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POSSESSION AND POSSESSORY REMEDIES IN THE DRAFT OF MODIFICATIONS TO THE CIVIL CODE OF RUSSIAN FEDERATION IN THE MIRROR OF JHERING'S DOCTRINE OF POSSESSION

It is well known that the core idea behind Rudolf von Jhering's doctrine of possession is that possession is an external manifestation of the right of ownership. Therefore, as a matter of fact, possessory remedies are aimed at facilitating protection of the latter and not of the possession as such. The fact that in the final analysis possessory remedies could be applied for protection of a possessor in bad faith, even of a thief or an invader, was for Jhering an inevitable evil resulting from facilitating the proof of the right of ownership in this way. However, to his mind, negative aspects of such approach are compensated in practice to a very high degree by its advantages.

At the same time, another distinguishing feature of Jhering's conceptualisation of possession was its "spiritualization", which differed much from the widespread tendency of its schematic vulgar generalization as an actual (physical) control over the object of possession. While demonstrating that aphoristic manner of description of doctrinal issues, which was characteristic of him, he wrote on the subject that the concept of actual possession of immovable property as a physical control of it "is the object of mockery for those rabbits, who are eating cabbage in my garden, and for children, who are wallowing in my haycocks"[1].

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[1] R. von Jhering: *The Reasons for Protection of Possession* (in:) *Selected Works*, (Russian translation), Vol. II, Saint Petersburg 2006, p. 515.

The institute of possessory remedies is absent from the current provisions of the Civil Code of the Russian Federation (hereinafter: CC RF), which recognises only a petitory remedy for protection of the *possessio ad usucapionem*, comparable with the *actio in rem Publiciana* of Roman law[2].

Still, the possessory protection is inculcated in the relevant provisions of the *Concept of Development of Civil Legislation of the Russian Federation* (hereinafter: Concept)[3], designed to become the basis for updating the CC RF, as well as in its outcome: the *Draft of Modifications to the Civil Code of the Russian Federation* (hereinafter: Draft), which has been on the floor of the Russian Parliament starting from 2012 and has already been partly implemented[4]. Both documents were developed by the Council for Codification and Improvement of Civil Legislation and the Research Centre of Private Law subordinate to the President of the Russian Federation.

In clause 1, Article 215 of the Draft, entitled "The Right to Protection of Possession", it is stated that: "Any possessor — both rightful and unlawful — has the right to protection of his possession, regardless of whether it belongs to him in respect of the object of possession right to property, including in the content of the power of possession".

Although this point is declared the universal protection of possession, it is unclear for whom it may in fact be necessary.

It is obvious that in the presence of the presumption of rightfulness of any possession ("Possession shall be recognized as rightful so long as the court does not set otherwise") in section 3, Article 212 of the Draft, possessory protection as such may become necessary only to an unlawful possessor in a situation where the violator of his possession is able to rebut the said presumption, i.e. when the violator is the owner or another title holder.

In any other case, relying on that presumption any possessor has the right to apply the vindication (*rei vindicatio*) thus avoiding the application of the possessory suit.

In other words, while in Jhering's conceptualisation of possessory protection as the advanced level of the right of ownership the fact that it could be used by possessors in bad faith against the owners has always been perceived as a necessary evil, whose existence is tolerated only insofar as the undoubted benefits of this

[2] Clause 2 Article 234 CC RF: Until the right of ownership to the property by virtue of acquisitive prescription is acquired, a person possessing property as his own has the right to protection of his possession against third persons who are neither owners of the property nor have the right of possession by virtue of another basis provided by a statute or a contract. See on this in: A. Rudokvas: *Azione publiciana nel diritto civile russo vigente*, Studia Universitatis Babeş-Bolyai, Iurisprudentia 2007, No. 2, pp. 211–214.

[3] *The Concept of Development of Civil Legislation of the Russian Federation*, Statut, Moscow 2009, pp. 72–75.

[4] Draft No. 47538–6/10 "About introduction of modifications into first and second parts of the Civil Code of the Russian Federation and into some legislative acts of the Russian Federation", available at: http://asozd2.duma.gov.ru/main.nsf/(Spravka)?OpenAgent&RN=47538–6.

institute for the rule of law generally outweigh its downsides, in the proposed national model possessory protection from the very beginning is seen as a special means of protecting unlawful possessors against the owners.

It is noteworthy that paragraph 1, clause 3, Article 242 of the same Draft offers the non-proliferation of the limitation of actions on the *vindication*, so that the loss of the right to the vindication occurred only simultaneously with the loss of the right of ownership due to the expiry of the acquisitive prescription on the side of the third person — *possessor ad usucapionem* — resulting in acquisition of the right of ownership by the latter.

Nevertheless, it is worth noting that almost the only practical example, which led supporters of the implementation of the fundamentalist models of possessory protection in the Russian legislation, was that in the absence of the possessory remedies in the positive law an unlawful possessor remains unprotected against the owner, who has fallen in the situation named *dominium sine re*, that is when he has lost the hope of vindication of his property after the expiry of the limitation period of this action, but continues to be the property's owner. The question why in such a situation the possessor in bad faith should be protected against the owner remains unanswered.

In clause 2, Article 215 of the Draft stipulates: "The protection of possession may be undertaken by the possessor himself (self-defence) or by recourse to public authorities (courts, executive bodies, etc.)". In other words, this provision allows the arbitrariness aimed at return of the lost property without application to the jurisdictional or other authorised state bodies.

This model of possessory protection, permitting and authorising arbitrary recovery of possession by the previous possessor from the intruder, appearing first in the classical Roman law, is implemented at present in Germany.

For that, the relevant provisions of §§ 861–862 of the German Civil Code (*Bürgerliches Gesetzbuch*, hereinafter: BGB) at the time of the latter's promulgation were harshly criticised by a Russian professor in Roman law, Iosif Alexeevich Pokrovsky, as encouraging arbitrariness[5].

At the same time, in accordance with clause 4 of the same article of the Draft, "protection of possession can be done by appealing to the executive authorities in the cases provided for by law. Thus, the actions of the executive authorities should be focused exclusively on the return of property to the person who lost it".

Here, the authors of the Draft explicitly tried to combine in it all the mutually exclusive positions, expressed in regard to possessory remedies in the Russian civilian literature. In particular, the provision under discussion reflects the position upholding the irrelevance of the jurisdictional possessory remedies in the presence

[5] I.A. Pokrovsky: *Main Issues of Possession in the New German Civil Code*, (in Russian), Vestnik Prava 1899, Book 1, pp. 92–120.

of effective administrative methods of protection of possession comparable with the *interdictum* of *praetor* in the classical Roman law. The Draft proposes such administrative remedy as an alternative (along with self-defence). But for this purpose, in addition to the amendments to the CC RF, the establishment of appropriate legal mechanisms would be required, which we lack in the currently binding Russian law.

By virtue of clause 1, Article 216 of the Draft, "the court should answer to the claim for protection of possession, if it is established that the possessor has been deprived of an object of possession against his will that is by the spoliation exercised by another person".

This draws attention to incorrectness of equating the deprivation of possession against one's will and its spoliation. After all, the possession can also be lost or transferred for a deal with the vices of will.

Here, the authors of the Draft apparently stipulate not by chance that "the possessor has been deprived of an object of possession", instead of stating that he has lost his possession. The point is that the drafters previously defined in paragraph 3, clause 1, Article 209 of the Draft that "In order to protect violated possession, it is not considered lost if the person in the prescribed manner has availed himself of the protection of possession".

In other words, one can actually lose the object of possession, but remain its possessor from a legal point of view.

The above-mentioned dichotomy forced the authors of the Draft to speak hereinafter about the defendant in a possessory claim not as of the possessor but as of "the person who actually possesses the object of possession", while the possessor from a legal point of view, at least within a year from the date of deprivation of possession (which is a limitation period for the possessory suit), remains the one who has been deprived of the actual possession (domination) of the thing. It remains a mystery how this construction relates to the fact that under Article 209 of the Draft possession is defined as "actual domination".

"Unless otherwise provided by law, the claim for protection of possession is filed by the person who possessed the object of possession until the intrusion giving rise to the respective claim" (clause 2, article 216 of the Draft).

In other words, the law under certain circumstances envisages a possibility to claim the possession which has been taken from a person another than the claimant.

The question of passive legitimisation for possessory claims is resolved here as follows: "the claim for protection of possession shall apply to the person who actually possesses the object of possession after the intrusion which constituted the grounds to advance the corresponding claim" (clause 3, Article 216 of the Draft). Thus, the possessory action is brought against any person, regardless of his awareness of the fact of the spoliation of possession from the previous possessor.

It is pertinent to note in this regard that, as a doctrinal justification for possessory protection in the *Concept of Development of the Legislation on the Real Rights*,

which became preliminary version of the corresponding parts of the *Concept of Development of Civil Legislation of the Russian Federation*, one can find a link to Jhering's doctrine, according to which possessory protection is necessary in order to avoid difficulties with proof of ownership in case of intrusion by third parties of the owner's sphere of economic domination[6].

At the same time, the preliminary Concept also cited the words of Pokrovsky, who — following Friedrich Carl von Savigny — insisted that the "protection of possession is the culmination of the idea of the protection of an individual"[7].

However, in the final variant of the Concept it remains only to mention that "the purpose of possessory protection is the fight against violent acts of arbitrariness"[8].

After a careful reading, it becomes clear that Jhering's idea was mentioned in the Concept rather for completeness, and introducing of possessory protection into Russian law is not based on his theory of the grounds of protection of possession.

In particular, this is evidenced by the statement of the above-discussed Concept that as long as the possession is not recognized as a subjective right, it is possible possession (and hence application of possessory remedies) in respect of assets withdrawn from civil turnover (*res extra commercium*) or those items which in principle do not meet the characteristics applied to the object of rights. In other words, the matter concerns situations when the protection of possession cannot be considered a protection of the presumed ownership, which was a crucial point for Jhering's theory of the protection of possession.

This idea of the Concept was reflected in clauses 2–4, Article 211 of the Draft.

Thus, the guiding idea behind the introduction of this section to the Concept and to the Draft was that of the protection of the individual. Due to the fact that its connection with possessory remedies as such is not obvious and is to some extent declarative, the idea clearly requires explanation. It was born at the very beginning of the Pandect law doctrinal development. A theoretical generalisation of the casuistry of the sources of Roman law made by Savigny led him to a conclusion that "the institute of possession belongs to the law of obligations" (*der Besitz in das Obligationenrecht gehört*). Therefore, Savigny insisted that "one who generally divides property rights into real rights and rights under the law of obligations, for this reason alone, should separate possession from any real right"[9].

This only at first glance may seem paradoxical. In fact, its logic is transparent and flawless. Possession is protected as such, regardless of its legality. Therefore,

[6] *The Concept of Development of the Legislation on the Real Rights*, (in Russian), Vestnik Vysshego Arbitrazhnogo Suda Rossiyskoy Federatsii 2009, No. 4, p. 72.

[7] *Ibidem*.

[8] *The Concept of Development of Civil Legislation…*, *op. cit.*, p. 72.

[9] F.C. von Savigny: *Das Recht des Besitzes*, 5 Aufl., Gießen 1827, p. 31.

possessory protection can be claimed both by a thief, and by the owner. Consequently, there can be no question of protection of the right of ownership. However, because the intrusion of possession takes place against the will of the possessor, it is a kind of assault on his person, violence over his will. Hence, demanding the restoration of the *status quo*, that is the return to the possessor of the actual possession of a thing or of the termination of encroachment on possession carried out in another form, is a measure of responsibility for that outrage on the person.

The institute of possessory protection is designed to protect not the possession as a property right (which is not such), but the moral good — the dignity of the person, which is not a subjective right, either. In other words, the right of possession (*ius possessionis*) occurs only as an element of the content of the protective legal relationship that arises from the legal fact of encroachment on the personal dignity of the possessor, implemented in the form of a violation of his possession. Therefore, it is tortious in its nature, representing the right to end the intrusion to possession addressed to the intruder.

In this aspect, Savigny had even nothing against innovations implemented in *usus modernus Pandectarum* by the canon law, which extended the scope of possessory claims against third parties — defaulting purchasers who should be recognized as complicit violators of possession[10]. In any case, the possessory claim modernised by canonists still fell within the ranges of the doctrinal scheme, elaborated by Savigny.

Georg Friedrich Puchta changed slightly Savigny's concept, recognizing the dignity as a special kind of inalienable subjective right. He wrote: "Personality, how the person independently understands and protects her, is in itself right. It is joined by another right arising from the activities of individuals, aimed at the outside world, the discipline of things. This submission appears to be only factual in the form of possession. But this actual attitude of a person to things already receives legal significance as a result of the person possessing. Such is the nature of the right of possession"[11].

Puchta did not consider the possession as such to be a right, and believed that "possession, by itself, has no characteristics of a right, and must borrow them from any other rights, under the safeguard of which it comes"[12], so that "the right of possession is a right to own personality"[13]. Under this doctrine, the object of protection was a regulatory right to own personality (*Recht an der eigenen Person*). The right of possession as the right to claim restoration of the *status quo* that has existed before the intrusion, after all, appeared only as an element of the content of the pro-

[10] U. Wolter: *Ius Canonicum in Iure Civili: Studien zur Rechtsquellenlehre in der neueren Privatrechtsgeschichte*, Köln–Vienna 1975, p. 185.

[11] G.F. Puchta: *Course of Roman Civil Law*, (Russian Translation), Vol. I, Moscow 1874, p. 125.

[12] *Ibidem*, p. 321.

[13] *Ibidem*, p. 322.

tective legal relation, generated by the fact of the violation of this right to own personality. One should emphasize that both Puchta and Savigny distinguished the *possessio ad usucapionem*, protected by the *actio in rem Publiciana* as a property right, from the mere possession protected by possessory remedies as an actual state[14].

Jhering, opposing the doctrines of Savigny and Puchta, denied tortious nature of possessory claims because the spoliation is not always related to the guilt of violence exercised against the person of the possessor. However, he admitted: "possessory interdicts are not against the third possessor, but only against someone who took away from us the possession, directly or contesting it from us — in other words, the relief of proof […] consisting in fact that without proof of his ownership (the claimant) can confine himself with proof of probability of the right on his side, requires a certain motive arising from the person of the adversary. In case of violation of possession this motive consists in the crime, which the defendant committed, but the possessory claim would be already out of place against the third person, which acquired possession from the invader, and (the victim) needs to apply vindication or *actio in rem Publiciana*"[15].

The authors of the Concept went their own way, stating that "The protection of possession is claimed against the violator of possession or any subsequent possessor". Thus, the Russian legislator is going to promote the idea peculiar to a specific possessory suit of Medieval law, the *actio spolii*. In some periods and in some regions of Western Europe, the claim in the form of the *condictio ex canone redintegranda* applied against any subsequent possessor, regardless of his awareness of the fact of deprivation of possession of someone of the previous possessors against the latter's will[16]. The construction of the claim was based on the idea that the loss of possession against the possessor's will is an objective "defect of thing" (*vitium rei*), which is detractive for all subsequent possessions[17].

However, in the era of modern codifications this design was rejected. In the civil codes of the European countries the defendant for the possessory claim can be only that subsequent possessor who acquired possession, knowing about its spoliation from a third person[18]. A dogmatic justification of this design is an old theory of canon law, according to which such subsequent acquirer of possession is complicit

[14] *Ibidem*, p. 347.

[15] R. von Jhering: *The Reasons…*, *op. cit.*, p. 450.

[16] S.P. Nikonov: *Evolution of the Protection of Possession in the Medieval Europe*, (in Russian), Kharkov 1905, pp. 134, 137, 144, 182 ff.

[17] F. Ruffini: *L'actio spolii. Studio storico-giuridico*, Roma 1972, p. 373.

[18] BGB § 858 Unlawful interference with possession: (1) A person who, against the will of the possessor, deprives the possessor of possession or interferes with the possessor's possession acts, except where the deprivation or the interference is permitted by law, acts unlawfully (unlawful interference with possession). (2) The possession obtained as a result of unlawful interference is defective. The successor in possession must allow the defectiveness to be asserted against him if he is the heir of the possessor or he knows when he acquires possession that the possession of his predecessor was defective.

in the spoliation of possession[19]. It should be admitted that even this doctrine is questionable, if one looks at it through the prism of the notion of complicity in the crime developed in the criminal law. It should be remembered that robbery or theft, on the one hand, and buying stolen goods on the other, represent different offences.

Nevertheless, the discussed theory gives at least some plausible justification for a passive legitimation of the possessory claim addressed to a subsequent possessor. Yet the problem of how it could be possible dogmatically to provide the passive legitimation of such claim for any subsequent possessor remains unresolved, and the resolution of this issue is not provided by the authors of the Draft, neither in their Concept nor in any other sources.

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S u m m a r y

A core idea behind Rudolf von Jhering's doctrine of possession is that possession is an external manifestation of the right of ownership. Therefore, as a matter of fact, possessory remedies are aimed at facilitating protection of the latter and not of the possession as such. The fact that in the final analysis possessory remedies could be applied for protection of a possessor in bad faith, even of a thief or an invader, was for Jhering an inevitable evil resulting from facilitating the proof of the right of ownership in this way. However, to his mind, negative aspects of such approach are to a very high degree compensated in practice by its advantages. At the same time, another distinguishing feature of the Jhering's conceptualisation of possession was its "spiritualization", which differed much from the widespread tendency of its schematic vulgar generalisation as an actual (physical) control over the object of possession. The institute of possessory remedies is lacking under the currently binding provisions of the Civil Code of the Russian Federation, which recognises only a petitory remedy for protection of the *possessio ad usucapionem*, comparable with the *actio in rem Publiciana* of the Roman law (clause 2, Article 234 CC RF). Still, the possessory remedies are inculcated in the relevant provisions of the *Concept of Development of Civil Legislation of the Russian Federation* designed to become the basis for updating the CC RF, as well as in its outcome: the *Draft of Modifications to the Civil Code of the Russian Federation*, which has been on the floor of the Russian Parliament starting from 2012 and has already been partly implemented. Despite of the fact that the drafters referred, *inter alia*, to the ideas of Jhering to be a source of their inspiration, they are evidently going to promote the idea peculiar to a specific possessory suit of Medieval Western law, the *actio spolii*, in the form of the what is referred to *condictio ex canone redintegranda.* Such conceptualisation of the possessory remedies seems to be rather far from Jhering's doctrine.