The Emergence and Evolution of the Legal Institution of Possessio in Roman Private Law

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ABSTRACT: The legal figure of the possession was born in the process of exploiting the lands in the *ager publicus.* In very ancient times, the patricians were shepherds and farmers. As the founders of Rome, they had access to the exploitation of the lands of the state. They often sublet part of these lands to their clients, who, at some point, refused to return the lands to them and endangered the rule exercised by the *patres*. Rome was a patrician state and that is why the fast legal protection of *possessiones* was required. Therefore, the *imperium* of the magistrates was resorted to and the interdicts of the possessors were created. Later, against the background of the development of legal ideas and the evolution of society, the effects of the *interdicta* were extended to other situations and contributed to the improvement of the legal protection of private property rights.

KEYWORDS: *possessiones, animus, corpus, interdicta*

The emergence of the concept of *possessio*

Possessio was a state of fact protected by law (Gaudemet and Chevreau 2009, 229). Initially, it was a simple possession of the land, which had nothing to do with the right of quiritary property and which was not protected from a legal point of view. Against the background of the evolution of legal ideas, the Romans noticed the fact that *possessio* and quiritary property were exercised by the same means, which made them understand that *possessio* represented the external manifestation of the property right.

In ancient times, *possessio* was designated by the term *usus*, because it included the use of the thing. Later, it was designated by the term *possessio*, which has its origin in the practice of the Patricians to subconcede the lands received from the *ager publicus*. *Ager publicus* (public field) was the public property of the Roman State, which was also fed with the lands that the Roman state conquered from its enemies. Since the Romans were a nation of shepherds and farmers, lots from the public field were assigned for use by the Patricians free of charge or for a fee. Thus a legal relationship was concluded between the state, which had the quality of owner, and the Patrician, who had the legal status of a tenant (Hanga and Bocşan 2006, 175).

The mentioned lots were called *possessiones* and were assigned to the Patricians, on the condition that they cultivate them with their own families. This practice continued and resulted in the fact that the Patricians acquired a lot of land, which they could no longer exploit with their own labor. Therefore, they started to sub-concession a part of the lots to their clients (Molcuț 2011, 110). In the very ancient era, the Patricians had at hand effective legal procedures that stemmed from the patronage relationship, with the help of which they could revoke the concessions made to the clients. Over time, however, patronage relations deteriorated, and the patrons lost the authority they had exercised over the clients. The consequence was that the clients often refused to leave the lands at the request of the patrons; under these conditions, the state of affairs between the patron and the client was not legally protected, proof that the patrons no longer had legal procedures available to compel the clients to return their land. In order to solve the problem and protect the patrons, the Roman jurists created *de precario interdictum* (Minculescu 1935, 62). The interdict placed at the patron's disposal results from the *imperium* of the magistrate. From this moment on, the control exercised by the patricians over the public

lands is no longer a simple state of fact, but becomes a state of fact protected by law.

Later, as the Romans acquired social and legal experience, they realized that they were in the presence of *possessio* and in other situations than the original one. That is why they extended the application of the *interdicta possessoria* also in the matter of private property, which is why *possessio* has become generalized.

Elements of *possessio*

According to the Digests of Emperor Justinian, possessio has two elements: *animus* and *corpus (apiscimur possessionem corpore et animo, neque per se animo aut per se corpore)* (Mommsen 1870, 504).

Animus denotes *rem sibi habendi* (the intention to keep something for oneself) (Tomulescu 1973, 167). Since *possessio* was the expression of ownership, the possessor behaved identically to the owner.

Corpus denotes the totality of material acts through which control over something is achieved (Axente 2021, 140). This results expressly from another work of the Jurisconsult Gaius, *Res cottidianae*, according to which *interdum etiam sine traditione nuda voluntas domini sufficit ad rem transferendam, veluti si rem, quam commodavi aut locavi tibi aut apud te deposui, vendidero tibi: licet enim ex ea causa tibi eam non tradiderim, eo tamen, quod patior eam ex causa emptionis apud te esse, tuam efficio* (Mommsen 1870, 490).

Categories of *possessio*

Roman legal texts have given us information about several categories of possessio: *possessio ad interdicta*, *possessio ad usucapionem*, *possessio iniusta* and *possessio iuris.*

Possessio ad interdicta is *possessio* defended by *interdicta possessoria*. *Possessio ad usucapionem* is the *possessio* that has the effect of acquiring the property through *usucapio*. *Possessio iniusta* is vicious *possessio*. As its name suggests, it does not provide legal protection to the person exercising it. *Possessio* was clandestine when a person possessed the thing without the knowledge of the owner. *Possessio* was vitiated by violence when, for example, it had been acquired by force. *Possessio* was vitiated by precariousness when a person did not possess the thing for himself, since he had to return it to the owner. *Possessio iuris* was the possession of a right.

Effects of *possessio*

Initially, possession was a simple state of fact, which did not produce legal effects. Along with the evolution of legal ideas, this situation changed, in the sense that the possessor enjoyed certain advantages.

First, the possessor was legally protected by interdicts. These were the main methods of legal protection of *possessio*. They were orders that the praetor gave by virtue of his *imperium* and whose purpose was to maintain an existing possessio or recover a lost *possessio (interdicta uero, cum prohibet fieri, uelut cum praecipit, ne sine uitio possidenti uis fiat, neue in loco sacro aliquid fiat. unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria uocantur)* (Girard 1890, 283). In other words, interdicte protect one whose *possessio* is disturbed or who has been unjustly dispossessed.

Another effect of possessio consists in the fact that the possessor has the capacity of defendant in the event of a *rei vindicatio*. *Rei vindicatio* is the legal action by which the property right is sanctioned. It was filed by the non-possessor owner against the non-proprietary possessor. The possessor's position was advantageous in *rei vindicatio*, because he did not have to prove that he was the owner; simply, he defended himself by saying *possideo quia possideo*

(I possessed because I possessed). Instead, the burden of proof rested with the applicant by virtue of the *actor incumbit probatio* principle.

Another effect of *possessio* is that possession can lead to the acquisition of ownership through *usucapio*. As we will see, mere possession is not enough for the *usucapio* to operate; it had to be accompanied by other elements: the term, the existence of something susceptible to usufructuring, *iusta causa* and good faith.

Legal protection of *possessio*

The legal protection of the *possessio* was ensured by means of *interdicta possessoria*. They were not legal actions, but administrative procedures through which the praetor could resolve certain disputes based on his *imperium*. These legal procedures presented the advantage that they ensured the protection of property rights in situations that did not fall within the scope of the *rei vindicatio*. *Rei vindicatio* could be brought successfully only when the owner was dispossessed of the work; it was ineffective when someone disturbed the *possessio* exercised by the owner or where the owner was in danger of being unlawfully dispossessed.

The *interdicta* did not definitively resolve disputes regarding *possessio*. The final solution was pronounced by the judge only after the organization of a claim process, which aimed to identify the person who had the capacity of owner.

Interdicta possessoris were of three types: *interdicta recuperandae possessionis causa* (for the recovery of a lost possession), *interdicta adipiscendae possessionis causa* (for the acquisition of a *possessio* that the interested party had not had until then) (Cătuneanu 1927, 218) and *interdicta retinendae possessionis causa* (to preserve an existing *possessio*). *Interdicta recuperandae possessionis causa* were of three types: interdicta *unde vi, interdicta de precario* and *interdicta de clandestina possessione.*

Justinian's Institutes send us valuable information about *unde vi interdicta.* According to this Roman legal monument, *"nam ei proponitur interdictum unde vi, per quod is qui deiecit cogitur ei restituere possessionem, licet is ab eo qui vi deiecit vi vel clam vel precario possidebat. Sed ex sacris constitutionibus, ut supra diximus si quis rem per vim occupaverit, si quidem in bonis eius est. Dominio eius privatur, si aliena, post eius restitutionem etiam aestimationem rei dare vim passo compellitur. Qui autem aliquem de possessione per vim deiecerit, tenetur lege Iulia de vi privata aut de vi publica: sed de vi privata, si sine armis vim fecerit, sin autem cum armis eum de possessione expulerit, de vi publica. 'armorum' autem appellatione non solum scuta et gladios et galeas significari intellegimus, sed et fustes et lapides"* (Hanga,2002, 315-316). From this source of law it follows that the *unde vi* interdicta was of two kinds: *unde vi cottidiana* and *unde vi armata* (Tellengen-Couperus 2008, 492).

Interdicta *unde vi cottidiana* were granted to possessors who had been dispossessed by violence. In order for this interdict to be filed successfully, two conditions had to be met: not a year had passed since the dispossession, and the dispossessed person had not exercised a defective possession at the time of the *interdicta*. *Interdicta unde vi armata* were granted in the case of dispossession by armed violence. They were created in the 1st century BC, against the backdrop of civil wars. In Justinian's time, *unde vi interdicta* were merged into a unique interdicta, *interdictum momentariae possessionis*.

De precario interdicta est quod precibus petendi ad utedum conceditur tamdiu, quamdiu ille qui concessit patitur (Cătuneanu 1927, 222). It was created in connection with the exploitation of public land and was used by the patricians against the client who refused to return the plot of land received by way of use. Later, this interdicta was applied in other cases as well (Minculescu 1935, 62-63).

De clandestina possessione interdicta (concerning clandestine possessio) was filed against the person who possessed something without the knowledge of the owner. It had its origin in certain customs related to shepherding. The ancient Romans had winter and summer

pastures. In the summer they took the herds to graze in the mountains, and in the winter to the plains. This practice could generate certain inconveniences. Once returned from the mountain pastures, the owner could find someone else who possessed the plain pasture, who could reason that the *possessio* had been lost with the *corpus*. In order to avoid such consequences, the praetor granted the *de clandestina possessione interdicta*, on the grounds that the possessor had occupied the land without the knowledge of the owner.

The interdicta *retinendae possessionis causa* aimed to preserve an existing *possessio* (Axente 2020, 221). Gaius tells us that *"retinendae possessionis causa solet interdictum reddi, cum ab utraque parte de proprietate alicuius rei controuersia est et ante quaeritur, uter ex litigatoribus possidere et uter petere debeat. Cuius rei gratia comparata sunt UTI POSSIDETIS et UTRUBI. Et quidem UTI POSSIDETIS interdictum de fundi uel aedium possessione redditur, UTRUBI uero de rerum mobilium possessione"* (Girard 1890, 284).

The *utrubi interdicta* (which of two) was filed for movable things (Cuciureanu 2021, 117). Gaius gives us valuable information about these *interdicta*. According to the great classical jurisconsult, *"sed in UTRUBI interdicto non solum sua cuique possessio prodest, sed etiam alterius, quam iustum est ei accedere, uelut eius, cui heres extiterit, eiusque, a quo emerit uel ex donatione aut dotis nomine acceperit. Itaque si nostrae possessioni iuncta alterius iusta possessio exsuperat aduersarii possessionem, nos eo interdicto uincimus. Nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest. Nam ei, quod nullum est, nihil accedere potest. Sed et si uitiosam habeat possessionem, id est aut ui aut clam aut precario ab aduersario adquisitam, non datur accessio; nam ei possessio sua nihil prodest. 152. Annus autem retrorsus numeratur. Itaque si tu uerbi gratia VIII mensibus possederis prioribus et ego VII posterioribus, ego potior ero, quod trium priorum mensium possessio nihil tibi in hoc interdicto prodest, quod alterius anni possessio est"* (Girard 1890, 284).

The interdicta *uti possidetis* (as you possess) was filed to retain possessio of real estate. According to Justinian's Institutes, *"sed interdicto quidem uti possidetis de fundi vel aedium possessione contenditur, utrubi vero interdicto de rerum mobilium possessione. Quorum vis et potestas plurimam inter se differentiam apud veteres habebat: nam uti possidetis interdicto is vincebat qui interdicti tempore possidebat, si modo nec vi nec clam nec precario nanctus fuerat ab adversario possessionem, etiamsi alium vi expulerat aut clam abripuerat alienam possessionem aut precario rogaverat aliquem, ut sibi possidere liceret"* (Hanga 2002, 313-314). Therefore, this *interdicta* was granted to the person who possessed the thing at the time of its release. Initially, the magistrate issued the *interdicta uti possidetis* for land, later also for houses, because the Romans did not know real estate advertising, and this fact was likely to cause confusion in relation to the ownership of property.

The interdicta *adipiscendae possessionis causa* had been created for the acquisition of a *possessio* that did not yet exist (Axente 2022, 216). The most important *interdicta* in this category were the *quorum bonorum* interdicta, the *Salvian* interdicta and the *possessorium* interdicta. The *quorum bonorum interdicta* aimed at acquiring the inheritance and was granted to the person trying to obtain *possessio* for the first time *"ideo autem adipiscendae possessionis vocatur interdictum, quia ei tantum utile est qui nunc primum conatur adipisci rei possessionem"* (Girard 1890, 685). The *Salvian interdicta* was granted by the praetor to the landowner in order to acquire *possessio* of the lessee's movable assets, which were pledged to him for the payment of the lease (Ciucă 1999, 443). The interdicta *possessorium* was the legal procedure available to *emptor bonorum (bonorum quoque emptori similiter proponitur interdictum, quod quidam possessorium uocant)* (Girard 1890, 284).

Conclusions

Possessio had an important role in the development of Roman Private Law. If, initially, it was found in the sphere of relations between patrons and clients and represented the result of the

legal protection of the rule over the land exercised by the patricians, later it was applied to other situations as well. The development of society and the accumulation of legal experience made the Romans understand that ownership is manifested through the legal institution of possessio and that the legal protection of possessio optimizes the legal regime of private property. The generalization of this legal figure was bonum omen and turned possessio into one of the fundamental pillars of the legal order.

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