set of facts prescribed by law is essential, but different for these two acquisition models. The most convincing argument, in this regard, is the fact that the precondition for private property acquisition by the treasure trove is: 1) *the report of finding* to the competent authority, so the acquiring is not immediate and unconditional, unlike the occupation; 2) handing over the treasure to the competent authority; 3) determining if the treasure trove has characteristics of cultural property. These three facts are additional in relation to the set of facts recquired for the acquisition by occupation.

3. *The third position* on the legal nature of property acquisition by the finding of treasure trove, and in our opinion the most appropriate, is the acquisition by the *specific originary method.*[30] In contemporary legal theory such acquisition method is differently designated, most frequently as: *direct acquisition ex lege, by law in narrow sense* (meaning direct law predictability of this acquisition method).

Yet, some authors name this method as: specific acquisition by «f*act of finding*»[31] or acquisition by «*direct discovery*».[32] However, these names make confusion in terms of legal nature, and especially in terms of the timing of acquisition. The last two formulations make the impression that reporting of the finding is not necessary but that: 1) acquisition by «finding fact» means the property is acquired by appropriation (occupation); and even more: 2) acquisition by «direct discovery» means the appropriation is not even necessary, enough is the fact that the treasure is discovered without apprehension establishment.[33]

---

[29] D. Popov, *Sticanje prava svojine okupacijom stvari*, Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008, 368.

[30] For Roman law see: M. Horvat, *Rimsko pravo,* Zagreb, 1967, 137.

[31] M. Juhart, M. Tratnik, R. Vrenčur, *Stvarnopravni zakonik s komentarjem*, Ljubljana, 2004, 293 – 294.

[32] P. Tuor, B. Schnyder, *Das Schweizerische Zivilgesetzbuch*, Zürich, 1979, 624.

[33] More about condition of "objective concealment of goods" see in: A. Pavićević, *Pojam izgubljene stvari*, 329.

We think such a conclusion would be wrong, because these authors also insist on establishing possession by the found treasure and reporting of the treasure trove as a precondition for property acquisition. Even though the treasure is objectively present all the time, only by the fact of finding, we become aware of its existence and of the state of its former concealment. In this moment the need to determine its legal nature by assigning to the new titular arises, thus ending the state of threat. Therefore, the treasure trove starts to be legally significant only from the moment of discovering. This is the way we should interpret the legal writers attitude, that in the eyes of law „*discovery of treasure trove is legally decisive*".[34] Its submission to the human power is than enabled via „*direct discovery*".[35]

Concerning that each way of originary acquisition of property *sui generis* means it is established when all cumulative legal facts are fulfilled, it would imply that both ownership forms (private and state property) can be acquired when the last legally prescribed condition is fullfilled. However, what creates confusion in interpretation are formulations of particular legal texts leading us to the conclusion that the moment of state property acquisition by the treasure is – prior with regard to the moment of private property acquisition by the finding (the second group of regulations).

Formulation of the Draft suggests state property acquisition automatically by «discovering of treasure trove».[36] Croatian law text indicates that the moment when the finder takes the treasure into his possession, is the actual moment of state property acquisition.[37] It is interesting to mention, for the sake of comparison, that the formulation of the Draft on cultural property of the Republic of Serbia related to property acquisition is the following: «a cultural property with prior protection, located in the ground or water, or lifted from the ground or water is owned by the state».[38] Therefore, in the situation like this the cultural property is the property of the state and is not established as a possession of the finder (before removing from the ground or water).

It is obvious that different moments could be possibly described as legally relevant: 1) the moment of discovery; 2) the establishment of the

[34] H. Westermann, *Sachenrecht,* Mueller, 1960, 298; J. L. Bergel, M. Bruschi, S. Cimamonti, *op. cit.,* 249.

[35] P. Tuor, B. Schnyder, *op.cit,* 624.

[36] Art. 184 of the Draft.

[37] Art. 140 par. 2 LPRR of Croatia.

[38] Art. 12 Law of cultural property Republic of Serbia (Zakon o kulturnim dobrima Republike Srbije, Sl. glasnik RS, br. 71/94, 52/2011, 99/2011 - dr. zakon).

finder`s physical possession; 3) reporting of the finding to the competent authority; 4) the moment of confirming that the found treasure does not have characteristics of cultural property. We get the impression that elements of factual set are different in two basic situations: when the state acquires public property and the finder acquires the private. However, with regard to the provision of the Law of property,[39] whereby the only difference between the private and public property is the subject, but not the conditions of acquisition, we consider that even the legal nature of acquisition should not be changed according to the ownership form.

In view of the arguments set forth, we believe that the originary way of property acquisition can be possible when all cumulative legal facts, envisaged by the legislator of a state are fulfilled, as they are necessary for the property acquisition by the finding of treasure trove, including both ownership forms. We consider that the moment of final determination if the found treasure has characteristics of cultural property is legally relevant: cultural property then becomes the state property, and the found treasure trove without that characteristic – private property. Thus, we consider that the important missing element in some positive regulations is explicit legal quoting of *the timing of property acquisition by the finding of treasure trove* that will resolve the existing dilemma and set equal interpretations in theory.

## 4. CONCLUSION

Treasure trove is an independent valuable movable item, such as money, jewellery and other items made of precious metals, being hidden for such a long time in real property or in a movable item – so that in the moment of finding, whether by accident or by (technical, institutionally unorganized) searching, the identity of the treasure owner, or his successors is not possible to determine.[40] In substantive law of the Republic of Serbia the finding of treasure trove is not regulated, so that the existing legal gap is estimated as an important deficiency contributing to legal uncertainty, due to which this institute has to be regulated as soon as possible. The lack of common rules in a situation like this causes inconsistent decision of judges when applying

[39] Zakon o javnoj svojini RS (Law of public property of the Republic of Serbia, Official Gazette RS, 72/2011, 88/2013). See: art. 4.

[40] A., Pavićević, *Pojam skrivenog blaga*, u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Knj. 2. Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2014, 323-338.

different legal regimes, with different legal outcomes, thereby violating individual interest of the interested persons, and general interest as well.

In the Draft, impersonating the proposition for the future Serbian law, this institute is standardized as a special kind of finding. This fact can contribute to the legal certainty in the future, and that we consider as an important upturn[41].

We consider that the acquisition of public or private property by the finding of treasure trove is a consequence of the concrete legislator`s assessment about outweighing the need to protect private or common interest in the given case. The concrete ownership form is a result of many factors that each legislator took into account, varying from country to country. In our opinion, the acquirer can be: the finder and the state, with various arguments supporting this division. The finder has put effort, time, money and satisfied common interest by obligatory reporting of the finding. With the assessment made by the competent authority that the treasure is not cultural property, he is justifiable to be rewarded with property.

On the other hand, the state will protect valuables better, by keeping and maintaining them more adequately. Besides, a great deal of valuables will certainly become cultural property after a couple of centuries, making this notice more economical. In this way the procedure of determining whether the treasure trove is cultural property would be time-effective, as the state becomes the owner in any case.

Essentially, we consider that more important legal effect of the finding of the treasure trove is – issuing the adequate height of the bounty to stimulate the reporting of the finding. Regarding the *height of the bounty* prescribed by the Draft, we consider that the possibility to correct the determined height by percentage is adequate, based on court assessment, in accordance with special circumstances of the case. It is important to take into account that the amount of the bounty is adequate, stimulative enough for the reporting of the finding, i.e. prevention of evasion and black market sale.

At the same time, the state would not be at loss, even by paying, «somewhat higher» bounty (in justifiable cases), as it would, for the price certainly lower than the market price, «ransom» the value of common interest, not only economic, but scientific, cultural, and historical. The Draft`s substantial failure is *irregularity of the charges* of the finding, its keeping, storage and reporting of the finding possessed by the finder or a third person. The bounty prescribed by the Draft is an obligation right that the

[41] About the way to „fill" the legal the gap in positive serbian law see: A. Pavićević, *Pravne posledice nalaza skrivenog blaga u srpskom pravu*, 92.

finder acquires on this basis, while paying the charges is another matter and should be regulated in that way, like in Croatia, Macedonia and the Republic of Srpska.

*The legal nature of property acquisition* by the found treasure is differently determined in comparative law. The originary way of acquisition is indisputable, but in regulations and legal theory there are also: positive prescription, occupation and the finding of treasure trove – as the way of acquisition *sui generis*. We consider that positive prescription and occupation are inadequate, from all the reasons stated above, so the only reasonable we believe is: acquisition by special originary way – by the finding of treasure trove. In order to avoid terminological misunderstanding we consider this way of acquisition is neither adequate to be called the acquisition by «finding fact» nor by «immediate discovery», as we talk about specific way of originary acquisition that should be designated as: *acquisition by the finding of treasure trove*.

The legal nature of property acquisition by the found treasure is differently determined in comparative law. In our opinion, this is a specific way of originary acquisition that should be designated as: *acquisition by the finding of treasure trove*. The moment of property acquisition is the moment when all the facts from the set prescribed by law are cumulatively fulfilled. This is different in systems where the establishment of private or state property is the result of the finding.

*The way of state property establishment* by the finding of treasure trove, stipulated in the Draft, requires the following factual set prescribed by law: 1) factual discovery (finding) of treasure trove; 2) establishing the finder`s possession – by taking into possession. For *private property establishment by the finding,* in systems predicting such ownership form, the last missing element of this factual set is: confirmation by the competent authority that the treasure trove does not have characteristics of cultural property. Otherwise, if the treasure has such characteristics – this element is the last in the range required for state property establishment, at the time procedure is completed.

We consider that comprehensive regulation of the institute of the finding of treasure trove, with poroposed quality content and certain corrections in the Draft, would be the most adequate model for Serbian law *de lege ferenda,* for the purpose of legal certainty protection. It would imply accepting values of the named newer legal notices of the neighbouring countries, which is extremely impotant for the tendency of regional real right harmonization.

## REFERENCES


Babić, I., *et al., Komentar Zakona o stvarnim pravima Republike Srpske,* Sarajevo, Privredna štampa, 2011.

Babić, I., *Nalaz skrivenog blaga*, Zbornik radova Pravnog fakulteta u Nišu, br. 56/2010.

Bartoš, M., Marković, L., *Građansko pravo prvi deo – Stvarno pravo*, Beograd, Geca Kon, 1936.

Bergel, J. L., Bruschi, M., Cimamonti, S., *Traité de droit civil*, Les biens, Paris, LGDJ, 2000.

Đorđević, A., *Nalazak izgubljenih stvari i blaga*, Arhiv za pravne i društvene nauke, 1-2/2006.

Eisner, B., Horvat, M., *Rimsko pravo*, Zagreb, 1967.

Gavella, N., *et al., Stvarno pravo*, Zagreb, Informator, 1998.

Henry, X., *et al., Code Civil*, Paris, Dalloz, 2010.

Horvat, M., *Rimsko pravo*, Zagreb, Školska knjiga, 1967.

Juhart, M., Tratnik, M., Vrenčur, R., *Stvarnopravni zakonik s komentarjem*, Ljubljana, GV Založba, 2004.

Kovačević - Kuštrimović, R., Lazić, M., *Stvarno pravo*, Niš, Centar za publikacije Pravnog fakulteta, 2004.

Koziol, H., Welser, R., *Gründriss des bürgerlichen Rechts*, Wien, 1988.

Palmer, N.E. *Treasure trove and the protection of antiquities*, The modern Law Review, Vol. 44., 1981.

Pavićević, A., *Pojam skrivenog blaga (Legal concept of hidden treasures),* u: Usklađivanje pravnog sistema Srbije sa standardima Evropske unije (ur. S. Đorđević), Knj. 2. Kragujevac: Pravni fakultet, Institut za pravne i društvene nauke, 2014.

Pavićević, A., *Pravne posledice nalaza skrivenog blaga u srpskom pravu,* Nova pravna revija, god. 5, br. 1-2/2015.

Pavićević, A., *Pojam izgubljene stvari*, Pravni život, 5-6/2014.

Pavićević, A., *Pravne posledice nalaza izgubljene stvari u srpskom pravu de lege lata i de lege ferenda,* Glasnik prava, god.. V, br. 1/2014.

Perić, Ž., *Specijalni deo Građanskoga prava i Stvarno pravo,* Beograd, S.N., 1920.

Popov, D., *Sticanje prava svojine okupacijom stvari,* Zbornik radova Pravnog fakulteta u Novom Sadu, 1-2/2008.

Rašović, Z., *Stvarno pravo*, Pravni fakultet u Podgorici, Podgorica, 2010.

Stanojević, O., *Rimsko pravo,* Beograd, Dosije, 2007.

Stojanović, D., *Stvarno pravo*, Pravni fakultet u Kragujevcu, Kragujevac, 1998.

Stojčević, D., *Rimsko privatno pravo*, Beograd, Naučna knjiga, 1981.

Tuor, P., Schnyder, B., *Das Schweizerische Zivilgesetzbuch*, Zürich, 1979.

Westermann, H., *Sachenrecht,* Karlsruhe, Mueller, 1960.