THE LEGAL REGIME OF POSSESSION IN ROMAN LAW

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Abstract

Unlike modern legal doctrine, the Romans, practitioners by definition, saw in their possession an independent legal title. According to the Roman conception, subjective rights and states of affairs are not synonymous, and possession was a state of affairs (legally protected since the time of the republic.). As a result, they never perceived possession as an attribute of property, instead considering it only an outward sign of it. Being a simple state of affairs, in the first centuries of the Roman state the possession was deprived of legal protection. In time, however, with the evolution of the procedural realm, the legal protection of possession began to be guaranteed by the interdicts of the possessor who could place the possessor in a privileged position even towards the owner. In this sense, we mention that in the case of an action in claim, the possessor had the quality of defendant, and the owner had the quality of plaintiff. As the burden of proof fell on the plaintiff, the possessive defendant could defend himself by stating only: I possess because I possess. The article aims to follow the evolutionary path of possession from a simple state of affairs to an independent legal title whose legal protection has gained a wide scope.

Keywords: *possession, legal regime, state of affairs, attributes of property, Roman law.*

1. Introduction

In modern law, possession has a wide doctrinal exposition. The luxury of knowing the depths of this legal institution is due to a solid pre-existing construction that bears the signature of the Roman people. Contemporary jurists have assumed the role of adapting to the context of the era an already elaborated legal system. For this reason it is vital to analyze the extraordinary dimension of the Romans' creative effort to mould all these concepts, principles and institutions that underlie contemporary civil law and implicitly possession.

The specificity of the Roman law system consists in the fact that its very construction is the product of a long process of reporting to the needs of society. Roman law was an eminently procedural law, developed in permanent accordance with the requirements of practice, the legal innovations not having a legislative character. The protagonists of the process of elaborating the Roman law system were praetors, judicial magistrates who, based on the principles of fairness and good faith, in the absence of their legislative consecration, sanctioned new subjective rights, using procedural means, whenever they found that the plaintiff had a legitimate claim.

The architects of the Roman law system concentrated their creative resources around the idea of power. We can say that the very essence of Roman legal constructions was the representation of dominion in the legal realm. But the nuances that dominion endured in Roman times go beyond both the historical dimension and the matter of real estate rights.

Indeed, the Roman Empire imposed itself globally as an unstoppable military force and yes, they had a very clear representation of the concepts of ownership, possession, detention, but the materialization of power is not limited to these spheres. On the contrary, on closer inspection it can be seen that even interpersonal relationships revolved around the idea of power.

In this sense we mention the way in which the Romans defined, in ancient times, the family as the totality of goods and persons that were under the power of the same master (*pater familias*). Moreover, depending on the person or object on which it is exercised, the power of the head of the family had a different name. Thus: the power of the man over the woman was called *manus*, the power of the father over the descendants was called *patria potestas*, that of the master over the slaves *dominica potestas* and that of the master over other goods besides slaves, *dominium*[1]. There even was a type of power that the buyer exercised over the son sold by the *pater familas*, known as *mancipium*. For a long time, the rights that pater familias had over family members could be confused with the rights of the owner over his property. More precisely, just as the owner's right over his property had an absolute character, so could the *pater familias* dispose of the fate of those under his power according to his own will, and this included even the right of life and death over them.

Another example of the relevance that the idea of power had is portrayed in the matter of inheritance. Initially, the Romans did not accept the idea of transmitting the patrimony *mortis causa*, as the size of a person's patrimony meant the expression of his power in the community, and in these conditions, the power itself had an individual, non-transmissible character. Naturally, the non-transferability of power principle could not last, because it came in opposition to the principle according to which there can be no patrimony

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[1] Gaius, Institutiones, 1.49.; Emil Molcuț, Drept privat roman, Ed. Universul Juridic, București, 2011, p. 95.

without a holder. As a result of this contradiction, the Romans had to admit the transmission of the patrimony *mortis causa* and to create the systems of legal and testamentary succession. Regarding the legal succession (*ab intestat*) we mention the fact that the very name of the successor (*heres*) springs from the idea of power, *herus* meaning master[2]. The will also appeared as an expression of the unlimited power of the head of the family over the persons and goods under his power, as a legal act meant to ensure the transmission of the power of the pater familias to his descendants and the perpetuation of the property-power principle[3].

Returning to the subject of possession, its regulation also mirrors exactly the phenomenon of diversification of forms of domination. Currently, we find that possession is (both in law and in legal doctrine) grafted onto the property law, being often perceived as an attribute of ownership. Thus, in art. 916, the Romanian Civil Code defines possession as being the exercise in fact of the prerogatives of the property law over a good by the person who owns it and who behaves like an owner. Unlike modern legal doctrine, the Romans, practitioners by definition, saw in their possession an independent legal title. According to the Roman conception, subjective rights and states of affairs are not synonymous, and possession was a state of affairs (legally protected since the time of the republic.). As a result, they never perceived possession as an attribute of property, instead considering it only an outward sign of it.

Through this article we aim to follow the evolution of possession in Roman law, and how it has been in a perpetual adaptation to the requirements of practice, traversing a millennial trajectory from state of affairs, to state of affairs protected by law and even to a distinct legal title from that of ownership.

2. Content

2.1. Origins

Although the great Roman jurists often pointed out that the difference between ownership and possession is a fundamental one (*separata esse debet possessio a proprietate*[4]*; nihil commune habet proprietas cum possessione*[5]), we must not understand from this that there is no connection between the two concepts, but only that ownership and possession were, in the conception of the Romans, two distinct legal titles.

The fact that possession has evolved closely connected with ownership is undeniable. As an expression of the idea of power, the first concept elaborated by the Romans was that of property. Although it has been repeatedly stated that private property (ownership) has been the symbol of the individualistic spirit of the Romans since the beginning, in reality, for centuries, the Romans knew only collective property, either in the form of collective ownership of the gens or in the form of family property. Only after the founding of the Roman state, two new forms of property appear, namely the *collective property of the state* and the *quiritary property*, as expressions of the property-power. In the classical era, *provincial property* and *pilgrim property* were formed, and in the postclassical era, Emperor Justinian achieved the unification of the legal regime of property and thus a unique form of property was born, called *dominium* or *proprietas*[6].

The evolution of the institution of possession was synchronized with the transformations that took place in the matter of ownership, dissociating in time from it and acquiring its own identity. Thus, the genesis of possession is marked by the emergence of collective ownership of the state. The goods that became the property of the state were called *res extrapatrimonium* precisely because they could not be the object of private property[7]. In addition to the goods used by all the inhabitants of the state (*res publicae*), this category also included the territories conquered from enemies, known as *ager publicus*.

In order for these vast lands to prove their usefulness, the Roman state attributed them, for use, to the families of patricians (sometimes free of charge, sometimes in exchange for sums of money). Initially, the relationship between the state and the patricians who benefited from the use of these lands was as clear as possible, as each family received in use an area of land proportional to the labor force they could provide through its own members. In time, however, the size of the lands allotted to the patricians had expanded to such an extent that their cultivation by their own means had become impossible. For this reason, their sub-concession has become a common practice. These sub-concessions led to the emergence of new subjects of law in the reports concerning ager publicus, namely customers. As a result, serious problems arose and with them the need to regulate in detail the legal relations between the state, patrons and customers. The problems we are referring to concern the bad faith of customers who refused to leave the sub-conceded land. In the absence of concrete regulations on the legal relationship between them, the patrons were defenseless faced with the abuses committed by customers. To help patrons, praetors created a legal instrument called the *precarious interdict*. In this context, the term *possessio* is mentioned for the first

[2] Arangio-Ruiz, Istituzioni di diritto romano, Napoli, 1957, p. 513.
[3] See C. Fadda, Concetti fundamentali del diritto ereditario romano, Napoli, 1900.
[4] Dig., 43.17.1.2.
[5] Papinian, Dig., 41.2.12.1.
[6] C.St. Tomulescu, Index, Napoli, 3, 1972, p. 108.
[7] C. Stoicescu, Curs elementar de drept roman, Ed. Universul Juridic, București, 2009, p. 143.

time, as a state of fact protected by law[8]. Since the analysis of the legal protection of possession is the subject of a subsequent individual section, we consider it necessary to *a priori* establish the coordinates of the Roman possession.

2.2. The concept of possession and its constituent elements

Possession designates a state of affairs consisting in the material dominiom of an object, dominiom that enjoys legal protection[9].

Possessio civilis, or as the Romans called it, the true possession (thus delimiting the possessor from the holder), was that possession which met the two constitutive elements, namely *animus* and *corpus*.

Through the volitional element *animus*, the Romans designated the intention to keep a good for themselves[10]. But also in this aspect the Romans distinguished between the intention of the possessor to own the good exactly like an owner, which they called *animus domini* and the intention to possess a certain good without wanting to become the owner of it, which they called *animus possidendi*[11]. *Animus possidendi* has a wider scope than *animus domini*. Thus, the persons who had *animus possidendi* were: the owner, the possessor in good faith, the possessor in bad faith, the long-term tenant, the pledge creditor, the lessee and the seizure-depositor. Animus domini instead had only the owner and possessor of good or bad faith. As the intention to rule implies the existence of legal capacity, naturally, the incapable did not have the aptitude to be appointed owners.

Corpus was the material element of possession as it designated the totality of material acts by which the possessor used a good. By the *corpus*, the Romans understood not only the taking possession of the good, but also the establishment of the deeds by virtue of which the possessor was entitled to behave as an owner towards that good (deeds that could vary from the remote indication of the purchased fund to the handover of the keys to the acquired property)[12].

Although the possession was usually acquired personally by the person who met the two constituent elements, there were also situations in which one person could acquire possession for another person. Such situations concerned the possession *ex peculiariari causa*, acquired by the sons of the family or the slaves of the pater familias for him[13].

Over time, the issue of admitting the gaining of possession with the help of people outside the family has arisen. Initially, the refusal was categorical, as Gaius stated that *per extraneam personam nobis adquiri non posse*[14]. Since the classical era, the acquisition of possession through representation has become widespread, a number of people such as prosecutors, legal representatives of legal entities, guardians and curators can acquire possession for others. Moreover, at the end of the classical era, it was allowed to conclude a special mandate having as legal object the acquisition of possession of a good by the agent in the name and for the person of the principal.

2.3. Possessory interdicts. The legal protection of possession

What must be understood about the Romans is that in the elaboration of law process, theorizing occupied the last position. For this reason, the whole theoretical evolution of possession (from the various types of possession to the effects produced) expressed nothing but the result of the practical reforms carried out in the field of its legal protection. And when we talk about legal protection of possession, we refer especially to the *possessory interdicts*. Depending on the purpose, these possessory interdicts were of three kinds: to obtain, to retain or regain possession (*Sequens divisio interdictorum haec est, quod quaedam adipiscendae possessionis causa comparata sunt, quaedam retinendae, quaedam recuperandae*)[15].

- *Recuperandae possessionis causa* interdicts

Since these interdicts were issued in cases where the possession was a defective one (obtained precariously, clandestinely or by violence), they were of three kinds: the precarious interdict, the *clandestina possessione* interdict and the *unde vi* interdicts[16].

The *de precario* interdict represented the legal means by which the owner recovered possession of his property from the precarious holder (who had received the property as a loan). If the precarious holder refused to return the property upon request, the owner addressed the praetor in order to command the holder to hand over the good.

We began displaying the possessory interdicts with the *de precario* interdict because the very idea of legal protection of the state of affairs called possession is due to it. As it was said, the conceptualization of possession as well as the need to protect it arose in close connection with the lands conquered from enemies, lands called *ager publicus*. The *patrons*, persons to whom the state assigned land owned by the state as possessions, sub-granted them to the customers. As the patrons did not own those lands, they depended on the good faith of the customers regarding their recovery.

[8] J. Gaudemet, Studia et documenta historiae et iuris, Roma, 29, 1963, p. 339.
[9] E. Molcuț, Drept privat roman, Ed.Universul Juridic, București, 2011, p. 109.
[10] M. Cormack, Zeitschrift der Savigny Stiftung, Romanistische Abteilung, Weimar: 86, 1969, p. 105; Al. Minculescu, Precariul în dreptul roman, București, 1935, p. 62.
[11] R. Hutschneker, G. Iuliu, Curs de drept roman, București, 1932, p. 424.
[12] Dig.,42.2.3.1.
[13] Gaius, Inst., 2.89.
[14] Gaius, Inst. 2.95.
[15] Iustinian, Inst. 4.15.2.
[16] R. Monier, Manuel elementaire de droit romain, I, Paris, 1945, p. 394.

However, if the latter were in bad faith, they could easily refuse to leave the land at the request of the patrons, and they had no legal instrument to oblige them. This was until the creation of the precarious interdict by which, with the help of the state, the praetor ordered the client to restore the ownership of the land to the patron.

Although in modern doctrine only the function of protecting the possessor-owner that this interdict fulfilled was taken over, the reality is completely different. We see how the precarious interdict was created in order to protect the patron (a possessor, not necessarily an owner) from the potential abuses of the holders. The genesis of the legal protection of possession also contradicts an idea taken over by contemporaries, namely that Roman possession is confused with an attribute of private property. The *de precario* interdict not only arose in connection with public property but the possessory legal protection of the owner was later enshrined in classical law. The interdict ignited a series of procedural reforms, which in order to meet the requirements of the practice implicitly led to the extension of the scope of possession and the diversification of its forms to the point that it acquired a physiognomy similar to that of real estate rights[17].

The *de clandestinea possessione* interdict sanctioned that possession acquired secretly, in the ignorance of the owner. Although it did not have an extensive exposure in Roman jurisprudence, this interdict deserves its mention because it allowed the exercise of possession only by *animus*, in absence of *corpus*[18].

- The *unde vi* interdicts were the legal instruments through which the person deprived of the good by violence could address the praetor to regain both the good from which he was expelled, and its accessories[19]. As such, the expected effect of these interdicts was not only to restore the previous situation, but also to obtain the fruits of the good or damages[20]. Depending on the nature of the violence through which the dispossession was carried out, the Romans distinguished between the *unde vi cottidiana* interdict (characterized by the use of ordinary means of violence), subject to a limitation period of 1 year and the *unde vi armata* interdicts (meaning dispossession by violence committed by a group of armed men) who were not subject to this term of extinctive prescription.
- *Retinendae possessionis causa* interdicts

Addressed to both parties (both were equally plaintiffs and defendants to each other), the interdicts on the preservation (retaining) of an existing possession had a prohibitive character. In real estate, the interdict used was called *uti possidetis* and the one through which the possession of movable property was protected was called the *utrubi interdict*.

By the *uti possidetis* (as you possess) interdict the one who was in possession of the good at the time of issuing the interdict maintained his possession until (at least) the settlement of the action in claim. The condition for him to maintain his possession, however, was that the possession exercised by him should not be vitiated, i.e. obtained by violence, clandestinely or precariously. Otherwise, the opponent could easily oppose a *vitiosae possessionis* exception by overturning the grant of possession.

The *utrubi* interdict individualises itself from the *uti possidetis* interdict also by the moment when the possession was related. Thus, although both interdicts protect the unblemished possession, the one protected by the *utrubi* interdict is not necessarily the one who possesses the good at the moment of issuing the interdict, being able to be either one of the two opponents[21]. This is because the dominion was attributed to the one who had it in his possession for the longest period in the year before the interdiction was issued.

- *Adipiscendae possessionis causa* interdicts

Examples of such interdicts aimed at acquiring a possession that did not yet exist were the *Salvianum* interdict, the *sectorium interdict*, and the *quorum bonorum* interdict[22]. Through the Salvianum interdict, the owner of an estate could acquire possession of the things left behind by the settler as collateral for the payment of the rent. Through the *quorum bonorum* interdict the praetorian heir acquired possession of the succesion assets and the *sectorium* interdict came to the aid of the buyer of goods subject to forefeiture.

Typical of all the possessory interdicts was the fact that they had a temporary character, the recognition of the rights of the parties gaining a definitive character only by solving the in claim legal action.

2.4. Various types of possession

Depending on the legal protection they benefited from, the object on which they wore or the effects they produced, the Romans distinguished between several types of possession, as follows: *possessio civilis, possessio ad interdicta, possessio ad usucapionem, iusta possessio, bonae fidei possessio, possessio iniusta and possessio iuris*[23].

Possessio civilis is a concept detached from that of *possessio* with the takeover of the idea of legal protection of a state of affairs from public law to private law. This enshrines the very notion of domination in fact exercised over the property of a person, and not over the property of the state. This type of possession

[17] E. Molcuț, Evoluția funcțiilor posesiunii în dreptul roman, Revista Română de Drept Public nr.3, 2010, Ed. C.H.Beck, București, p. 98.
[18] Gaius, Inst., 4.153.
[19] C. Stoicescu, op. cit., p. 162.
[20] P.F. Girard, Textes de droit romain, ed. A 6-a, Paris, 1918, p. 287.
[21] Gaius, Inst. 4.151.
[22] Gaius, Inst., 4.146.-4.147.
[23] E. Molcuț, Evoluția conceptului de posesiune, In honorem Valeriu Stoica, Ed. Universul Juridic, București, 2018, p. 416.

leads to the acquisition of ownership by acquisitive prescription, as opposed to *possessio naturalis* of the holder who can never strive for such an acquisitive prescription. Specific to civil possession is that it has its origins in the sources of Roman civil law, and not in Praetorian law, which for a long time led to the exclusion of *ad interdicta* possession from its content.

Possessio ad interdicta meant possession protected by interdicts. Starting from the *de precario* interdict of the old era, in time, the legal protection of the possessors extended to the private domain. The possessory interdicts guaranteed the undisturbed possession. Thus, in the event that a third party, by his actions, inhibited or inconvenienced the possessor in exercising his possession over the good, the latter requested the praetor to issue on behalf of the third party an injunction ordering the cessation of any action in that direction.

Why were such interdicts seen as blessings for possessors? If we start from the premise that all owners are possessors, why not simply appeal to the legal action in claim? The answer is simple: the one who brought an action in claim was obliged to *probatio diabolica*, which meant that he had to prove the title deed of all those who previously owned the property. Such a burden proved itself to be cruel to the applicant. By appealing to the possessory interdicts on the other hand, the applicant was not subject to such harsh steps. In addition, if the owner himself was the defendant, he could simply defend himself by *saying I possess because I possess (possideo quia possideo),* without having to prove whether he was the owner or explain how in which he came into possession of the good.

The doctrine has rightly raised the question: how fair is the legal protection of possession as a legal title in its own right, given that the advantages of interdicts could benefit the possessor even if he is the one who stole a good?

In the effort to elucidate this dilemma, two theories were distinguished. The author of the first theory, Savigny[24], argued that through the mechanism of legal protection of possession was in fact protected the very social order consolidated on the idea of domination. Indeed, for a long time the Romans correlated the power of a person in society with the dominion that person exercised over things. In this context, depriving man of his goods or forcing him to justify his control over the goods were real attacks on the social position. It can be seen how possession was associated as an extension of personality, and the attack on possession was in fact an attack on the personality of the possessor. Precisely for this reason, Savigny said, the praetor was obliged to intervene in order to maintain social order to protect possession as a matter of fact (state of affairs).

Jhering[25] contradicts Savigny and argues in the second theory that possessory interdicts were not created to protect the personality of the possessor, who could ultimately be the thief himself, but to protect the legal right to property. It may seem a paradox: the right to property should be protected by the very lack of obligation to be proven by the owner. But it is not. From a statistical point of view, it is presumed (justifiably) that the number of possessors who are at the same time owners of the property is much higher than those possessors who stole the property from the ownership of a proprietor. Jhering therefore takes into account a presumption of lawful acquisition of property. According to Jhering, the same principle led to the legal protection of Roman possession. A contrary presumption would have tragic procedural effects: anyone could be accused at any time of stealing the property they own and the defendants would have to constantly prove their innocence in court by presenting evidence of legal acquisition of property. For these reasons, the Romans considered that it is not natural to oblige the one who owns a patrimony to be always ready to prove his quality of ownership in front of any accuser. All the more so as it was often extremely difficult, if not impossible, to prove the legal path taken by that property to its present dominion. Much more justified is the attribution of the burden of proof to the accuser (the plaintiff). Besides, due to the intervention of the praetors, the injust possession did not benefit of legal protection. Being procedurally consecrated, *possessio ad interdicta* was not included in the category of *possessio civilis*, until the time of Emperor Justinian who recognized it as legal possession.

Possessio ad usucapionem. As the name suggests, it was the possession that could lead to the obtaining of the legal right of ownership through acquisitive prescription. Of course, for such a result, in addition to the actual possession, it was necessary to meet all the other conditions of *usucapionem* (the good to be susceptible to such an acquisition, just cause, good faith and the fullfilment of the term).

Iusta possessio, iniusta possessio and *bonae fidei possessio* must be regarded as different sides of the same coin. *Iusta possessio* was civil possession, recognized by positive law and of course also benefited from legal protection[26]. At the opposite pole is *iniusta possessio*, as flawed possession (acquired by violence, clandestinely or precariously). This had the effect of lifting the legal protection of that person's possession. *Bonae fidei possessio* emerges from the legal conditions of civil possession, promoting the good faith of the possessor as an important element in the recognition of his mastery. Thus, possession in good faith is that in which the possessor is convinced that he has acquired the good from the owner or from a person capable of transmitting it by contract. Moreover, in the

[24] See F. K. Von Savigny, Das Recht des Besitzes: Eine civilistische Abhandlung, Viena, 1865.
[25] See R. von Jhering, Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, Leipzig, 1866.
[26] G. May, Elements de droit romain, Recueil Sirey, Paris, 1925, p. 257.

category of bona fide possessors were also included the persons who occupied abandoned goods[27].

Possessio iuris or *quasipossessio* expresses the extension of the scope of possession from tangible property to property rights (patrimonial legal rights)[28]. Indeed, until the classical era, such a thing was inadmissible, since in the conception of the Romans only tangible goods could be susceptible of *corpus*. With the theorizing abstracting of real estate rights and especially of the right of servitude, the adaptation of the institution of possession to the new legal realities was necessary. Thus, through *quasipossessio*, the Romans admitted the possibility of exercising possession over some patrimonial legal rights.

3. Conclusions

Although it has never been confused with the legal right of ownership, we cannot deny that the legal regime of possession has evolved in close connection with the changes that have taken place in the matter of property. Thus, the word *possessio* was used for the first time in connection with the collective property of the state, out of the need to somehow protect the state of affairs in which the patrons found themselves in a legal relation to the customers.

Then, in relation to the *quiritary property*, the possession expressed the external form of the ownership. For this reason, it could sometimes be confused with the attributes of property (*usus, fructus* and *abusus*). However, this confusion can be easily dismantled. First, possessio being a state of affairs, could not be classified as an attribute of civil property, a state of law with a well-defined legal content[29]. Secondly, the proof of the fact that the Romans regarded the possession as a distinct legal title lies precisely in the equal manner of legal protection of the non-owner-possessor with that of the owner-possessor[30].

There existed an almost fraternal relationship between good faith possession and Praetorian property. The praetors recognized to the *bonae fidei possessors*, through the *actio publiciana*, a praetorian property right even when the acquisition was not made from the owner, assimilating this possessor with the one who obtained the property through acquisitive prescription[31]. Finally, even the *provincial property* was characterized by the attribution of a possession over lands in the provinces of the state to non-citizens.

In modern doctrine, possession may no longer be a major subject of interest, being seen rather as an instrument in understanding and deepening the legal right of ownership, but for the Romans this was not the case at all. Being flawless practitioners, without having too many theoretical concerns, they have dedicated themselves to shaping an identity specific to the concept of possession and this can be seen from the very path taken by it: from simple state of affairs, state of affairs protected by law , to a distinct legal title that in the time of Emperor Justinian acquired a physiognomy similar to that of real rights.

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[27] Gaius, Inst., 2.1.17.
[28] G. Longo, Diritto romano, Torino, 1939, p. 249.
[29] C. Bîrsan, Drept civil. Drepturile reale principale, Ed. Hamangiu, București, 2015, p. 336.
[30] E. Molcuț Evoluția conceptului de posesiune, In honorem Valeriu Stoica, Ed. Universul Juridic, București, 2018, p. 418.
[31] Gaius, Inst., 4.36.