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ABOUT LEGAL NOTION OF POSSESSION

Abstract

Possession is a legal institute which is treated in every civil or property law textbook in all civil law countries. However, despite numerous works devoted to it, one cannot say what possession precisely means: factual power over a thing, property right, authorization resulting from some kind of property right or something completely different.

Keywords: possession, quasi-possession, detention, property rights, animus domini, ownership, occupation, tradition, possession remedies, servitude (easement), use, usufruct, abusus

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Possession is a legal institute which is treated in every civil or property law textbook in all civil law countries. However, despite numerous works devoted to it, one cannot say what possession precisely means: factual power over a thing, property right, authorization resulting from some kind of property right or something completely different.

In Roman law, the institute of possession is primarily linked to ownership. It is usually defined as a factual power over a thing, although for the sake of precision we must underline that possession is a "power over a thing" by a person who holds a thing as his own (*animus domini*). Ownership in Roman law is defined as *dominium*, domination of a thing (*plena in re potestas*). The owner is entitled to its use, usufruct and disposal (or consumption of a thing). Therefore, in order that he can exercise his ownership, the owner must have a factual power over a thing, real possession. Contrary to the prevailing opinions, Roman law links possession only to ownership, nothing else. It does not take into account detention, the factual power over a thing by a lessee, depository or anybody else holding a thing on any other grounds. Possession is a right eminently or immanently linked to ownership and only to it. A lessee, an accidental holder of a thing, a depositary, a borrower, etc., although they may hold a thing in their hands, they are not in possession on account of a simple fact that they do not own a thing or things, they do not hold it with a will to be theirs. (They do not have *animus domini*). A person in possession is the owner and nobody else. That is why he has the right to request a thing to be returned in his possession, when it is legally or illegally held by someone else. None except the owner is entitled to possession remedies, because possession is linked exclusively to ownership (*dominium*) and to a right to domination over a thing which is mine (*erga omnes*). Possession is an essential element of the ownership right. The owner may not exercise any property powers (use, usufruct etc.) if he does not have a power over a thing and that is a fact (factual ownership of a thing) which is extremely relevant to understand a Roman notion of possession (as well as to comprehend the notion of possession understood as *erga omnes* right). In that system nobody (not even the conscientious acquirer or acquirer in good fight) may acquire ownership or possession from a thief or a person who has seized a thing in a violent way (without legal grounds).

In the Justinian's Institutes, things may be acquired through **occupation** (when they did not have a previous owner) or tradition (transfer of a thing or in today's terminology "transfer of possession") in cases when a thing had a previous owner. These two modalities for acquisition of ownership are indicated as basic ways of acquiring ownership of things in accordance with "natural

law" (*jure naturalis*), understood as law applicable to all nations in the world[2], as distinct from civil law *(jure civilis)* specific for individual countries. Through occupation, a person becomes an owner simply by becoming *dominus*, a person that acquired a factual power over a thing not owned by somebody else (or by military occupation). Through tradition, a person relinquishes of his ownership and of his power and domination of a thing and transfers it to another person. So you either acquire power over a thing through occupation or you transfer the existing power by tradition.

If ownership is a right, possession is the essence of that right, a factual power over an owned thing, a power making a person a *dominus*, a master of that thing. Without this kind of definition, it is impossible to understand the phrase *"plena in re potestas"*.

Contrary to the modalities for acquisition of ownership of things under natural law, one of the basic modalities to acquire ownership under civil law *(jus civilis*) is usucaption or adverse possession **(usucapio).** One of the main reasons for its introduction in the Roman legal system, according to the Justinian's Institutes, was to "prevent a situation in which it was unclear who the owner of things was". Here we are talking about situations of acquisition in good faith and determination of different deadlines for movable and immovable goods following which a person may be considered their owner. A person who usucapts is not a possessor as long as he does not become an owner. Provisions for usucaption are important because in a way in this case acquisition of things is carried out in a manner analogous to occupation (as for things without an owner) or analogous to a situation in which the owner abandoned his things. Usucaption does not lead to ownership of things that may not be subject to ownership (free man, *res nullius*) or things that are already owned (fugitive slave, stolen goods, emperor's fiscus, things floating in the sea following a shipwreck...). Things stolen, forcibly or fraudulently seized cannot be acquired in good faith by a third party.[3]

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[2]Accession, mixture, specification or production of a new thing etc. are considered other such ways of ownership acquision in line with natural law. Here we are talking about legal presumptions who becomes an owner if things of different owners are mixed or joined. This is the source of the famous legal presumption about *superficies solo cedit*.

[3]In this connection, one should take into account that the Institute of Gaius and the Justinian's Institutes contain different division of things. Gaius does not define "things common to all mankind", but refers to them as "public" and that there is a different definition of things *in bonis*. For example, Gaius divides things into 1. Things that may be privately owned (*private dominium*) and 2.Things that may not be privately owned (not subject to *private dominium*) and further on 1.Things subject to divine law and 2. Things subject to human law. Things subject to human law may be 1. Public, belonging to a) society or b) corporations) or 2.private. Justinian's division of things is slightly different: 1. Things common to all mankind (air, sea, running water), 2. Public things 3.Things of corporate bodies (town buildings, theatres, hipodromes) 4.Nobody's things (sacred, religious, sanctus) and 5. Things that may be privately owned by individuals in line with a) natural law and b) civil law.A particular attention must be paid to the fact that things defined as common, public, corporate or as *res nullius* by both Gaius and Justinian are treated as things *in bonis*, although ownership cannot be acquired in respect of them through usucaption (*usucapio*), as is the case of things

A notion of ***quasi-possession (quasi possesio)*** periodically appears in the Justinian's Institutes. It is important to explain this notion because it is of great importance in the entire system of Roman law, primarily because of its today's utterly wrongful interpretation. An owner is in possession, has a power over a certain thing. It keeps that thing with the will of having it (*animus domini)*. However, in certain situations some privileges in respect of that thing may be awarded, which limits the absolute power of the owner and creates authorizations or privileges for another person. A classic situation of that type relates to servitudes (easements). If someone was permitted to cross another person's land, although not an owner, that person acquires some sort of quasi-power over it: he can cross over it, and the owner is obliged to tolerate this. The crossover or another privilege ensuing from servitudes leads to quasi-power over the land, and a person awarded such servitudes becomes a quasi-owner i.e. quasi-possessor on account of a simple reason of having power over "servient or subservient land" in some respects. This is the basic notion of quasi-possession which drastically differs from its today's interpretation as "possession in respect of a right". In this case, quasi-possession relates to a thing (servient or subservient thing), **and not to servitudes (i.e. a right).** If a property right is unique and indivisible, yet an owner may on his will or if required by law allow someone ("give him privilege or concession") to do something with that thing, which otherwise the owner does not have to allow or refrain from (for example, not to erect a second floor of the house in order not to inhibit light for his neighbor, not to create noise or similar). Or he may conclude a contract for that.

In order to clarify the above, we have to explain the notion of **servitude (easement)** in Roman law. Property right is unique and indivisible. It is an absolute power over a thing. That right implies certain powers or rights (depending on today's interpretations), as the right to use *(usus)* and the right to dispose of or consume (*abuses)*.These powers (rights) are two key ownership-related powers. The right to usufruct *(fructus, ususfructus)* is often mentioned as a variant of a right to enjoyment (use), so ownership may imply use and disposal or use, usufruct and disposal. The owner of a thing may willingly transfer the exercise of these ownership-related fragments or separate powers (rights) to another person (right to use), and when they are in another person's hands they are called servitudes *(servitude)*. Basically, a servitude represents limitation of a property right or more precisely limitation of ownership-related powers. If as an owner, I may

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subject to private ownership. The institution *in bonis* is not studied in detail in all of its aspects and requires further analysis. It might be particularly interesting for those having experience with "self-managing socialism" in the former Yugoslavia we were remainded of in the text by Anna di Robilant, "Property and Deliberation, Numerus Clausus Principle, New Property Forms and New Property Values", with all problems and dilemmas raised by her (American Journal of Comparative Law, Vol. 62, pp. 367-416).

use a thing in any way, with the creation of servitude, I allow another person to use that thing to a certain degree and I have to tolerate that use. If as an owner, I have the ***right to dispose of a thing***, with a creation of security, I allow another person to dispose of that thing when a certain condition has not been met ("do not pay off a debt to that person"). In both cases, however, the owner continues to own and possess the thing (even in case of pledge when pledgee, after collection of his claim from the profits gathered from the sale of the thing, returns the remaining funds to the owner, i.e. debtor). The only right a person on whose account a servitude or a security is created is quasi-possession and his right to servitude or security is yet treated as a property right, not as an obligation, because it relates to powers resulting and ensuing from ownership.

Servitudes in Roman law are divided into personal servitudes (linked to a person they have been conferred upon) and property servitudes (linked to the property – optionally to dominant and subservient thing). Use **(usus),** usufruct **(usufructus),** right to habitation **(habitatio)** are considered personal servitudes while property (real) servitudes are divided into rural and urban. All servitudes are mainly related to the right to use or usufruct, as distinct from security rights mainly related to limitation of the right of disposal **(abusus)**.

Persons who have some of these rights do not have the right to possession, because it is retained by the owner of the thing. What they are entitled to is quasi-possession. Their quasi-possession relates to the thing which is owned and possessed by the owner, and their servitude or a security right, from the owner's viewpoint, represents some sort of limitation on his powers ensuing from his property right of the thing (from his ownership).

For the purpose of the so-called "neighboring rights" which is today considered urban planning, the state consciously prescribed rules defined as "legal servitudes" (trees to be planted at a certain distance from the neighbor's estate, a balcony not to hang over the neighbor's estate, not to build in a window with a direct view in the neighbor's house, handicrafts producing noise or unpleasant odor to be performed at a certain distance from populated places etc.), whereby the authorities impose limitation on ownership for the purpose of urban living. The most classical example of such a legal creation of servitudes for the purpose of urban planning is found in the so-called Prohiron or Procheiron (or also in a version today known as Calabrian Prohiron or Procheiron).

Holders of these property rights differ from holders of personal rights or obligations. As distinct from personal rights holders (for instance related to lease or deposit contracts) who neither have possession nor quasi-possession, holders of servitudes or security rights or in today's

terminology holders of limited property rights – enjoy quasi-possession which may be protected by interdict. To illustrate this we will take the example of persons with a property right to use (as a personal servitude) and a conductor (from *locatio-conductio rei*, as a lessee). As distinct from holders of servitude i.e. some sort of property right which entails quasi-possession and thereby a possibility to request interdicts to protect such quasi-possession, persons in obligation relations with the owner of the thing, (a conductor from *locatio – conductio rei* or in today's terminology a lessee) are not entitled to such quasi-possession, to ruler's interdict and are left at the mercy of the owner. In relation to the owner, they only have obligation rights resulting from their contract (right to request agreed damages). The depositary, borrower and others are in the same situation. In both cases, the right to use and lease, a person is given a land or a building for use, but his rights are not the same in these cases. In the first case a person is entitled to servitude (i.e. property right) and in the second, he is entitled to obligation only. Both cases relate to the right to use or the right to use and usufruct, but the position of a person with usus and the position of a lessee (conductor) are utterly different. Everyone protects his right depending on the basis on which it was created. Property right holders do that with lawsuits and interdicts, while obligation right holders do that with personal lawsuits (aimed at the other contracting party) and with *actio utile*. Obligations of owners of things in both cases are completely different and these differences must not be neglected.

Possession is also mentioned in another part of the Justinian's Institutes dealing with the so-called interdicts. Contrary to the situations in which property, that is to say property right is disputed, which were resolved by lodging lawsuits,[4] the situations in which a property rights was not disputable were sometimes resolved by the so-called interdicts. Interdicts were orders by the praetor through which he ordered or prohibited a certain action. They were mainly used for possession and quasi-possession disputes. These interdicts were usually requested when possession was disturbed or forcibly or fraudulently (without legal grounds) taken away. An

[4]A particularly relevant for our discussion is definition and classification of lawsuits presented in the Justinian's Institutes. Article 1, Book IV, Chapter VI (Lawsuits) reads as follows: "All actions, by which any matter whatever is submitted to the decision of judges or of arbitrators may be divided into two classes; for actions are either real or personal. Either the plaintiff sues the defendant, because he is made answerable to him by contract, or by a delict, in which case the plaintiff brings a personal action, alleging that his adversary is bound to give to, or to do something for him, or making some other similar allegation. Or else the plaintiff brings an action against the person not made answerable to him by any obligation, but with whom he disputes the right to some corporeal thing, and for such cases real actions are given; as for example, if a man is in possession of land, which Titius maintains to be his property, while the possessor says that he himself is the proprietor, the action is real". ibid, page 511.

The Roman law does not recognize the so-called "possessory lawsuit" because ownership is not fragmented in the sense of Savigny, and only the owner is considered a possessor. What is today achieved with "possessory lawsuits", in Roman law was achieved by interdicts because possession was not treated as a "right" different from ownership. In effect, they could not image ownership without possession in the sense of real power. Ownership is not ownership if it is not *plena in re potestas.*

interdict was only requested by the owner of the thing, as a possessor, and by quasi-possessors because in the Roman law understanding of possession, these were the persons who had rights in respect of the thing (ownership or servitude i.e. property rights). An interdict could not be requested by persons that, in the Roman law understanding, were not considered owners or quasi-owners, for instance lessee, depository, borrower, etc. (that for instance had the occasional right to lodge a theft lawsuit - furtum). When property right was disputable, lawsuits were lodged, when not, interdicts were requested.

Such understanding of notions may be specifically traced in the case of praetorian lawsuit (*actio Publiciana* and *actio quasi-Publiciana*). Contemporary debates about Roman law have increasingly become "today's projections" of the time passed, and the actio Publiciana lawsuit is today utterly wrongly interpreted, depending on the needs of the "legal author" and the legal system he comes from.

Finally, one should briefly consider Roman law solutions relating to the possibility of acquiring ownership of things or acquiring possession of things "through somebody else", which is a point where modern interpretations largely depart from the original Roman positions. The fundamental Roman rule was that none may acquire or possess things through somebody else. Various subsequent conceptions about the will (intent) for acquisition or possession, for the corps etc. will not be considered here. We only note a general rule about personal engagement of the owner or of the possessor. But Roman law functioned in slave-holding society in which slaves were treated as things, children and servants as person under governance (or literally as "persons in possession"). Hence, without going into discussion about categories of persons and their status in Roman law, we may freely state that a person who had power over somebody acquired all that had been acquired by persons under his governance. All acquired by a slave or by children was considered to have been acquired by a master or a father who simultaneously acquired possession of those things. This is a particularly important point that the drafters of civil codes in the XVIII and XIX centuries did not perceive well and projected it in a strange way awarding the status of slaves or of persons in possession to persons who acted on behalf of somebody else (agents, employees, trade assistants etc.).

This is in short a Roman understanding of possession. This kind of Roman interpretation had been gradually changed at the time of Western Feudalism, starting from the Glossator School. The Byzantine Empire adhered to the Justinian's Institutes until its downfall. Western Feudalism, however, brought about a real fragmentation of ownership, to *dominium directum* and *dominium*

utile understood as separate property rights, which endowed the owner a real possession or "use ownership or possession". In Western Feudalism, possession started to acquire a different meaning and adjust to the changed concept of ownership as such. If more than one person have property right over a thing, it automatically meant that more than one person had it in possession, that is to say factual power over that thing. A feudal master had a direct ownership and a direct possession; a vassal had user ownership, but also a user possession. Here it comes to the change in the basic understanding of possession in Roman law, which is now literally understood as a "factual power over a thing" and ownership is fragmented into rights or in English terminology it becomes "a bundle of rights". Possession in Byzantine is defined as a factual power over a thing, but it is yet a legally defined notion. Not every factual power over a thing entailed possession. But in Western Feudalism there were multiple owners and multiple possessors on different levels of feudal hierarchy. If earlier lawsuits to contest a property right were lodged and interdicts were requested for undisputable property rights, things have now become more complex. Because ownership i.e. possession could be contested, disturbed, or forcibly and fraudulently seized on different levels of feudal hierarchy and consequently different vassals gained the right to defend their property by themselves and to request protection through interdicts, the same as their feudal masters. That led to different situations which Western Feudal law tried to respond to and provided some response.

Yet a key twist in today's understanding of possession occurred in the period of new-century adoption of big civil codes. In an attempt to rid of feudal tradition, legal thinkers in civil law countries reverted to Gaius and Justinian and to ownership understood as *erga omnes* right. However, burdened by the preceding feudal tradition, but also by new ideas of equality of citizens and their rights and freedoms, and often neglecting the fact that the Justinian's and Gaius' Institutes functioned in slave-holding society, the lawyers of that time did not always correctly interpret Roman notions, and not rarely made mistakes, what left traces on laws passed. Later on inertia played its part. For instance, "Possession" by Savigny is today considered a particularly relevant work of that period.[5] Since Savigny was reading the Institutes, and all others read his work, it is logical that where Savigny made a mistake all others followed suit. But Savigny is far from the Institutes of Justinian or Gaius. He reads them through the eyes of the preceding feudal reality and often makes mistakes or cannot understand the meaning of certain provisions at all. Basically relying on feudal concepts and interpretations of Justinian, he draws more heavily on them than

[5]Von Savigny's Treatise on Possession or The Jus Possessionis of the Civil Law, Hyperion Press Inc., S. Sweet, London, 1848 (sixth edition, reprint).

on the real Institutes. Civil codes of that time were largely influenced by his work and his errors were reflected in laws, in particular in the so-called German legal circle.

Ownership is no longer unique and indivisible (as right) and is fragmented into different rights (use, usufruct, and disposal) understood as individual rights independent of each other (which is admittedly justified to a certain degree in the Institutes of Gaius). The same destiny is shared by the essence of ownership (i.e. possession), which was understood as an individual right, independent and autonomous from ownership.[6] The Praetor's interdicts and *actio utile* in the common law world continued to live in the distinction *legal owner – equity owner,* as well as in the entire equity trial system. In civil law countries changes were more dramatic. The Praetor's rules were in a way assimilated into the so called- temporary or interim measures and the so-called non-contentious proceedings, although they were incorporated in different ways in other legal solutions as well.

It is, however, obvious that the Roman rules were not reinstituted or embraced in full. France kept the difference between ownership, possession and detention. Possessory lawsuits were introduced as an independent ground for protection of possession for all persons keeping a thing on any basis. Something that is unimaginable for Roman law. Possession became a right independent of ownership which is a lasting feudal impact on all systems of today. Nowadays all depositories, lessees, pledgee have possession. For instance, the German Civil Code contains provisions on "original" and "derived" acquisition of possession which in Roman law related to ownership (occupation-tradition) but not to possession as such because for them possession did not differ from ownership.

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[6]We may follow this in the Institutes of Gaius who mentions procedures such as mancipatio in jure cessio (as "fictitious sale" for transfer of property rights, what is not the case in the Justinian's Institutes. In regard to transfer of ownership of things, Gaius makes distinction between mancipable (houses and lands in Italy, rural servitudes and domestic and farm animals) and not mancipable (urban servitudes, public and imperial lands, wild beasts and incorporeal things). Ownership of mancipable things is transferred by mancipatio or in jure cession, while ownership of not mancipable things by tradition (if they are corporeal things). In Italy creation and/or transfer of incorporeal things was carried out by in jure cession and in provinces by pacts and stipulations. Justinian simplifies things. All corporeal things are transferred by tradition, all incorporeal things are transferred either by a unilateral act of will (concession) or by pacts and stipulations. Justinian is interesting because of the fact that although he fully abandoned mancipation, it is not the case with cession. For him cession has a completely different role but exists as such. This is especially important for incorporeal things. According to the Institutes of Gaius, an "owner" of an incorporeal thing transfers (creates) it by cession (in jure cession). In the Justinian's Institutes an owner of an incorporeal thing (inheritance, usufruct, servitude) creates and/or transfers it by pact or stipulation, but if it comes to property right, the acquirer may transfer that right by cession. For illustration, an owner give a usufruct right to someone by pact or stipulation, the latter may transfer that right by cession. The Institutes of Gaius even contain provisions on "fiduciary transfer" what is not the case with the Justinian's Institutes (in Byzantium it became obvious again at the time of Emperor Maurice, although it is quite certain that the institute waq'f had been known in the Eastern part of the Empire much before that, but it is difficult to find written evidence.

Such a system of protection of possession differs drastically from what we find in Roman law. The right to request protection of possession is given to everybody: to owners (possessors) and those considered detentors, which indicates that they are treated as former "feudal vassals" who were entitled to protection of their possession.

Although both codes apparently start from the concepts of the Justinian's Institutes, their feudal feature is prevalent because they do not correlate possession with ownership, but with a factual power over a thing and in a way treat ownership and possession as something different, even as two different rights, what was utterly unimaginable in the Roman concept.

One of the most striking proofs of this is a provision contained in Article 854 of the German Civil Code, according to which theoretically acquisition of possession is divided into original (with acquisition of real control of a thing) and derived (through contract, if an acquirer may exercise control over a thing). This indeed resembles acquisition of ownership in Roman law, in line with natural law and *jus civile*, but these provisions in Roman law concern ownership and not possession. Acquisition and loss of possession outside the context of ownership is utterly senseless in Roman law. These are more feudal concepts.

One of the fundamental questions we may ask is what can be possessed, i.e. whether possession relates only to things or to rights also. As far as this point is concerned, all legal systems start from a basic classification of things, that is to say what is defined as a thing (r*es*) in a specific legal system. In view of the fact that in France things include both corporeal (*res corporales*) and incorporeal things (*res incorporales*), likewise both corporeal things and rights, i.e. incorporeal things may be possessed.[7] Although this is supported by the legal definition of possession, up to now there is a difference of opinions between the French legal literature and court practice in regard to "possession of rights". As distinct from the French system, in Germany only material goods are considered things and accordingly only corporeal things may be possessed. In the German legal family, there is no possession of incorporeal things (rights). All this is in full compliance with a definition of what can be an object of ownership. Contrary to the French system in which incorporeal rights (things) are the object of ownership rights, rights, i.e. incorporeal things are not an object of ownership in the German legal family.

This distinction originates from Byzantine and requires a short explanation. In our opinion, the key change in relation to classification of things appeared somewhere in late 14th and early 15th century, just before the fall of Byzantine. At that time in Byzantine, the first mechanical printing

[7]Similarly to the division in common law to choses in possession and choses in action.

machines were invented what resulted in the first printed books. According to our traditional sources, the inventors of printing machines were Sabbatai Zevy (often mentioned as Rabbi Shalom Shabazi) born in Yemen and Nathan of Gaza, who at the time came to the center of the Byzantine Empire.

Today in Florence in *Palazzo Medici Riccardi*, built somewhere between 1445 and 1460 for Cosimo Medici, there is a painting by Italian Renaissance painter *Benozzo Gozzoli,* which is today referred to under different names, although a large number of them disclose a certain degree of cynicism: Three kings, Three Wizards, Procession of Wizards, etc. (as an association to the birth of Christ). In addition to the Byzantine nobility visiting Florence, a dominant figure on the painting is a person known as *Georgius Gemistus Pletho*, who at the time was the Church patriarch known as Joseph. He is a rather unexplored figure who was a true renaissance personality in every respect.

Although according to all available sources Pletho is considered a philosopher, neo Platonist, and alike (and perhaps he was), he yet gave a much bigger contribution to codification of secular and church law of his time. A small segment of it has been preserved until the present day which is known as "Nomos Georgikos" and the famous *Krmcija*, printed under his guidance. The international literature mentions that the first law was adopted long before, at the time of the Macedonian dynasties and usually its title is translated as the "Farming Law". In my opinion, this is a misinterpretation and it relates to a small segment of codification named after the author "Law of George" (*Nomos Georgikos)*.

What can be further concluded indirectly from a large number of sources is the classification of things made at his time. The discovery of printing machines and the first printing of books at that time undoubtedly represented a revolution for people's minds and their understanding of the world. What was difficult to achieve with manual transcription of books then became an easier mechanical process of book publishing which then could be available to a much wider circle of people.

The appearance of the so-called "renaissance figures" dealing with versatile topics was inspired by the possibility of reading books of various contents (today's "google it"). For instance, Pletho himself is an author of a publication on double accounting which was later one published by Luca Paciollo in an adapted form, as a "publication devoted to the Dutch of Urbino".

The first characteristic classification feature of that time was that the thing (*res*) included only material things, that is to say only corporeal things. All the rest was rights, as incorporeal

things that were not named as *res*.[8] Such a division is noted in Germany much later. The logic was quite simple. All persons have rights of various types. Some have property rights that are transferable. Other rights are rights a person is entitled to by nature or under the law of nature and they are not transferable. A classification similar to goods in and out of trade (*res in commercio, res extra commercio).* Movable goods were transferred according to tradition, immovable with registration and rights with cession. Incorporeal rights are not subject to the same rules as corporeal rights. Because they are not *res.* For illustration, no one can say I am the owner of rights but I have rights, because a right is incorporeal and is not a thing. Because a right cannot be owned. For the same reason, we do not say I am the owner of claims, but I have claims.[9] At that time a differentiation was made between assets in bankruptcy and realized assets (as a material substitute for assets) or liquidation assets and liquidation mass etc. Because rights are not a thing, they cannot be sold, leased, rented etc. They can only be transferred (if they are in trade) and only by cession (now understood as an ordinary contract) or by novation.[10]

What in the Gaius's work was *in jure* cession as a procedure for creation and transfer of incorporeal real rights (as a matter of interest for us here), in the case of Justinian is reduced to *pact* and *stipulation* (or to put it simply a contract – less frequently involvement of the praetor – with the option that a person who has acquired a property right may transfer that right to a third party by cession). In the late Byzantine period cession, as an ordinary contract, was expanded to obligations. For both Gaius and Justinian, cession relates to property rights exclusively. In both Institutes obligations were transferred by novation. Pletho fully transformed cession into a contract on transfer of rights of all types (both property rights and obligations).

Cession used to denote transfer (or creation) of property rights and their acquirer only stepped into the shoes of his predecessor with all advantages and disadvantages that the position entailed. The owner of a thing who transferred a limited property right continued to be an owner and there was no change in that regard. But obligations (especially in case of contractual obligations) were *inter partes* and therefore their transfer was performed by novation, what in

[8]Other European states maintained the Justinian classification into corporeal and incorporeal things or in common law systems into *choses in possession* and *choses in action*.

[9] This is important for defining various types of transactions, for instance in case of factoring in different legal systems: whether it is a "sale of claims" or "transfer of claims".

[10]This classification was disputed by the Napoleon Codification. Recalling the Justinian's Institutes and division into corporeal and incorporeal things, both types of things are marked as *res*, whereby they could be owned. Since anything considered *res* might be owned (even an incorporeal thing or a right) it became possible to say "I own a right" or "I sell a claim", I lease a claim" what is unknown to the Byzantine state of mind, including even Justinian. But undoubtedly strange to the time of Pletho.

essence meant a completely new tie of law, new contract with other parties, different from the ones in the preceding contract (new obligation). In the last decades of Byzantine existence, a possibility was created that obligations, on one's will, could be transferred by novation (as up to then, with a replacement of old obligation with a new one due to the change of parties in the *inter partes* relationship), but also by cession. The cession enabled a new acquirer of obligation "to step into the shoes of the old one" and the relationship remained the same. At that time it was considered that this provided greater security for all, compared to novation (which led to new legal relation).

But when an incorporeal, intangible right, only a legal idea or fiction is attached to the paper, that right becomes a thing (*res*) or a material object that can be transferred as any other corporeal thing. That represented a rather revolutionary idea, which was inspired by the invention of printing machines. A claim is a right and as such it is incorporeal. It is transferred by cession. But if a claim is attached to the paper, it is transformed into a security (*Wertpapier)* and becomes a corporeal thing. Its transfer is not made by cession but under the rules applied to corporeal things. In case of a bearer security, rules for movable goods are applied (tradition) and in case of a registered security, the rules for immovable goods are applied (tradition and entry into registry).

That is why in the system in which only material things are considered *res,* a legal provision that "securities are transferred by cession" would sound illogical, because securities were invented to avoid cession and what was known as incorporeal right to be transformed into a corporeal thing. Therefore for that legal circle, a transfer of securities by cession would be nonsense, because the transfer of the right is carried out as if there were no securities. Then why was it invented? The French way of thinking would probably wonder and ask what is disputable in its idea and classification because it starts from the premise that an incorporeal right is a thing, but an incorporeal thing. That is what Byzantine lawyers tried to avoid in the 14thcentury when they determined that the notion of thing (*res*) implies only material things. They wanted a clear classification: something is either an incorporeal right and is transferred by cession (if the transfer of that right is possible) or something is a thing and is transferred by tradition or entry into registry. That was an ingenious idea of simplifying a legal "Mendeleev's system".[11]

[11]These ideas are particularly visible in the differences betwen common law and the French understanding of copyrights (as droit d'autheur or copyright), that is to say whether there must be a material fixation in order that the work exists or not, whether registration "on the name" is required or not (as for registered securities), although it sometimes seems that legal systems are not fully aware of the source of their legal ideas. This confusion in relation to classification of things becomes particularly visible today at the time of tendency of "dematerialization of securities" and their transformation into "electronic notes". Today it

Another important point is how the right to ownership is defined in a specific legal system, that is to say whether it is defines as absolute, single and indivisible right or as a bundle of rights. If we follow the Roman concept since the time of Justinian, ownership is defined as a single, unique and indivisible right. Fragments of that right such as use, enjoyment and disposal (*usus, fructus, abusus*) are not understood as individual rights in the Roman concept, but as "separate powers" within a single right. This aspect is essential in order to understand what the owner is doing when such a "power" is transferred to someone else. The Justinian's Institutes use the term "license" or "concession", i.e. the owner of a thing permits another person to use, enjoy (for instance collect fruits) or dispose of (consume), although he himself remains the owner enjoying all powers resulting from a single and indivisible right to ownership (pact or stipulation). The owner continues to own a thing even if it is placed as collateral (*pignus*) to his creditor. That is why he is entitled to ask for the extra profit gained after the sale of the thing and collection of claims. Although the Institutes of Gaius contain a rather different concept, he however defines cession (*in jure cession*) as a fictitious sale not a real sale of the right and that fiction never meant that the owner of a thing was no longer its owner and that he "sold for real" some of the powers ensuing from the right to ownership. During its entire existence, the Byzantine Empire applies the Justinian concept of a right to ownership understood as a single right. Even in its feudal stage, even in the work of Georgius Gemistius Pletho, that concept was never abandoned. The only difference is that in the period following the 16th century, and in particular in the work of Pletho, instead of "license" or "concession", it was preferable to use the term "privilege" ("I give you a privilege" - *privilegium*). Independently of whether the transfer of power is theoretically carried out as "dismemberment" as in France, or as a simple transfer of powers (rights) as in Germany, today the result is the same – the right of ownership is singe and indivisible no matter whether understood as erga omnes right or as "fragmented" right.

This is especially important in order to understand today's perception of the principle *numerus clausus* in civil law systems and deviations from that principle in the period of feudalism (which has nevertheless left a lasting trace on the understanding of that principle today).

In short, possession is a power over a thing, but it is a legally formed notion. Not every factual power over a thing is possession and therefore a legal definition of possessions says a lot about a society applying and accepting such a definition.

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might be quite amusing to read various works on the legal nature of transactions conducted by different clearing houses, securities depositaries etc. in different legal systems.

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