

## **POSSESSION: HISTORICAL AND LEGAL STUDY IN LIGHT OF RF CIVIL CODE IMPROVEMENT**

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The article studies the most important civil law concept existing in the legal system of each state: the concept of possession. The article describes the concept of possession in the Roman law. The complexity of Roman possession structure has been highlighted. F.C. von Savigny's subjective theory of possession has been examined along with its criticism by R. Jhering. Modern foreign codes of civil law have been described: Netherlands Civil Code of 1992, Quebec Civil Code (Canada) of 1992, Brazil Civil Code of 2003, Vietnam Civil Code of 2005, Catalonia Civil Code (Spain) of 2006, Argentina Civil Code of 2016. Possession in pre-revolution and modern civil law of Russia has been described. Relation issues of possession right, right of use and right of disposal are analyzed. The paper's scientific novelty lies in the fact that the authors have endeavored to define general trends of development of the possession concept based on studying its history in modern foreign codes, and to reveal the most important provisions that can be used to improve the concept of possession in Russia. A conclusion has been made on the need to improve the concept of possession in the Russia's civil law, and primary criteria are recommended for the possession model in the Russian Civil Code.

**Keywords:** possession in Roman law, possession in modern codes of civil law, possession in the Russian Civil Code, concept of possession improvement.

### **1. INTRODUCTION**

Recently, much attention has been paid to studying Roman law in Russia. As an example, we can mention a scientific conference titled "Roman Private Law and Legal Culture in Europe" held in Saint Petersburg in 2010. One of its participants Julinao Krifo (Rome, Italy) spoke that a good lawyer is the one who knows Roman law well (*nullus bonus iurista nisi romanista*). The conference was visited by the Minister of Justice of Russia V. Konovalov who spoke with a report called "Roman Law and Principles of Modern Russian Law". He underlines that the Roman law is a foundation for forming civil law in Russia (Rudokwas *et al.*, 2010).

Giovanni Nikozia (Catania, Italy) also spoke on possession at the conference. His underlying motive was "Possession is not a right (*La possessio no era considerata un diritto*)".

But the Civil Code of Russia chose another way. Article 209 of the Russian Federation Civil Code (RF CC) stipulates that the owner possesses all rights of possession, use and disposal of his property. In this case, possession is an element of right of property. Our Civil Code does not consider possession as an individual

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concept. So, the authors of one of the textbooks for the civil law of Russia rightfully state that the Russian law has no specific right of possession; instead, there is only a legal power for possession being a part of various legal rights (Sergeyev, & Tolstoy, 1998).

Other articles of the RF CC give another meaning of the term of possession. Article 216 of the RF CC uses the term of possession to indicate one of the rights for another person's things: I. Along with the right of possession, another rights in rem, in particular, include a right for lifetime inheritable possession of a land plot. This is what is called an emphyteusis in the Western European law.

Articles 301-305 governing the protection of possession rights and other rights in rem establish the following categories of possession: illegal possession, property transferred by the owner to possession, owner, both in good faith and not in good faith. There is no other information concerning possession in the RF CC. There is no definition of possession, and neither objects of possession, nor subjects of possession, nor ways to set or cease possession, nor protection of possession as an individual concept are specified.

If the RF Civil Code had stipulated another structure of possession as an individual institute protected by law, this would increase the stability of property relations. Multiple illegal takeovers and landmark cases show that property rights in Russia are ineffectively protected. This is why "it is important to study the law and track most problematic areas in the practice of its application" (Navasardova *et al.*, 2015).

## **2. METHODOLOGY**

When making this paper, we used the following methods of legal science: dialectic, historical, logical and comparative legal. The dialectic method allows examining possession in its relation and interaction with other institutes of law in continuous motion. The historical method was predominantly used to define the notion and essence of possession when examining the structure of possession in the Roman law. We should specify that in the Roman law possession meant actual relations. Let us describe the contents of the Savigny subjective theory of possession and its criticism by R. Jhering. Let us note such types of Roman possession as natural possession, civil possession and interdictive possession. The logical method is important when analyzing the institution of possession in various legal systems in combination with the comparative legal method. The logical method has been applied when analyzing the possession in the Civil Code of Netherlands prepared in Dutch and its translation in English. The comparative legal method allowed analyzing and comparing modern foreign codes of civil law and regulations governing possession relations.

To understand the modern Russian structure of possession, let us refer to the pre-revolution Russian civil law and try to propose our own point of view on how to improve the structure of possession in the civil law of Russia.

### 3. RESULTS

#### 3.1. Possession in the Roman law

The notion of possession has been born in the Roman law. The Laws of the Twelve Tables, c. 450 B.C, indicate long-ago possession as one of the ways to obtain a right of possession (Medvedeva, & Semenova, 2015). The Roman law had overcome narrow national features and was adapted to governing property relations of various peoples. In specific relations between commodity producers, Roman lawyers managed to reveal the most common forms, which allowed the Roman law to be transformed into perfect law based on commodity production (Medvedev, 2007). For these reasons, the Roman law had and still has a great impact on the development of feudal and bourgeois law. The Roman law occurred in Italy, which was a center of its study until late Middle Ages. In the 16th century, France became the leader in studying the Roman law when the Humanism was born, and in the 17th century, Holland took the lead to give it up to Germany in the 19th century. During centuries, the Roman law had ardent adepts and vociferous opponents (Algemeines Landrecht für die Preußischen Staaten, 1835).

The primary issues that occur in Roman sources concerning possession are referred to understanding the terminology (Nicosia, 2008). Savigny denoted the complexity of scientific study of possession (Savigny, 1865).

Roman lawyers understood possession as actual relations. Paulus says (D.41.2.1.3): “Ofilius quidem et Neiva filius etiam sine tutoris auctoritate possidere inci pere posse pupillum aiunt: earn enim rem facti non juris esse” (“Some Ofilius and the son of Neiva say that a child may possess without his custodian’s permission, since possession is not a right, but a fact”). In the same fragment, we read (D.41.2.1.4): “Si vir uxori cetat possessione donationis causa, plerique putant possidere earn, quoniam res facti infirmari iure civili non potest” (“If a husband gifts his wife a property, she can possess it, for the actual relation may not necessarily be legal”).

As widely known, transfer by gift was forbidden between spouses in the Roman law, so gifts could be possessed only as a fact rather than on a legal basis.

Ulpian wrote (D.41.2.12): “Nihil commune habet proprietas cum possessione: et ideo non denegatur er interdictum uti possidetis, qui coepit rem vindicare: non enim videtur possession! renunciasse, qui rem vindicavit” (“Property has nothing to do with possession; therefore, if a person that has started to vindicate a thing asks the praetor for interdictum uti possidetis, that persons is granted the same, since the one who presents rei vindicatio shall not be deemed to have waived possession”).

Based on these provisions, F.C. von Savigny developed the so called subjective theory of possession. He considered possession as an actual relation (ein bloß faktisches, unjuristisches Verhältniss) (Savigny, 1865). He understood the

possession as physical impact on the possessor's thing and an obstruction for any third party to have effect thereupon. Such possession had legal consequences and was deemed to be legal possession (*juristische possessio*).

An antagonist of this theory was R. Jhering. He was very emotional about it: "The subjective theory was based on two places in the Digest by the lawyer Paulus. They read that *animus possidenti* represents a necessary condition of possession and due to its absence its representative and the lessee have only holding. If the compilers of the Digest would have done the same with these wordings as the compilers of *basilica* who have just adopted the provision '[its] representative and the lessee have only holding' without giving any explanation from Paulus: 'since they have no *animus possidentis*', the subjective theory would have never occurred because *animus possidentis*, in the way Paulus meant it, are no longer seen in the Digest" (Jhering, 1883). However, this is not true. Apart from Paulus, *animus possidenti* were also used in the Digest by Prokul (D.41.2.27) and Afrikan (D.12.1.41). This is what Prokul said (D.41.2.27): "Si is, animo possessionem saltus retineret, furere coepisset, non potest, dum luieret, eius saltus possessionem amittere, quia furis non potest desinere animo possidere" ("If the one who intends to possess a mountain pasture becomes mad, he cannot lose the possession of the mountain pasture while he is sick, since insane persons can't lose the intent to possess").

Jhering's criticism can't be admitted as convincing. For a starting point, he took the studies of simple holding; a holder had no *animus*, but, nonetheless, it has been protected. On these grounds, R. Jhering made no distinction between possession and holding, which resulted in so called objective theory of possession.

We believe that the subjective theory of possession allows increasing the level of protection of property rights. For example, from the above we see that that a right of possession can be protected three times: self-protection, as a fact and as a right. In the objective theory of possession, this is impossible, since it is only protected twice: self-protection and as a right.

The modern theory names the following types of Roman possession:

1. Natural possession or holding (*corporalis possessio*). Natural possession or holding means permanent material or physical possession of a thing without *animus*.
2. Civil possession (*possessio civilis*). Civil possession is a possessive relation based on justice (*iusta causa*), which is possession in good faith.
3. Interdict possession (*possessio ad interdicta*). This type of possession means that it is protected by praetor's interdicts, irrespective of whether it is supported by legal or illegal grounds (Nicosia, 2008).

### 3.2. Possession in modern foreign codes of civil law

In the last decade, the global civil law has been significantly modified. In new codes, an important place is taken by the concept of possession.

These include Netherlands Civil Code of 1992, Quebec Civil Code (Canada) of 1992, Russian Civil Code of 1994, Brazil Civil Code of 2003, Vietnam Civil Code of 2005, Catalonia Civil Code (Spain) of 2006, incomplete codes of the Chinese civil law of 1986 and the Property Right Law of 2007, Argentina Civil Code of 2016. It is interesting to track the development trend of the possession institution in these codes and borrow most interesting provisions acceptable to be adopted in the Russian concept of possession.

We should note that the RF CC and incomplete codes of the Chinese civil law and the Vietnam CC (Bo luat dan su No. 33/2005Qhiii, 2005) do not describe an independent concept of possession and consider it only as an element of right of property. The latter code gives an unexpected definition of possession: "Right of possession is a right to store and manage the property" (Bo luat dan su No. 33/2005Qhiii, 2005). The new Property Right Law of the People's Republic of China contains a whole section dedicated to possession. But it describes possession based on a legal agreement, e.g., the right of possession is actually admitted.

The Netherlands Civil Code sees possession as a fact, but the English translation makes it a legal institution. Article 107 of the Third Book of the Code reads as follows: "Bezit is het houden van een goed voor zichzelf" ("Possession is the legal status in which a person holds an asset for himself" (Burgerlijk Wetboek, 1992). Legal status can also be understood as a legal relationship.

The civil code of Brazil admits possession as its actual relation: "An owner is the one who fully or partially controls a thing as a possessor: (Art. 1196) (Novo codigo civil brasileiro, 2003).

The Civil Code of Quebec (Canada) understands possession as actual possession of a thing by the person himself or through another person as a possessor of right in rem. This will is implied. Holding is meant when there is no such will (Art. 921) (Code civil du Quebec (Canada), 1992).

The Civil Code of Catalonia (Spain) defines possession as "actual power over a thing and a right exercised by the possessor by himself or through any other person" (Art. 521-1) (Codigo civil de Cataluña (España), 2006).

The new code of Argentina states that "there is possession when a person exercises actual power by himself or through another person over a thing, acting as a possessor of a title of a right in rem, whether he has had it or not" (Art. 1909) (Codigo civil y comercial de la Nacion, 2016).

In this manner, some codes consider possession as an element of right of property, while others admit it a fact and an individual institution. An object of possession should also be considered. Some of the codes indicate the object of possession as a material thing, while others see it also as a thing and a right.

### 3.3. Ownership concept in the Russian law

Article 209 of the Russian Federation Civil Code (RF CC) stipulates that the owner possesses all rights of possession, use and disposal of its property. In this case, possession is an element of right of property.

The well-known triad occurred in the Russian law early in the 20th century.

The Russian civil lawyer V.G. Kukolnik defined the right of property as a right for available material things, which means a power to own, use and dispose of the same fully or partially, unless it is not forbidden by law or any right of any third person (Kukolnik, 1815). Considering possession and ownership protection in the modern civil law, A.V. Konovalov calls it the father of the triad structure of the owner's legal powers in the Russian civil law (Konovalov, 2002).

Let us remind that a right of possession as an element of right of property first appeared in the Prussian Regulations 1794. Claus 1, Title 12, reads: "A right and rights of property for things are exercised through possession and all legal powers that the law provides to secure possession (Besitzrecht)" (Algemeines Landrecht für die Preußischen Staaten, 1835).

When developing the German Civil Regulations of 1900, its authors abandoned the triad and came to understand possession as an actual relation.

Now let us consider possession as a legal power of property right. If we compare the definition of the ownership right under the RF CC with similar definitions in other civil codes, we will find out that only the Russian code presents possession as an element of property right. Most civil codes stipulate no right of possession as an element of property right. We believe this is correct. A right of property and a right of possession are equivalent notions. Possession is actual control of a person over a thing combined with intent to refer to the thing and the right as an owner of a right in rem. If this possession is based on the right, there is no distinction between the right of property and the right of possession. For this reason, possession as an element of a property right shall be excluded from its definition.

There is another reason why it is unduly to include the right of possession into the notion of the property right. If we consider the notion of the right of possession and the right of use, we will understand that the latter suggests the former.

The Russian Language Dictionary gives the following definition of the verb "to use": "Use, 1. Resort to something, employ for one's needs and demands. 2. Use something in one's own interests, derive benefit" (Russian Language Dictionary, 1957).

It means that the right of use is deriving material or other benefit from using a thing. Using a thing suggests deriving internal qualities and useful properties of the thing. Possession is external control of a person over a thing. One can possess without deriving useful properties of a thing. But using is impossible without controlling the thing, e.g., without possessing it. In this manner, using suggests

possession. This also allows not including the right of possession into the notion of the property right.

#### **4. DISCUSSION**

We believe that it is necessary to include a complex concept of possession into the RF CC. The Concept of Developing Law of Rights in Rem recommended in 2009 by the President's Council for discussion declares that the applicable law contains no regulations on possession and its protection, which shall be deemed as one of the most severe Civil Code flaws (Concept of Developing Law of Rights in Rem, 2009). It is suggested to include a special chapter on possession into the RF CC. The draft of the Law to Implement Amendments into the Russian Civil Code introduces RF CC Chapter 13 Notion and Types of Possession and Chapter 14 Protection of Possession into Section 2. Innovations do improve the Russian Civil Code. But the draft has not been implemented so far. However, we believe that two chapters are insufficient: the draft gives no information about possession origin and cease, possession consequences and time limitation as a means to accrue a property right. The possession protection shall be based on administrative measures as in the Roman law, which will increase the protection efficiency of property rights. The methodological basis of possession structure shall be Savigny's subjective theory of possession. The notion of the right of possession shall be avoided in the Civil Code. It should be remembered that possession is a fact, rather than a right. Certainly, in the modern society owners are possessors, which results in some confusion between the notions of possession and property right (possession is like property, as R. Jhering said) (Jhering, 1883).

#### **5. CONCLUSION**

This article attempted to theoretically justify the need to improve the structure of possession in the modern civil law of Russia.

When modifying the possession structure, we suggest methodologically using the viewpoint of Charles Maynz who revealed the essence of the Roman possession and wrote: "Before we can talk of rights of rem, we should say several words about power that a person can exert upon a thing, and abstracting from our issues – whether it had a right to have it or not. This physical power of a person over a thing is called possession. Possession contains two elements that are equally present in property, namely: human's will and a thing subordinate to this will. But property requires much as a substantial condition for a thing to be subordinate to our will in an accepted way and to be guaranteed by law. For possession to be obvious, we should have a power to dispose of a thing, and it is of no concern whether this power must conform to the law or not" (Maynz, 1876).

It seems that today when we see reformation of civil law, it is necessary to reconsider such principally important issues for all participants, law making and

law enforcement practice as terminology of the possession concept, definition of possession, rights and possession objects, etc. Special attention should be paid to the theory of possession protection.

We will hope that law-makers will take into account our remarks and will accelerate the process of possession law reformation.

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