

PERSONAL SERVITUDES IN CONTEMPORARY PROPERTY LAW

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-Abstract-

Personal servitudes are property law institutes with roots in Roman Law. Contemporary property law systems in Europe have accepted this institute originating from Roman law, and have adapted it so that it can be incorporated within their national legislations. The paper aims to examine and analyze how personal servitudes have been adapted and incorporated into the national legislation of European countries and how the different trajectories of development of national legislation have affected that incorporation. Drawing from the similarities and differences in the regulation of personal servitudes in different legal systems, the paper also aims to identify the common characteristics of personal servitudes in contemporary property law systems in Europe.

Keywords: personal servitudes, property law, usufruct, use, habitation.

I. INTRODUCTION

Servitudes represent a type of *right in rem* that entitles its holder to use a thing belonging to another person in a certain manner and scope for one's benefit¹. Due to the nature of servitudes, some scholars refer to servitudes as a *limited right in rem*². By defining servitudes as a *limited right in rem* these scholars aim to underline the fact that servitudes only allow for limited use of the object of servitude, which is a thing owned by another person. However, most scholars think that it is redundant to refer to servitudes as a *limited right in rem* since all *rights in rem* have a distinct nature and content that differs one *right in rem* from the other. This is why most scholars when defining servitudes use the term *other right in rem*, meaning a *right in rem* distinct from the right of ownership which is the principal and strongest *right in rem*³. The category of *other rights in rem* consists of rights such as servitudes, real burdens, and pledges (pawn and mortgage).

Servitudes are also viewed as encumbrances over the right of ownership⁴. This is because the existence of servitudes over one's property limits the freedom of the owner in exercising his or

* Tina Przeska, Full professors. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, email: t.przeska@pf.ukim.edu.mk, ORCID 0000-0002-3476-2789.

¹ Р. Живковска, *Стварно право*, Европа 92, Скопје, 2005, p. 119; N. Gavella, T. Josipović, I. Gliha, V. Belaj, Z. Stipković, *Stvarno pravo, Svezak drugi, II. izmijenjeno i dopunjeno izdanje*, Narodne Novine d.d., Zagreb, 2007, p. 5. Д. Стојановић, *Стварно право*, Правни факултет у Крагујевцу, Крагујевац, 1998, p. 17. И. Бабић, *Грађанско право, Књига 2, Стварно право*, Београд • Нови Сад, 2012, p. 225. R. Kovačević Kuštrimović, M. Lazić, *Stvarno pravo*, Zograf, Niš, 2004, p. 205.

² Z. P. Rašovlć, *Stvarno pravo*, Beograd, 2005, p. 303. N. Gavella, et. al., *Stvarno pravo, Svezak drugi, op. cit.*, p. 8.

³ Р. Живковска, *Стварно право, op. cit.*, p.119. N. Gavella, et. al., *Stvarno pravo, Svezak drugi, op. cit.*, p. 8.

⁴ N. Gavella, et. al., *Stvarno pravo, Svezak drugi, op. cit.*, p. 5. R. Kovačević Kuštrimović, M. Lazić, *op. cit.*, p. 205.

her right of ownership. The owner must refrain from all actions that may infringe on the established servitude over his or her property.

Contemporary legal systems recognize different types of servitudes depending on their content and how they are established and exercised. The reason why there are so many different types of servitudes is reflected in the principal function of this *right in rem*, and that is to enable its holder to gain benefits from the limited use of someone else's property. Those benefits can be in favour of a particular real estate belonging to the holder of the right of servitude, or they can be in favour of the person holding the right of servitude, and even in favour of members of his or her immediate family.

The different types of servitudes are categorized into two main categories – predial and personal. This differentiation of servitudes on personal and predial dates from the period of Roman law⁵. Predial servitudes (servitudes rerum) were established as encumbrances on one real estate (servient real estate) for the benefit of another real estate (dominant or privileged real estate). Since predial servitudes were established as an encumbrance on one real estate for the benefit of another real estate, these types of servitudes were linked to both the servient and the dominant real estate and existed in favour of every owner of the dominant real estate. Personal servitudes (servitudes personarum), unlike predial servitudes, were established in favour of a particular person as its holder. The holder of the personal servitude was entitled to use the property encumbered with the personal servitude to satisfy certain personal needs⁶. Personal servitudes were linked to a particular person, which is why they couldn't be transferred or inherited. As a result, personal servitudes were usually terminated at the moment of death of its holder, or earlier, upon expiration of a time-limit⁷.

This differentiation of servitudes on predial and personal has remained the main point of distinction between servitudes in contemporary law as well. The regulation of the establishment, exercise and termination of servitudes in contemporary civil codes and laws regulating property relations is mainly dependent on whether the servitude is classified as predial or personal. For predial servitudes, the principle of *numerus clausus* does not apply. As a result, there are many varieties regulated in the contemporary legal systems. The types of personal servitudes, on the other hand, are restricted and usually include the right of usufruct, use and habitation.

In the text that follows the regulation of personal servitudes in contemporary legal systems in European countries will be examined and analyzed.

II. PERSONAL SERVITUDES IN CONTEMPORARY LEGAL SYSTEMS OF EUROPEAN COUNTRIES

Contemporary legal systems in Europe have adopted many Roman law institutes such as servitudes. However, in the course of legal evolution, each European country has modified the adopted Roman law institutes so that they can follow its legal traditions, and be in harmony with the set trajectory of development of a particular legal system. We will be looking into the regulation of personal servitudes in the German Civil Code⁸, Swiss Civil Code⁹, French Civil

⁵ G. Mousourakis, *Fundamentals of Roman Private Law*, Springer-Verlag Berlin Heidelberg, 2012, p.165. G. Mousourakis, *Roman Law and the Origins of the Civil Law Tradition*, Springer International Publishing Switzerland, 2015, p. 122.

⁶ G. Mousourakis (2012), *op. cit.*, p. 168. A. M. Riggsby, *Roman Law and the Legal World of the Romans*, Cambridge University Press, 2010, p. 144

⁷ G. Mousourakis (2012), *op. cit.*, p. 168

⁸ Bürgerliches Gesetzbuch – BGB, available at: [German Civil Code BGB \(gesetze-im-internet.de\)](http://www.gesetze-im-internet.de)

⁹ Schweizerisches Zivilgesetzbuch - ZGB, available at: [210 \(admin.ch\)](http://www.admin.ch)

Code¹⁰, Italian Civil Code¹¹, Spanish Civil Code¹², the Slovenian Property Code¹³, the Law on Ownership and Other Real Rights of Croatia¹⁴ and the Law on Ownership and Other Real Rights of North Macedonia¹⁵.

- The German Civil Code (Bürgerliches Gesetzbuch – BGB) divides servitudes into three categories: predial servitudes (easements), personal servitudes (usufruct) and restricted personal easements. It is notable that the German Civil Code only regulates usufruct as a personal servitude. However, according to the German Civil Code, there are three types of usufruct: usufruct in things, usufruct in rights and usufruct in assets. Usufruct in things is a type of usufruct that encumbers material (tangible) things and enables the holder of the right of usufruct to collect emoluments from the encumbered thing (§ 1030). This type of usufruct can encumber movable as well as immovable things. Usufruct in things usually enables the holder of the right to collect all emoluments from the encumbered thing. However, the German Civil Code allows for restriction of the right of usufruct in things by exclusion of individual emoluments. Usufruct in rights encumbers rights (§ 1068). The German Civil Code does not specify what type of rights can be encumbered with usufruct in rights, but it does state that those rights need to be transferable by nature (§ 1069). From other provisions, it can be concluded that usufruct in rights encumbers rights such as the right to performance, claims, life annuity, land charges, annuity land charge, and rights incorporated in instruments (§ 1070, 1073, 1074, 1080, 1081). Usufruct in assets is a type of usufruct that encumbers particular objects that constitute an asset, for example, inheritance (§ 1086). The German Civil Code, besides the two categories of servitudes (predial and personal), introduces a third category of servitudes – restricted personal easements. The third category of servitudes, the restricted personal easements are types of servitudes that have combined characteristics of the predial and personal servitudes. These types of servitudes are easements that encumber a plot of land in favour of a particular person who is entitled to some form of use of the encumbered plot of land (§ 1090). The right of residence (habitation), which is typically considered personal servitude, according to the German Civil Code can be established as a restricted personal easement (§ 1093).

- In the Swiss Civil Code (Schweizerisches Zivilgesetzbuch - ZGB) servitudes are regulated in Part Four of the Code – Property Law, in Division Two named *Limited rights in rem*. The Swiss Civil Code also divides servitudes into predial and personal. Personal servitudes are regulated in Chapter Two named *Usufruct and Other Personal Servitudes*. There are several different types of personal servitudes regulated, such as usufruct, the right of residence (habitation), building right, right to access to a water source and other servitudes. Usufruct is defined as a right that can encumber movable and immovable things and assets (Art. 745). Usually, usufruct entitles its holder (the usufructuary) to enjoy the object of usufruct completely. However, if the right of usufruct encumbers immovable things, it may be limited to a specific part of it, according to the Swiss Civil Code (Art. 745 (3)). The right of residence (habitation) is a type of personal servitude that entitles its holder to live in a building or a part of the building owned by another, with his or her family and household (Art. 778, 777). The building right as a type of personal servitude entitles its holder to erect or maintain a structure on the encumbered plot of land (Art. 779). This right can also be registered in the land register

¹⁰ Code Civil, available at: [Code civil - Légifrance \(legifrance.gouv.fr\)](https://www.legifrance.gouv.fr)

¹¹ Codice Civile Italiano, available at: [Codice Civile Italiano, aggiornato a Aprile 2024 | Codice Civile online \(codice-civile-online.it\)](https://www.codicecivileonline.it)

¹² Código Civil Español, available at: [Código Civil. Última modificación: 1 de marzo de 2023 \(boe.es\)](https://www.boe.es)

¹³ Stvarnopravni zakonik, available at: [SPZ - Stvarnopravni zakonik \(SPZ-A\) \(zakonodaja.com\)](https://www.zakonodaja.com)

¹⁴ Zakon o vlasništvu i drugim stvarnim pravima, available at: [Zakon o vlasništvu i drugim stvarnim pravima - Zakon.hr](https://www.zakon.hr)

¹⁵ Закон за сопственост и други стварни права, available at: [Sluzben vesnik na RM, br. 4, Vtornik, 23 januari 2001 \(slvesnik.com.mk\)](https://www.slvesnik.com.mk)

as an immovable property if it is established as a permanent right (Art. 779 (3)). The right of access to a water source is another type of personal servitude that encumbers a particular parcel of land and entitles its holder to permanently draw or channel water on the encumbered land (Art. 780). Similar to the building right, the right of access to a water source can be registered in the land register as an immovable property if it is established as a distinct and permanent right (Art. 780 (3)). Unlike usufruct and habitation, the building right and the right of access to a water source can be transferred and inherited, unless the parties have agreed otherwise (Art. 779 (2), 780 (2)). The Swiss Civil Code does not observe the principle of *numerus clausus* regarding personal servitudes. It therefore states that the owner is allowed to establish any type of personal servitude in favour of a person or a group of persons designed to meet a particular need of the holder of the right of personal servitude (Art. 781).

- The French Civil Code (Code Civil) also separates servitudes into two categories – predial and personal. Personal servitudes regulated by the French Civil Code are usufruct, use and habitation. Usufruct is defined as a right to enjoy a thing owned by another person in the same way as the owner would, with the duty to preserve the substance of the encumbered thing (Art. 578). According to the French Civil Code, the right of usufruct can encumber both movable and immovable property (Art. 581). Regarding the right of use and the right of habitation the French Civil Code states that these rights are established in the same manner that usufruct is established (Art. 625). The right of use entitles its holder to enjoy the fruits of the encumbered thing to the extent necessary to meet his personal needs and the needs of his family (Art. 632). As for the right of habitation, it is stated that the holder of the right of habitation is entitled to live in the encumbered house with his or her family (Art. 632).

- Same as in the previously analyzed civil codes, the Italian Civil Code (Codice Civile Italiano) divides servitudes into predial and personal. Personal servitudes are regulated in Chapter V of the Third Book named - *On Property*. There are three types of personal servitudes regulated: usufruct, use and habitation. According to the Italian Civil Code, the right of usufruct entitles its holder to enjoy the encumbered thing while respecting its economic use (Art. 981). The holder of the right of usufruct may collect all the benefits that the encumbered thing can give, within the limits established by the provision in the Code. Usufruct is a transferable right according to the Italian Civil Code unless it is otherwise determined in the legal instrument establishing the right of usufruct (Art. 980). Regarding the right of use, the Italian Civil Code states that this right entitles its holder to use the encumbered thing and to collect its fruits, only to the extent that is necessary to satisfy one's personal needs and the needs of his or her family (Art. 1021). As for the right of habitation, the Italian Civil Code states that the holder of this right is entitled to live in the encumbered house with his or her family (Art. 1022). Unlike the holder of the right of usufruct, the holder of the right of use, or the right of habitation is not allowed to transfer the right to another person, nor is allowed to cede the exercise of the right of use, or habitation to another person (Art. 10024).

- The Spanish Civil Code (Código Civil Español) regulates both categories of servitudes, personal and predial in different chapters. Personal servitudes are regulated in Chapter VI of the Second Book named – *Of animals, of goods, of property and its modifications*. Same as the French Civil Code and the Italian Civil Code, the Spanish Civil Code regulates three types of personal servitudes: usufruct, use and habitation. According to the Spanish Civil Code, the right of usufruct entitles the holder of the right to enjoy the benefits of the encumbered property, with the obligation to preserve its form and substance, unless it was otherwise stated in the act of its constitution or if the law allows differently (Art. 467). The right of the usufruct can be limited to only a part of the fruits of the encumbered property (Art. 469). In the Spanish Civil Code, it is explicitly stated that the right of usufruct can also be established over rights, as long as those rights are not personal, or untransferable (Art. 469). According to the Spanish Civil Code, the right of use entitles its holder to collect the fruits of

the encumbered property to the extent necessary to satisfy his or her personal needs, and the needs of his or her family, even when those needs have increased (Art. 524 (2)). The right of habitation entitles its holder to live in the encumbered house, occupying only the parts necessary to meet his or her housing needs and the housing needs of his or her family members (Art. 524 (2)). Regarding the possibility of transferring personal servitudes, the Spanish Civil Code clearly states that the right of use, and the right of habitation are not transferable under any circumstances, nor the exercise of these rights can be ceded to another person (Art. 525). The transfer of the right of usufruct, or the possibility of ceding its exercise to another person, is not explicitly prohibited by the Spanish Civil Code.

- In the legal system of the Republic of Slovenia, servitudes are regulated by the Property Code (Stvarnopravni Zakonik). The Property Code regulates predial and personal servitudes as the two main categories of servitudes. According to the Property Code, personal servitudes are rights that entitle its holder to use a thing belonging to another person (Art. 227). The Property Code also states that personal servitudes can last no longer than the person's death if the holder of the right is a natural person, or no longer than 30 years if the holder of the right is a legal entity. Usufruct, use and habitation are the three types of personal servitudes regulated by the Property Code. Usufruct is defined as a right that entitles its holder to use the thing belonging to another person while preserving its substance (Art. 230 (1)). The right of use is defined as a right that entitles its holder to use the encumbered thing according to its designated purpose while preserving its substance and limiting the use only to the extent necessary for satisfying his or her personal needs (Art. 244). The right of habitation is defined as a right that entitles its holder to use the encumbered building for his or her housing needs, and the housing needs of his or her family while preserving the substance of the encumbered building (Art. 247). Concerning the transfer of personal servitudes, the Property Code clearly states that those rights cannot be transferred, while the exercise of these rights can be ceded when explicitly permitted by law (Art. 229). By analyzing the provision in the Property Code regulating the types of personal servitudes it can be concluded that only the holder of the right of usufruct is permitted by law to cede the exercise of his or her right onto another person (Art. 230(1)).

- The Republic of Croatia is one of the European countries that doesn't have a civil code and regulates property law relations in a basic law named - Law on Ownership and Other Real Rights - LOORR (Zakon o vlasništvu i drugim stvarnim pravima). Servitudes are regulated in Part Four of the Croatian LOORR which is named – *Servitudes*. This Law, same as the other analyzed regulation, makes a distinction between predial and personal servitudes. Personal servitudes are regulated in Chapter 3 of Part Four of the Croatian LOORR. Three types of personal servitudes are regulated: usufruct, use and habitation. The right of usufruct in the Croatian LOORR is defined as a right that enables its holder to use the encumbered thing in any way possible while preserving its substance (Art. 203(1)). Usufruct can encumber movable or immovable things or a group of things, as long as those things are unconsumable (Art. 203 (2))¹⁶. The right of use is defined by the Croatian LOORR as a right that entitles its holder to use the encumbered thing according to its designated purpose while preserving its nature to the extent that is sufficient to satisfy his or her personal needs (Art. 212). In the Croatian LOORR, the right of habitation is defined as a type of servitude that entitles its holder to use the encumbered building or a part of it for his or her housing needs and the housing needs of his or her household (Art. 217). Regarding the possibility of transfer of personal servitudes, the Croatian LOORR is adamant that personal servitudes cannot be transferred or inherited (Art.202). The heirs can become successive holders of a right of personal servitude

¹⁶ By exception, the right of usufruct can be established as an encumbrance over consumable things, which is considered as quasi-usufruct (Art. 211).

upon the death of the principal holder, but only if the right of personal servitude was also established in favour of the principal holder's heirs.

- In the legal system of the Republic of North Macedonia, same as in the legal system of the Republic of Croatia, the property law relations are regulated by a basic law named - Law on Ownership and Other Real Rights - LOORR (Закон за сопственост и други стварни права). In the Macedonian LOORR servitudes are regulated in Part Three of the Law named – *Other Real Rights*. This Law also recognizes two categories of servitudes – predial and personal, which are regulated by separate provisions adequate to their specific nature. Personal servitudes are regulated by articles 208-224 of the Macedonian LOORR. According to the Macedonian LOORR, there are three types of personal servitudes usufruct, use and habitation (Art. 208). The right of usufruct, according to the Macedonian LOORR is a personal servitude that entitles its holder to make full use of the encumbered thing under its designated purpose while preserving its nature (Art. 210 (1)). Movable or immovable things, or a group of things can be encumbered by the right of usufruct (Art. 210 (2)). The right of use, according to the Macedonian LOORR is a type of personal servitude that entitles its holder to use the encumbered thing to the extent needed for the satisfaction of his or her personal needs and the needs of his or her family, while preserving the nature and substance of the encumbered thing (Art. 221). The right of habitation in the Macedonian LOORR is defined as a right that entitles its holder to use the encumbered residential building for his or her housing needs, and the housing needs of his or her family members and other persons that he or she is obligated to support (Art 223). Most of the provisions regulating personal servitudes in the Macedonian LOORR refer to the right of usufruct. Regarding the regulation of the right of use and the right of habitation, the Macedonian LOORR directs towards adequate application of the provisions regulating the right of usufruct, unless it is otherwise stipulated by a special law (Art. 221, 224).

The comparative analysis of the regulation on servitudes in the legal systems of European countries shows that the two main categories of servitudes (personal and predial) dating from the period of Roman Law have been adopted by contemporary legal systems as well. In most of the analyzed legal systems of European countries (France, Spain, Italy Slovenia, Croatia, and North Macedonia), the traditional three types of personal servitudes are regulated (usufruct, use and habitation). In the legal system of Germany, only usufruct is regulated as a type of personal servitude. Habitation in the legal system of Germany is regarded as a restricted personal easement, which is a hybrid type of servitude with characteristics of both personal and predial servitudes. As for the legal system of Switzerland, we can notice that the list of personal servitudes includes traditional servitudes such as usufruct and habitation, but also new types of personal servitudes such as building rights and the right of access to a water source. Another specific feature of the Swiss legal system is the fact that the list of personal servitudes is not a closed list, like in the other analyzed legal systems, but rather it is an open one. This means that in the legal system of Switzerland, new types of personal servitudes can be introduced depending on the needs and the free will of the parties in civil law relations.

III. CHARACTERISTICS OF PERSONAL SERVITUDES

By analyzing the regulation of personal servitudes, one can derive some common characteristics of this category of servitudes that affect the way that they are established, exercised and terminated.

a) Personal servitudes are usually established on material (tangible) movable or immovable things that are unconsumable. This correlates to the nature of personal servitudes as a *right in rem* that entitles its holder to use and collect benefits from the encumbered thing

(the object of personal servitude) owned by another person. For such form of exercise of the right of personal servitude tangible and unconsumable things are the perfect object. The right of usufruct can be established as an encumbrance on rights or consumable things, but in such cases, this right is considered to be a *quasi-usufruct* by scholars¹⁷.

b) Personal servitudes are usually established in favour of natural persons. This, without exception, applies to the right of use and the right of habitation. By their very definition, the right of use and the right of habitation are established for the personal/housing needs of the holder of the right and the members of his or her family. Therefore, the nature of these types of personal servitudes doesn't allow for them to be established in favour of legal entities since legal entities have no personal needs or families. The right of usufruct, on the other hand, can be established in favour of natural persons or legal entities. This is possible because the right of usufruct entitles its holder to fully use the encumbered property, collecting all types of benefits, the same as the owner would be able to do so, if not for the right of usufruct. By establishing a right of usufruct, the owner cedes to the usufructuary his power to use his or her encumbered property, and since the use can be exercised by legal entities, as well as natural persons, there is no reason why usufruct should be a right reserved only for natural persons.

c) Personal servitudes are bound by the person holding the right of personal servitude. This *personal bond* makes personal servitudes nontransferable rights. In principle, the holder of the right of personal servitude is not allowed to transfer that right to another person. Personal servitudes are also treated as noninheritable rights. The reason why personal servitudes are considered bonded by the person holding the right is found in the personal relationship that exists between the owner and the holder of the right of personal servitude. This personal relationship is the main motivation for the owner to agree to establish a personal servitude in favour of a particular person. If that person, later on, transfers that right onto another, that could be considered a breach of trust concerning the owner of the encumbered property, especially if the regulation on personal servitudes does not permit compensation for the establishment of personal servitudes. However, it needs to be pointed out that there are exceptions. In some legal systems, certain types of personal servitudes can be transferred¹⁸. For example, the Italian Civil Code permits the transfer of the right of usufruct, unless it was otherwise determined by the legal instrument upon which the right was established (Art. 980), and the Swiss Civil Code allows the transfer of personal servitudes such as the building right and the right to access to a water source, unless the parties have agreed otherwise (Art. 779 (2), 780 (2)). There are also legal systems that prohibit the transfer of the right of personal servitude as such, but allow the possibility for the holder to cede the exercise of his or her right of personal servitude to another person. For example, the Slovenian Property Code allows the holder of the right of usufruct to cede the exercise of that right to another person (Art. 229).

d) Personal servitudes could be divisible or indivisible¹⁹. The divisibility of personal servitudes refers to the possibility for the right of personal servitude to be shared between several persons, each co-holding an aliquot part of the right. Most scholars agree that only the right of usufruct can be shared into aliquot parts, while personal servitudes such as the right of use and the right of habitation are indivisible²⁰. The reason why personal servitudes such as the right of use and the right of habitation are indivisible is because these types of personal servitudes are strictly bonded to a particular person and serve to satisfy his or her personal and

¹⁷ R. Kovačević Kuštrimović, M. Lazić, *op. cit.*, p. 230. A.-L. Verbeke, B. Verdictt., DJ. Maasland, *The many faces of usufruct*, in Van der Merwe, C., Verbeke, A.-L. (eds), *Time Limited Interests in Land, Common Core of European Private Law*, Cambridge University Press, 2012, p. 37.

¹⁸ A. M. Riggsby, *op. cit.*, p. 145. N. Gavella, et. al., *Stvarno pravo, Svezak drugi, op. cit.*, p. 37. R. Kovačević Kuštrimović, M. Lazić, *op. cit.*, p. 229.

¹⁹ N. Gavella, et. al., *Stvarno pravo, Svezak drugi, op. cit.*, p. 37. Z. P. Rašovlj, *op. cit.*, p. 346.

²⁰ *Ibid.*

family needs. Even though family members of the person holding a right of use or a right of habitation benefit from the established right, they cannot be considered as co-holders of those rights. The benefits from the established right of use or right of habitation for the family members are contingent, or in other words, the benefits are drawn via family ties to the person holding those rights.

e) Personal servitudes are a type of *right in rem* established on things belonging to another person. This principle is based on the Roman law maxim - *No one can have a servitude over property of his own (nulli res sua servit)*²¹. If the holder of the right of personal servitude later becomes the owner of the encumbered property, then the right of personal servitude established on that property will be terminated. In this case, the right of ownership, as the stronger and more extensive right absorbs the right of personal servitude. There is, however, a dilemma as to whether the right of ownership could absorb the right of personal servitude if the holder of the right of personal servitude becomes co-owner of the encumbered property. This dilemma is relevant only if the personal servitude in question is usufruct. The right of usufruct entitles its holder to fully use the encumbered property, and as a result, completely excludes the owner of the encumbered property from the possibility of using his or her property. If the holder of the right of usufruct later becomes the co-owner of the encumbered property his right of usufruct should be considered terminated regarding the co-owned share now belonging to him or her, but should remain as encumbrance on the co-owned shares of the rest of the co-owners. The logic behind this conclusion is found in the fact that the right of usufruct established on the entire property enables its holder (the usufructuary) to use the entire property without limitation to its use, while co-ownership of the encumbered property only entitles the co-owner to partial use of the property proportional to his or her share in the property. This point is mute if the personal servitude in question is the right of use. Considering that the right of use only entitles its holder to limited use of the encumbered property, it becomes clear that co-ownership is a far more extensive right, so if the holder of the right of use later becomes co-owner of the encumbered property, his or her right of co-ownership will absorb his or her right of use.

f) For personal servitudes the principle of *numerus clausus* applies. This means that the types of personal servitudes are determined by law so that no varieties of personal servitudes can be contractually introduced. However, the application of the *numerus clausus* principle is not absolute in all legal systems. For example, the Swiss Civil Code allows the owner of a property to establish any type of personal servitude in favour of a person or a group of persons (Art. 781).

g) Personal servitudes are established to satisfy the particular needs of a particular person. The right of usufruct is established to enable full use of the encumbered property for its holder (the usufructuary), the right of use is established to enable limited use of the encumbered property for the satisfaction of personal and family needs of its holder and the right of habitation is established to enable the satisfaction of housing needs of its holder. As a result, the exercise of the right of personal servitude cannot go beyond the satisfaction of the particular needs for which it has been established.

h) Personal servitudes are time-limited rights. As time-limited rights personal servitudes are terminated upon expiration of the time-limit for which they have been established. The longest time that a personal servitude can last is until the death of its holder. If usufruct is established in favour of a legal entity, the right can last until the termination of that entity, or until the maximum time limit determined by law. For example, the Italian Civil

²¹ F. Tuccillo, *Algunas notas sobre las servidumbres prediales en la tradición romanística y en las modernas codificaciones*, Ridrom, Derecho Romano, Tradición Romanística y Ciencias Histórico-Jurídicas, Octubre., p. 100. A. M. Riggsby, *op. cit.*, p. 148.

Code states that usufruct in favour of a legal entity cannot be established for more than 30 years (Art. 979).

i) Personal servitudes are established gratuitously. This results from the special relationship between the owner of the encumbered property and the person in whose favour the personal servitude is established. The existence of the special relationship is what motivates the owner of the encumbered property to tend to the needs of a particular person by permitting his or her property to be encumbered with a particular type of personal servitude.

j) Personal servitudes cannot create positive obligations for the owner of the encumbered property. The owner of the encumbered property is obligated to tolerate the exercise of the established right of personal servitude but is in no way obligated to assist or facilitate the exercise of that right.

k) Personal servitudes give priority to the use of the encumbered property. The priority of personal servitudes regarding the use of the encumbered property means that the owner of that property is obligated to refrain from all action that might impede the full exercise of the established right of personal servitude. It needs to be noted that the intensity of that priority varies depending on the type of personal servitude that is established. The right of usufruct holds the strongest priority over the use of the encumbered property because it completely excludes the owner from using his or her property. The priority of the right of use over the encumbered property is limited. The right of use entitles its holder to only use the encumbered property to the extent of satisfying personal and family needs, beyond that, the owner is free to use his or her encumbered property any way he or she sees fit. The right of habitation can also have limited priority if it is established on a part of the encumbered building. When the right of habitation is limited to be exercised on a part of the encumbered building, the owner of the encumbered building can freely use the rest of that building.

IV. CONCLUSION

Contemporary legal systems recognize different types of servitudes depending on their content and how they are established and exercised. The different types of servitudes are categorized into two main categories – predial and personal. Predial servitudes are established as encumbrances on one real estate (servient real estate) for the benefit of another real estate (dominant or privileged real estate), while personal servitudes are established in favour of a particular person. In contemporary law, the differentiation of servitudes on predial and personal has remained the main point of distinction between servitudes. The regulation on the establishment, exercise and termination of servitudes in contemporary civil codes and laws regulating property relations is mainly dependent on whether the servitude is classified as predial or personal. In most of the analyzed legal systems of European countries (France, Spain, Italy Slovenia, Croatia, and North Macedonia), the traditional three types of personal servitudes are regulated - usufruct, use and habitation. In the legal system of Germany, only usufruct is regulated as a type of personal servitude, while habitation is regarded as a restricted personal easement. In The legal system of Switzerland, besides the traditional personal servitudes such as usufruct and habitation, new types of personal servitudes are included such as the building right and the right of access to a water source. The regulation on personal servitudes exhibits their common characteristics that affect the way that personal servitudes are established, exercised and terminated. Common characteristics of personal servitudes are the following:

- Personal servitudes are usually established on material (tangible) movable or immovable things that are unconsumable;
- Personal servitudes are usually established in favour of natural persons, and by exception in favour of legal entities;
- Personal servitudes are bound by the person holding the right of personal servitude;

- Personal servitudes could be divisible or indivisible;
- Personal servitudes are a type of *right in rem* established on things belonging to another person;
- For personal servitudes, the principle of *numerus clausus* mainly applies;
- Personal servitudes are time-limited rights;
- Personal servitudes are established gratuitously;
- Personal servitudes cannot create positive obligations for the owner of the encumbered property and
- Personal servitudes give priority to the use of the encumbered property.

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