

LEGAL REGIME OF POSSESSION AND ITS PROTECTION

Abstract

The subject of research in this paper is the legal regulation and protection of possession as one of the main institutes in Macedonian property law.

As the paper will demonstrate, possession is regulated by general Law on Ownership and Other Real Rights as a factual power over things (movable or immovable) distinct from the property rights, which represent different types of legal power over things. The objective of the paper is to emphasize the importance of possession in Macedonian property law and the need for its protection. In order to demonstrate the importance of possession, the paper analyzes the various types of possession regulated in the Macedonian property law and how they affect property law relations. Types of possession that are analyzed in this paper are: indirect and direct (depending on the spatial relation), original or transferred (depending on the origins of the possession), individual, collective or joint possession (depending on whether the factual authority is exercised by one or more persons), legal and illegal (depending on existence or non-existence of a legal basis), peaceful or flawed (depending on the method of taking possession), conscientious or unconscientious (dependent whether the possessor knew or did not know that there were defects in the act of taking possession). By demonstrating the importance of possession in property relations, the paper underlines the value of an effective and efficient system for protection of possession. As the paper will demonstrate, the system for protection of possession consists of two forms of protection – institutional (judicial) protection and self – help, the scope of which is subject of detail analysis.

In addition, the paper also contains comparative look on the legal regulation of possession in the legal systems of the EU member states.

Key words: possession, property law, legal protection.

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1. The concept and the basic characteristics of possession

Possession is an important institute in the property law system and because of that there is a regulation concerning possession in all modern property law legal systems. Although, possession is a part of every property law system, it is important to note that possession is not one of the property rights. Possession expresses a factual power over things, while property rights express legal power over things. It should be emphasized that possession even though is not a type of property right, it exists as a separate legal institute independently of a property rights². In fact, the factual power over things known as possession is one of the basic legal institutes in property law systems³.

The role of possession as a separate legal institute in the Macedonian legal system is to give legal effect to the exercise of factual power over movable or immovable things. As result of exercising factual power over things, i.e. having possession, the possessor enjoys legal protection of his or her possession. Also, under conditions prescribes by law, possessors can eventually lead to aquaring property rights over the object of possession by prescription.

Considering, the effect of having possession it needs to be pointed out that not every form of exercising factual power over things constitutes possession. In that sense, a distinction must be made between possession and mere retention. The possessor exercises the factual power over the thing in his or her possession with an intent to satisfy personal interests by way of possession. The retentor, unlike the possessor, exercises factual power over thing for the benefit of another, usually the owner⁴. The intention, behind the exercise of factual power, is the key element in making distinction between possession and mere retention. Hence, it can be concluded the possession and mere retention are separate legal institutes that cause different legal effects. The legal effects attributed to possession are not present when the factual power is exercised as mere retention. In that sense, the possessor enjoys a higher level of legal protection than the retentor. The possessor

² Р. Живковска, *Стварно право, книга I*, Европа 92, Скопје, 2005, 223.

³ А. Групче, *Имотно (граѓанско) право, II дел – Стварно право*, Култура, Скопје, 1985, 212.

⁴ Art. 168, Law on ownership and other real rights (Закон за сопственост и други стварни права, Сл. весник на РМ, бр.18/2001, У.бр.173/2007, 92/2008, 139/2009, 35/2010) (*Macedonian law*). Art. 12, par. 2, Закон о vlasništvu i drugim stvarnim pravima, Narodne Novine, br. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15 i Narodne Novine br. 94/17. (*Croatian law*). Art. 71, Закон о osnovama svojinskopravnih odnosa, Sl. List SFRJ, br. 6/80 I 36/90, Sl. List SRJ, br. 29/96 I Sl. glasnik RS, br. 115/05 – drugi zakon. (*Serbian law*). Art. 393, par.1, Закон о svojinsko-pravnim odnosima, Sl. list CG", br. 19/2009 (*Montenegro law*). Art. 26, par. 1, Stvarnopravni zakonik, Ur. List R. Slovenije, št. 87/02, 91/13 in 23/20. (*Slovenian law*) § 855, BGB (*German civil law*).

is able to protect his or her possession before the courts, while the retentor is only allowed to use self-protection when the circumstances call for self-protection. Another important difference between possession and mere retention is that possession can lead to acquiring ownership or some other property rights by way of prescription while mere retention cannot.

1.1. The development of the concept of possession

The origin of possession is in the Roman law. In the Roman law possession was considered to be a legal category intended to provide protection to individuals exercising factual power of things (*corpus possessionis*) if the possessor had the intention to hold the thing for himself (*animus domini*)⁵. At that time, possession was protected with special legal instruments so-called possessory interdicts⁶. These legal instruments provided protection of possession for the purpose of re-establishing the factual power i.e. possession in favor of the possessor who has been deprived of possession in an unlawful manner. However, these legal instruments - interdicts have had limited legal effect because they only provided protection in favor of Roman citizens and were not available for people who were in a subordinate social position. The irony of the available legal protection for possession is that it could be used against the owners on part of individuals who have obtained possession illegally such as thieves, for example.

In conclusion, we note that possession represented a legal category in the Roman law, that was protected by the law with legal instruments – interdicts. According to the Roman concept, in order for possession to be constituted two key elements must be present. The first element is the existence of factual power over a certain thing and the second element is the intent to hold that thing as one's own.

The modern legal systems have developed different approaches in defining and regulating possession⁷. As a result of these different approaches, scholars have identified two different concepts about the constituent elements of possession. The first concept is largely based on the Roman

⁵ For possession in the Roman law, see: И. Пухан, В. Бучковски, М. Поленак-Акимовска, Г. Наумовски, *Римско право*, Скопје, 2019, 212. R. Kovačević Kuštrimović, M. Lazić, *Stvarno pravo*, CIP PUNTA, Niš, 2004, 37-39.

⁶ Р. Живковска, *op. cit.*, 223-224.

⁷ Art. 167, par.1 and par.2, Law on ownership and other real rights...Same as Art. 24, par.1, *Stvarnopravni zakonik*... It can be seen that Macedonian and Slovenian property law do not explicitly define what is possession, as it did in Croatian law: Art. 10, par.1, *Zakon o vlasništvu i drugim stvarnim pravima* and in German law: § 854, BGB...The different views of defining possession are given in § 987, Civil Code (Czech Republic), 89/2012. Art. 430, Spanish Civil Code (*Código Civil Español*), 2016. Art. 336, Poland Civil law.

concept of possession, meaning that possession is recognized if two constituent elements are present and those are: 1. The material element – the existence of factual power over the thing and 2. The psychological element – the intent to keep the thing as own (to act as the owner)⁸. The second concept developed mainly by German legal scholars recognized possession if only one element is present and that is the existence of the factual power over the thing (the material element)⁹.

The Macedonian contemporary law bases the regulation of possession on the German concept of possession and therefore protects every form of exercise of factual power over things. This is clearly stated in the provisions of the Macedonian Law on ownership and other real rights (further: Law on ownership)¹⁰.

In the following text a detailed analyzes will be given regarding the legal regulation of possession in Macedonian property law and the manner of its protection.

2. The legal regulation of possession in Macedonian property law

Since possession in the Macedonian law is based on the German (objective) concept, it is determined that possession exist whenever factual power over things is exercised. The intent behind the exercise of the factual power is considered to be irrelevant for the existence of possession. The only time the law considers the intention behind the exercise of factual power to be relevant is when a distinction needs to be made between possession and mere retention. Even though, the law does not strictly require for the exercise of factual power to be accompanied with some form of intent for possession, the legal scholars maintain that some form of intent must be present in the mind of possessor that will give him or her the status of possessor. What legal scholars emphasize is that possession cannot exist without having minimum the will to possess¹¹. According to scholars, this natural intent to possess is crucial to distinct possession from mere retention and to provide legal protection accordingly.

⁸ Р. Живковска, *op. cit.*, 228.

⁹ Р. Живковска, *op. cit.*, 229.

¹⁰ Art. 182-190, Law on ownership and other real rights...

¹¹ А. Групче, *op. cit.*, 214.

Possession is regulated with the articles 167-191 of the Law on ownership. It can be noted that the Law does not explicitly defined possession. However, the overall analyzes of the provisions that regulate possession confirms the conclusion that the legislator recognizes possession to be a factual power over things, without giving any indication on the manner how that power is to be exercised¹².

Regarding possession, it is important to be noted that object of possession are primarily things that can be an object of ownership and other property right. The law, however, also recognizes possession over rights, or to be more precise, possession is recognized over the right of predial servitude¹³.

In order for a certain thing to be eligible for possession, the thing should be transferable in legal traffic and should be specified in a manner the distinguishes it from other things¹⁴. Usually, the object of possession is a single and independent thing, however, in some cases, components of the thing can also be object of possession even though there is no factual power over the principal thing.

Regarding the right of predial servitude, for which we have said that can be object of possession, we note that the law prescribes that the provisions regulating possession over things will be adequately applicable to the extent that they are not contrary to the nature of the right. According to legal scholars, possession over a right entails the factual realization of the content of a predial servitude¹⁵. Having possession over a right of servitude means that possessor is exercising the right of predial servitude, even though he or she does not hold that right.

The Law on ownership does not explicitly state what kind of capacity a person should have, so that he or she can take possession and exercise factual power over thing. Legal scholars, on the other hand, considered that a person should have some level of active legal capacity in order to be able to exercise a factual power. This is based on the scientific opinion that possessors should have some form of intent to hold possession. Therefore, scholars underline that those persons who have no active legal capacity cannot be considered as possessors, they can only be mere retentors. Apart from natural persons, legal entities can also be considered as possessors. Regarding legal entities

¹² Р. Живковска, *op. cit.*, 231.

¹³ Art. 170, Law on ownership and other real rights...

¹⁴ Art. 169, Law on ownership and other real rights. Art. 437, Spanish Civil Code, 2016...

¹⁵ Art. 10, par 1, par. 2 and par. 3, Zakon o osnovama svojinskopravnih odnosa. Art. 70, par.1, par. 2, par. 3, Zakon o osnovama svojinskihpravnih odnosa...

as possessors, legal scholars considers that their intent for possession should be evaluated on the basis of the acts of their legal representatives¹⁶.

3. Types of possession

Possession as a factual power over the things can be exercised in different ways and forms. Legal science classifies types of possession depending on the manner and form it is being manifested. The type of possession can influence property law relations in different aspects and therefore it is important to look into the effect the various type of possession on property law relations. In the text that follows, we will analyze different types of possessions regulated by the Law on ownership and we will demonstrate their effect on property law relations.

The Law on ownership regulates the following types of possession: 1. Direct and indirect; 2. Original or transferred; 3. Individual and collective possession; 4. Legal and illegal; 5. Peaceful or flawed and 6. Conscientious or unconscientious.

1. Depending on the spatial relation between the possessor and the object of possession (the thing), the possession is differed as direct and intermediary possession. Direct possession is a type of possession where the factual power is exercised directly on the object of possession by the possessor¹⁷. When the factual power is exercised indirectly meaning that the possessor does not have the factual possession of the object of possession, then it is considered that the possession is intermediary¹⁸. In practice, these types of possession (direct and intermediary) exist at the same time. This is the case when the owner has given the direct possession over his or her object of ownership onto another person (direct possessor) while maintaining some type of control over his possession in an intermediary way. For example, when the owner has leased the real estate and by doing so has given possession of the real estate on to the lease holder and in return demanded rent payment.

¹⁶ И. Бабић, *Увод у грађанско право и стварно право, девето измењено и допуњено издање*, Службени гласник, Београд, 2021, 261.

¹⁷ More about definition of direct possessor: Art. 167, par. 1, Law on ownership and other real rights. Art. 10, par. 2, *Zakon o vlasništvu i drugim stvarnim pravima*. Art. 24, par.1, *Stvarnopravni zakonik*. § 854, BGB, where German law does not mention explicitly direct possessor, but define a direct possessor as each person who directly realizes power over the thing. § 990, *Civil Code Czech Republic*...

¹⁸ More about definition of intermediary possessor: Art. 167, par. 2, Law on ownership and other real rights. Art. 10, par. 3, *Zakon o vlasništvu i drugim stvarnim pravima*. § 868, BGB. Art. 24, par. 2, *Stvarnopravni zakonik*...Art. 431, *Spanish Civil Code*, where the provision indicates that possession is exercised by the same person who holds and enjoys them, or by another in his name, without use the terms such as direct or intermediary possession.

The significance of this type of possession is seen in the fact that it enables owners to seed the use of their property onto another person without fully losing the factual power over the thing i.e. possession. This is very important for the owners because that means that, even though, another person exercised direct factual power over their property, they are still in parallel considered to have intermediary possession. Having intermediary possession, enables owners to use possessory protection against third parties if and when the direct possessor has neglected to protect the possession.

2. Based on its origins the possession can be original and transferred¹⁹. The original possession exists when the factual power over the object of possession has been established independently with a unilateral act on part of possessor and not by transfer of possession. Transferred possession, on the other hand, is type of possession where the factual power over the object of possession has been acquired by transfer from the previous possessor onto the new one. The transferred possession is usually based on some form of legal transaction between the previous and the new possessor, which means that the transfer possession occurs with consent of the previous possessor²⁰. This is very important distinction for the issue of protection of possession. Once the previous possessor transfers the possession, he or she loses any possibility to seek possessory protection.

3. The possession can be individual or collective, depending on whether the factual power is exercised by a sole person or by two or more persons²¹. The individual possession is always exercised by one person even in cases when the factual power is exercised via legal representative²². This is so because the legal representative acts in name of the represented person and therefore the possession exercised in this fashion should not be confused with collective possession. Collective possession is a type of possession that is exercised by two or more persons together. The collective possession can be co-possession or joint possession. Co-possession is a type of collective possession where the possessors can exercise factual power over the object of possession independently one from another²³. Joint possession is a type of collective possession where the possessors are depended one from another meaning that they can only exercise factual

¹⁹ Art. 173, par. 1, Law on ownership and other real rights. Art. 13, Zakon o vlasništvu i drugim stvarnim pravima...

²⁰ А. Групча, *op.cit.*, 219. Р. Живковска, *op. cit.*, 237.

²¹ Р. Живковска, *op. cit.*, 239.

²² Art. 171, Law on ownership and other real rights...

²³ Art. 172, par. 2, Law on ownership and other real rights...

power over the object of possession if all of them are present at the same time²⁴. Differing individual from collective possession is relevant from several viewpoints. When there is individual possession, all legal consequences attributed to possession can only affect the person that is considered as possessor. For example, if one person takes a lease on a real estate and then he or she allows for another person to reside with him or her in that real estate, that does not mean that person also has possession. When there is a collective possession, the type of collective possession is crucial for resolving the relationship between the possessors. In that sense, when the collective possession is in a form of co-possession, each possessor is authorized to protect the collective possession against third parties. Also, when there is co-possession, each possessor is authorized to protect his or her possession against other co-possessors that may interfere with his or her possession²⁵. When the collective possession is in a form of joint possession, each possessor is authorized to protect the possession against all third parties, but protecting the possession against other joint possessors is excluded due to the nature of their relationship vis-a-vis the possession. In actuality, the joint possessors cannot possibly interfere with each other's possession since they depend one from another in the exercise of the factual power.

4. Depending whether there is a legal base for possession, the possession is classified as legal or illegal possession. Legal possession is a type of possession for which there is a valid legal base for exercising the factual power over the object of possession²⁶. The possessor who has a valid legal base of possession is also considered to have the "right to possess". Illegal possession is a type of possession for which there is no a valid legal base. Since the illegal possessor does not base his or her possession on a valid legal base, this type of possessor is considered not to have the "right to possess". Regarding possessory protection, this is irrelevant, but the state of having the "right to possess" may be crucial in resolving other property relations between the possessor and third parties who also exercise certain rights over the thing that is the object of possession. Whether the possessor is legal or illegal, can also affect the ability of possessor to acquire ownership over the object of possession by way of prescription. When the possession is legal, the required time

²⁴ Art. 172, par.3, Law on ownership and other real rights...

²⁵ „If more than one person has co-possession of property, there shall be no protection of possession in their relationship to each other ...§ 866, BGB.

²⁶ Art. 179, Law on ownership and other real rights. Art. 18, par. 1, Zakon o vlasništvu i drugim stvarnim pravima. § 991, Civil Code Czech Republic...

for prescription is significantly shorter than the required time for prescription when the possession is illegal²⁷.

5. Dependent on the act of taking possession, the possession can be peaceful or flawed. Peaceful possession is a type of possession where the act of taking possession is conducted in a peaceful manner without using force, fraud or abuse of trust. Flawed possession is the opposite of peaceful possession meaning that is a type of possession where the act of possession is conducted forcibly, fraudulently or with an abuse of trust²⁸.

It is important to underline that not only peaceful but also flawed possession enjoys possessory protection according to the Law on ownership. Flawed possession can be protected against all third parties at any time, however, regarding the protection against the peaceful possessor, possessory protection can be used once the peaceful possessor allows for the term for protection of peaceful possession to lapse. This is because in the moment when the term for peaceful possession lapses, previously flawed possession turns peaceful²⁹.

6. Considering the subjective attitude of the possessor in regards of the possession that his or her has, the possession can be qualified as conscientious and unconscientious³⁰. Conscientious possession is type of possession where the possessor does not know, nor could have known, that the possession is without legal base³¹. Unlike the conscientious possession, unconscientious possession exists when the possessor is aware or at least has sufficient reasons to believe that his or her possession is without legal base³².

Conscientious possession carries a lot of weight in property law relations. For example, conscientious possession is the crucial requirement for acquiring ownership by way of prescription. The conscientious possessor is also treated with leniency regarding his or her obligations vis-à-vis the owner of the object of possession in court proceedings³³. It is important

²⁷ P. Живковска, *op. cit.*, 240.

²⁸ Art. 179, par. 2, Law on ownership and other real rights. Art. 18, par. 2, Zakon o vlasništvu i drugim stvarnim pravima...

²⁹ Art. 182, Law on ownership and other real rights...

³⁰ Despite Macedonian law, in Czech Republic law, the legislator this classification of possession prescribes as possession in good faith or possession in bad faith, § 992, Civil Code ...

³¹ Art. 179, par. 3, Law on ownership and other real rights. Art. 18, par. 3, Zakon o vlasništvu i drugim stvarnim pravima.

³² M. Vedriš, P. Klarić, *Građansko pravo, Opći dio, stvarno, obvezno i nasljedno pravo, peto izdanje*, Narodne novine, Zagreb, 2001, 200.

³³ Art. 157 and art. 158, Law on ownership and other real rights...

to note that the Macedonian Law on ownership presumes that any possession is conscientious³⁴. The person who claims that the certain possession is unconscientious is required to prove so. However, once a court proceeding has been initiated disputing the possessor's "right to possess", it is considered that conscientious possession turns unconscientious³⁵.

Analyzing the different types of possession, legal scholars conclude that there is a type of possession not explicated regulated by the Law on ownership as a separate type of possession. This type of possession is called by legal science qualified possession and it has the strongest legal effect in property law relation³⁶. The qualified possession is a type of possession that is conscientious, legal and peaceful at the same time.

4. The legal protection of possession

Considering the importance of possession in property law relations, the legal system provides legal protection for possessors if they have been deprived of their possession or if their possession has been subject of interference by third party. The protection of possession can take on two forms: institutional protection and self-help³⁷. Institutional protection of possession is afforded by the courts in a special civil procedure for protection of possession regulated by the Law on civil procedure³⁸. Self-help, which is the other form of protection of possession, is regulated by the Law on ownership in articles 183 and 189.

4.1. Judicial protection of possession

Judicial protection of possession, as we have mentioned, is afforded by the courts in a special civil procedure. However, we have to bear in mind, that the material base for protection of possession is given by the provisions in articles 181-189 of the Law on ownership. An overall analysis of the provisions referring to the protection of possession demonstrates that protection is

³⁴ Art. 179, par. 5, Law on ownership and other real rights...

³⁵ Art. 179, par. 6, Law on ownership and other real rights...

³⁶ M. Vedriš, P. Klarić, *op. cit.*,197-201. Z. Rašović, *Stvarno pravo, drugo izdanje*, Beograd, 2005, 57.

³⁷ Art. 183, par. 2, Law on ownership and other real rights...

³⁸ Art. 411-416, Law on civil procedure (Закон за парнична постапка, Сл. весник на РМ, бр. 79/2005, 110/2008, 83/2009 и 116/2010).

afforded for all types of possession. This means that the legislator affords protection even if the possession is flawed meaning it has been acquired by force, fraud or abuse of trust³⁹. However, we have to consider that the possessor with flawed possession can protect that possession primarily against third parties, as for the previous possessor, the flawed possessor is afforded protection only after the timeline for protection of possession of the previous possessor has lapsed.

According to scholars, there are two basic conditions for protection of possession to be afforded. The first condition is that there must be possessory power and not mere retention, since the retentor's possession does not enjoy judicial protection⁴⁰. It is especially pointed out by legal scholars that the first thing that the courts need to determine when initiating the procedure for possessory protection is whether there is possessory power or a mere retention. Second condition for affording possessory protection is the existence of the act of interference or deprivation of possession. The act itself must be unlawful in order to constitute a violation of possession⁴¹. In that sense, acts of public authorities who have mandate to enter premises, to conduct search and seizure, are not considered to be parties who engage in unlawful violation of possession. The same applies to persons who act out of necessity to prevent or to alleviate consequences from a pending danger. For example, a fireman breaking the door, entering in someone's home to extinguish the fire.

The Law on ownership makes a distinction between interference and deprivation of possession. However, the law does not go into explaining what constitutes infringement and what constitutes deprivation of possession. Although, the Law does not specifically define the meaning of these two forms of violation of possession, in legal science there is a unanimous opinion that the difference is of more theoretical, rather than practical relevance, since there are no differences in the legislative or procedural form of protection. From a theoretical point of view, interference with possession is an act that prevents the possessor from peacefully exercising his or her factual power over the object of possession⁴². The act of interference can be in a form of physical interference or verbal interference, and in both cases it needs to be serious enough to discourage the possessor from fully exercising his or her factual power. Deprivation of possession, according to scholars, constitutes an act that completely disables the possessor from exercising his

³⁹ Art. 181, par. 1, Law on ownership and other real rights...

⁴⁰ See: P. Живковска, *op. cit.*, 262. Z. Rašović, *op.cit.*, 46.

⁴¹ Art. 184, par. 2, Law on ownership and other real rights...

⁴² P. Живковска, *op. cit.*, 255.

or her factual power over the object of possession. Usually, the act of deprivation is a physical act. Some scholars, however, considered that it could also be a verbal act, appearing in a form of serious threat that forces the possessor to abandon possession⁴³.

From a procedural view point, the person who is authorized to take possessory action is the immediate possessor meaning the person who held possession over the object of possession in the moment when the act of interference or deprivation of possession took place. Regarding the capacity for filing a possessory action, legal scholars' debate on the issue whether that capacity belongs primarily to the direct possessor, or whether it belongs equally to the direct and the intermediate possessor. Taking into account the provisions of the Law on ownership, where it is stated that every possession enjoys protection, the general conclusion is that the capacity for possessory action belongs equally to the direct and intermediate possessor. However, for practical reasons, we must add that the possessory action should be filed primarily by the direct possessor, since it is he or she that suffers the violation of possession directly. If the direct possessor neglects to protect his or her possession, the possessory action can also be filed by the intermediate possessor⁴⁴. Another issue regarding the capacity for filing possessory action is the issue whether the intermediate possessor can protect his or her possession against the direct possessor. There is a difference in opinions on this issue. Some considered that the intermediate possessor has the right to protect the possession only against third parties, while others considered that intermediate possessor may also protect his or her possession against the direct possessor. It seems logical for the intermediate possessor to be able to protect his or her possession against the direct possessor as well, since the Law of ownership allows protection for all types of possession. However, we must consider that possessory protection to the intermediate possessor against the direct possessor cannot be afforded unless the court goes on to examine the legal nature of their relationship⁴⁵. This goes out of the scope of possessory protection, because as we have said, when affording possessory protection, the court only evaluates factual issues and not legal relationships.

When there is collective possession, the capacity to file possessory action belongs to each of collective possessors equally⁴⁶. Any of them can protect possession individually against all third

⁴³ Одлука на Округен суд Скопје Гж 3450/78 од 21.2.1979 година, Билтен бр. 3/79.

⁴⁴ Art. 185, par. 1, Law on ownership and other real rights...

⁴⁵ Art. 185, par. 2, Law on ownership and other real rights...

⁴⁶ Art. 186, par. 1, Law on ownership and other real rights...

parties. Co-possessors can also protect their possession against other co-possessors⁴⁷. Joint possessors can only protect their possession against third parties.

As for the person towards whom the possessory action is directed – the defendant, that must be the person who has unlawfully taken possession or has unlawfully conducted an act of interference against the possessor⁴⁸.

Filing a possessory action is time-limited and the action can be filled no later than 30 days counting from the moment that possessor has become aware of the act of interference or deprivation of possession. This is so-called subjective deadline. There is also an objective deadline of 1 year counting from the moment that the act of interference or deprivation of possession has taken place⁴⁹. It is important to note that after these deadlines lapse, the possessory protection is lost⁵⁰.

When a timely possessory action is filed, the court initiates the procedure for protection of possession. It is important to note that in this court proceeding the court analyzes and determines only factual issues. The purpose on this type of protection is to provide reinstatement of possession onto the last peaceful possessor or to prevent any act of interference of possession against the peaceful possessor. In the proceedings for possessory protection the court does not engage and determine whether the last peaceful possessor holds the “right to possess” or not. Some scholars argue that the courts cannot provide effective possessory protection if they do not at least consider whether there is a “right to possess” or not. However, most scholars hold the opinion that the function of possessory protection is to provide, in the shortest possible time, protection of the existing factual power of the last peaceful possessor, so that public order will be held up and no arbiter action will be taken. The person who considers that he or she has a stronger right to possess, can go on to prove that right in a regular civil procedure. Is it important to note that, the outcome of the afforded possessory protection by the courts has no bearing on a regular civil procedure for determining a stronger “right to possess”. For example, the owner may appear as a defendant in

⁴⁷ Art. 186, par. 2, Law on ownership and other real rights...

⁴⁸ Р. Живковска, *op. cit.*, 256.

⁴⁹ Art. 183, par. 1, Law on ownership and other real rights...Same as: Art. 21, par.4, Zakon o vlasništvu i drugim stvarnim pravima, Art. 404, par. 1, Zakon o osnovama svojinskopravnih odnosa. In Czech Republic, the legislator prescribes a different time-limits for possessory protection: „ *A court shall dismiss an application to protect or retain possession, if the application is filed after six weeks from the date on which the applicant became aware of his right and of the person who threatens or disturbs the possession, but no later than one year from the date on which the applicant could have asserted his right for the first time*”, ...§ 1008, Civil Code Czech Republic...

⁵⁰ А. Группче, *op. cit.*, 294. R. Kovačević Kuštrimović, M. Lazić, *op. cit.*, 58-59.

proceedings for possessory protection and action may be taken against him for violation of possession, but the owner will always be able to file petitori action and protect his or her right of ownership regardless of the outcome of the possessory proceedings.

When rendering a decision of the issue of protection of possession, the court may order restatement of possession in favor of the last peaceful possession. This type of decision is rendered when the possessor claims that he or she was deprived of possession. When there is interference with possession, the court renders a decision prohibiting the defendant to undertake any action that constitutes interference in the future. The protection is also afforded for similar acts of interference if they are undertaken by the same defendant. The reason why possessory protection is afforded for the same or similar acts of interference in the future is of practical nature and its aim is to make a possessory protection more effective. This means that if the defendant commits the same or a similar act of interference in the future, the possessor will not be obligated to file a new possessory action and he will be able to seek protection under the already rendered decision.

The judicial protection of possession in a proceeding for possessory protection is of urgent nature. This is why the courts only restrict themselves in determining factual issues, without getting into the legal relationship between the parties. The timelines for conducting the procedure are shorter and so is the timeline for filing a complaint before higher courts.

4.2. Self-protection of possession

As it was mentioned previously in the text, possession can also be protected by way of self-help. It is important to note that self-help is permitted only in extenuated circumstances when judicial protection would be ineffective⁵¹.

According to the Law on ownership, under strict conditions determined by the Law, the possessor can execute self-help and protect his or her possession without the assistance of authorities⁵². The conditions for executing self-help consist of the following: existence of immediate danger of deprivation or interference with possession, existence of necessity for self-help and proportionality between the act of self-help and act of violation of possession. The

⁵¹ P. Kovachević Kuštrimović, Građansko pravo, opšti deo, drugo izmeњeno i dopuњeno izdaње, Niš, SIRIUS, 1995, 302. M. Vedriš, P. Klarić, *op. cit.*, 217.

⁵² Art. 189, Law on ownership and other real rights...§ 859 and § 860, BGB. Art. 343, Civil Code Poland. Art. 27, Zakon o vlasništvu i drugim stvarnim pravima. § 1006, Civil Code Czech Republic...

existence of immediate danger means that possessor is faced directly with an unlawful act of violation of possession. Being faced with such an act is a prerequisite for fulfillment of second conditions – having the necessity to protect one’s possession. The third condition refer to the proportionality between the act of self-help and the act of violating possession, when executing self-help. There is no legal definition of what proportional is in this situations, however, legal scholars point out that proportionality means that the act of self-help cannot be more harmful than the act of violating possession.

Regarding the capacity for self-protection, it is important to be pointed out that not only possessors but also mere retentors are allowed by law to use self-help⁵³.

As for the timeline for protection, we note that the Law on ownership does not contain a precise provision determining this issue. On this issue legal scholars considered that same timeline should apply as in the case of judicial protection of possession⁵⁴.

6. Conclusions

This paper analyzes possession as a legal institute of the property law. The nature and forms of protection of possession are in the focus of this analyze.

As the paper demonstrates, possession is considered to be a factual power over things and does not constitute any type of property right. The importance of this legal institute is reflected in the legal effects that it may have on property law relations. Those legal effects reflect in a possibility for the possessors to eventually acquire ownership or some other property right (servitude by way of prescription). The manifestation of factual power that is possession also has an effect on preserving or even protecting existing property rights over the object of possession with the use of possessory protection. The paper concludes that possession is a legal category of significant importance in the property law, which is why it is present in all contemporary property regulation.

Regarding the possessory protection, the paper elaborates on the two available forms of protection recognized by the Law on ownership – judicial protection and self-help. Judicial protection is an afforded but the courts in a special possessory protection proceeding. Self-help is

⁵³ Art. 27, par. 2, Zakon o vlasništvu i drugim stvarnim pravima, § 860 BGB, Art. 26, par. 2, Stvarnopravni zakonik...

⁵⁴ Р. Живковска, *op. cit.*, 261.

permitted in extenuated circumstances and under strict conditions determined by the Law on ownership.

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