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COMMON (AND COLLECTIVE) PROPERTY – A HISTORICAL PERSPECTIVE

INSTITUTE OF COMPARATIVE LAW
in collaboration with
DEPARTMENT OF LAW OF THE UNIVERSITY OF NAPLES "FEDERICO II"

International Scientific Conference

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Proceedings from the International Scientific Conference
26 June 2024, Belgrade, Serbia

Editors:
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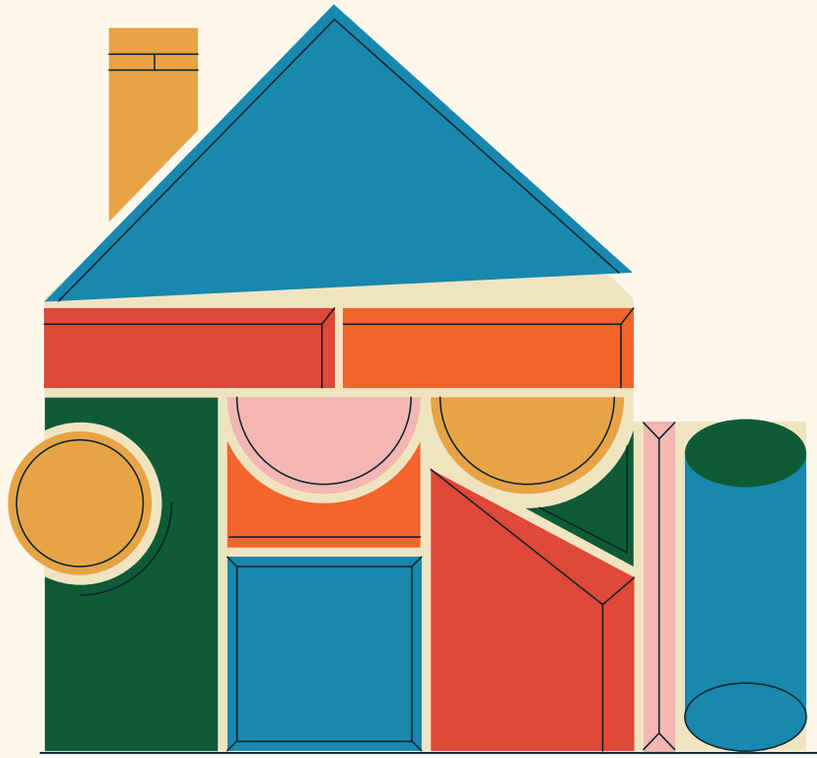

Beograd, 2024.

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CONTENT

PREFACE

The history of the common (and collective) property is probably the best observation point in order to try to understand the hard problem concerning the so called alternative forms of property; in the meantime, also the reality represented by the property right itself, when it appears as conditional and even "functionalized", that is to say depending from a specific function that is given it by the legal system, could be considered from the historical viewpoint.

As a matter of fact, this kind of split between the ownership and its use comes on the surface continuously in history, normally preceding the dogma of the absolute private property: just think about the relation between the *Code Napoleon* and the previous *Ancient Régime*, where the property right appeared as divided among several owners; or, in the context of Roman law, the power of the *pater familias*, that arrived at the end of a process according to which the property and in particular the use of the land was, probably, more common (and collective) than private.

The medieval Serbian law, strongly influenced by the Byzantine legal sources, had the knowledge of that kind of split too, a kind of split connected mainly with the concept of land and studied by different historiographic currents, expecially by the Slavophile doctrine and the Marxist critic.

And we know how the Marxist critic considered the dogma of the absolute private property, into the reality of the Socialism: in a world of economic and social injustice, a reconsideration of such a dogma finds a new life, as many experiences everyday are able to show us.

The reality, a reality.

If the task of the historian is to describe and then to explain exactly the reality, as the jurist has to do, how is it possible to be a good jurist without to be a good historian?

The solution could be that every jurist must be also a legal historian, but we could say something more, that every legal historian must be also a comparative jurist!

For this reason we are in the right place, here at the Belgrade Institute of Comparative Law (*Institut za uporedno pravo*): a place established to preserve the tradition of the European legal system; a tradition, here in Serbia and once upon a time in the former Jugoslavia, coming from the Roman and Byzantine law, a legal culture where was possible to observe relevant alternative forms of property.

Starting from the present seminary, which would be the first one of a series, our task will be to light up the corners that have been left into the obscurity by the dogma of private property as absolute right.

Prof. Dr. Samir Aličić
Prof. Dr. Valerio Massimo Minale

LEGAL HISTORY OF SERBIA AND SOUTH-EAST EUROPE

Valerio Massimo Minale* DOI: 10.56461/ZR_24.CCP.01

EXAMPLES OF COLLECTIVE PROPERTY IN THE *JUSTINIJANOV ZAKON* AND IN THE DUŠAN'S *ZAKONIK*: BETWEEN BYZANTINE LAW AND MEDIEVAL SERBIAN LAW**

Abstract: *The problem represented by the collective property had a pivotal role in the medieval Serbian law, as coming from the Byzantine one; moreover, according to such a problem, a historical perspective of the economic and social function of the property right, together with an approach of comparative law, must be considered unavoidable in order to understand also the split between the ownership and the use of the land also in some contemporary legal systems.*

Keywords: *collective property; Byzantine Law and medieval Serbian law; function of the property right.*

1. Introduction

The historiographic debate concerning the collective property in the Byzantine law has been focused, between the Slavophile doctrine and the Marxist critic, mainly on some places belonging to the *Nomos Georgikos* (NG)[1]: in particular, the scholars have stressed the relevance of the articles 32 and 81, concerning the profile of the communion, and 8, concerning that one of the division; 18 and 19 concerned the practice of the common taxation[2].

And because all these articles are emerging points of the function represented by the so called community of village, could be interesting to search if that specific function presents an evidence also in the medieval legislation of Serbia,

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** The contribution is inspired by the first part of "La proprietà collettiva nella Lex Iustiniani e nello Zakonik di Stefan Dušan: echi di diritto romano e bizantino per una ricerca (e in calce ad un nuovo libro)", Codex. Giornale romanistico di studi giuridici, politici e sociali 5/2024, 179-197, where S. Šarkic (2023), A History of Serbian Mediaeval Law, Leiden-Boston, Brill, 2023 is taken in consideration too.

[1] We refer to J. Koder, Nomos Georgikos. Das byzantinische Landwirtschaftsgesetz. Überlegungen zur inhaltlichen und zeitlichen Einordnung Deutsche Übersetzung, Wien, Verlag der Österreichischen Akademie der Wissenschaften, 2020.

[2] Cf. V. M. Minale, "La bizantinistica giuridica tra le due guerre mondiali e il riavvio del dibattito sul Nómos Georgikós", in: Segmenti della ricerca antichistica e giusantichistica negli anni Trenta (eds. P. Buongiorno, A. Gallo, L. Mecella), Napoli, Editoriale Scientifica, 2022, 747-796.

that was characterized, as we know[3], by a strong connection with the legal sources coming from Byzantium.

Now, inside the *Zakonik*, the triple (and after, in the manuscripts, double) codification given by Stefan Dušan, there are not exact correspondences with our articles, neither in the *Justinijanov Zakon*, better known as *Lex Justiniani* (LJ)[4], that was exactly a translation of the *Nomos Georgikos* (but with material coming from the Isaurian *Ekloge*, the Macedonian *Prochiron* and even the *Basilika* too), neither in the real *Zakonik* (Z)[5], that was the collection issued in two times between 1349 in Skoplje and 1353/54 in Serres; the Slavic version of the *Syntagma Alphabeticum* by Matthew Blastares, that represents the third part of the *Zakonik* and that was reduced just to the secular laws, the *politikoí nómoi*, has only some references to the institute of the emphiteusis[6], that are not useful in this case.

Anyway, both in the first (LJ) and in the latter source (Z) it is possible to record the presence of relevant prescriptions ruling the property of the land in a collective sense.

2. *Justinijanov Zakon*

We start from the LJ, by considering the oldest exemplar, preserved in the National Library of Moscow[7], that was found in the context of the Mount Athos and that remounts to the XV century.

The village, exactly a common subject, appears in the articles 10 and 11, where, in case of a sell, a preemption – the Byzantine *protímesis* [8]– is imposed in favour of an inhabitant of the community (for a not better specified "thing") or in favour of the relatives and after of the inhabitants of the same community (for a house, a soil or a vineyard, a mill): the remedy is the invalidity of the sell and, for the purchaser, the restitution of the payed price, under the temporal limit of then years; the prescriptions could be connected with the tradition of the land legislation given by the Macedonian emperors against the *dúnatoi* (riches) and

[3] Cf., again, V. M. Minale, "Il «Syntagma Alphabeticum» di Matteo Blastares e lo «Zakonik» di Stefan Dušan: nuove prospettive sul «Syntagma» cd. abrégé", Index 45/2017, 187-211 (a proposito di V. Alexandrov, The Syntagma of Matthew Blastares. The Destiny of a Byzantine Legal Code among the Orthodox Slaves and Romanians, 14-17 Centuries, Frankfurt am Main, Löwenklau, 2012).

[4] We refer to B. Marković, Justinijanov Zakon. Srednjovekovna vizantijsko-srpska pravna kompilacija, Beograd, Srpska Akademija Nauka i Umetnosti, 2007, where the original text (53 ss.) and the Serbian version (65 ss.).

[5] We refer to Đ. Bubalo, Dušanov Zakonik, Beogard, Zavod za ydžbenike, 2010, where, again, the original text (75 ss.) and the Serbian version (149 ss.).

[6] K-3 (περὶ καινοτομιῶν) from Proch. 38 (translated in the Nomokanon by Saint Sava): on the common parts; cf. nt. 32 and 33.

[7] Rossijskaja Nacional'naja Biblioteka (ex Gosudarstvennaja Biblioteka SSSR imeni V. I. Lenina), segnatura: Ф. 87, N. 28 M 1708; 31 capitoli (ff. 169v-176).

[8] Cf. E. Papagianni, "Protimesis (Preemption) in Byzantium", in: The Economic History of Byzantium. From the Seventh through the Fifteenth Century (ed. A. E. Laiou) III, Washington, Dumbarton Oaks, 2002, 1071-1082.

in favour of the *pénētes* (poors)[9]: in particular, it could be connected with the famous constitution issued by Romanus Lecapenos in 922[10].

Then – apart from the article 19, where the possibility appears that two farmers, during the planting season, decide to cultivate the same field by putting together the seed and the manual work, and that could recall NG 4[11] – we find the article 22: it seems to presume a kind of collective use of the land if we consider that the harvest, that appears as separated from the property of the soil, is divided in several parts (here, ten); who takes it, or better who takes some parts of the harvest over the assigned one, must be considered a thief[12].

Finally, there is the article 33, that rules the division of the land and that could remember NG 8 (Proch. 39.48 and B. 60.9.1 from D. 11.6.1, Ulp. 24 *ad ed.*)[13].

3. *Zakonik*

The Z, on the other side, offers less material concerning the collective use of the land, but seems to sketch a more complete scenario concerning its property: it shows itself in different ways, each one depending from the function played by the involved subjects in their relation with the central power.

The main typologies of property that we have to take into consideration are the *baština* and the *pronija*, both models of private property: anyway, because of their existence is often evoked in proposing a sort of distinction from something else, it is possible to imagine that the normality was another, that is to say that one represented exactly by the community of village; and we know that the community of village, in Serbia, during modern times has been embodied in the *zadruga*.

But we must go ahead in order.

The *baština*, that in a literal sense – from the noun *bašta*, "father" – means "patrimony", represents a (more or less) perfect private property, that is able to be transmitted after the death of the owner and that could be referred both to the ecclesiastics and the noblemen: in the sources it is distinguished from the more generic term *imanije* – from the verb *imati*, "to own/to have"; the *baština*

[9] Cf. P. Lemerle, "Esquisse pour une histoire agraire de Byzance: les sources et les problems", Revue Historique 219/1958, 32-74 and 254-284; 220/1958, 42-94 together with J. de Malafosse, "Le droit agraire au Bas-Empire et dans l'Empire d'Orient", Rivista di diritto agrario 1/1955, 35-73; moreover, J. F. Haldon, "Military Service, Military Lands, and the Status of Soldiers: Current Problems and Interpretations", DOP. 47/1993, 1-67.

[10] Jus Graecoromanum (eds. J. Zepos, P. Zepos) I, Athina, Fexis, 1931, 198-204; moreover, N. G. Svoronos, Les Novelles des empereurs macédoniens concernant la terre et les stratiotes. Introduction, edition, commentaires, Athens, Centre de recherches byzantines, 1994 [revised edition by P. Gounaridis] and E. McGeer, The Land Legislation of the Macedonian Emperors, Toronto, Pontifical Institut of Mediaeval Studies, 2000.

[11] 'Εὰν δύο γεωργοὶ συμφωνήσωσι καταλλάξαι χώρας πρὸς καιρὸν τοῦσπεῖραι καὶ διαστρέψῃ τὸ ἓν μέρος, εἰ μὲν ὁ κόκκος κατεβλήθη, μὴ διαστρέψωσιν· εἰ δὲ οὐ κατεβλήθη, διαστρέψουσιν· εἰ δὲ ὁ διαστρέφων οὐκ ἐνέωσεν, ὁ ἕτερος δὲ ἐνέωσεν, νεώσει καὶ ὁ διαστρέφων καὶ διαστρεφέτω; the Greek text speaks about an "exchange" of lands.

[12] Cf. NG 9 and 10.

[13] 'Εὰν μερισμὸς γενόμενος ἠδίκησέν τινας ἐν σκαρφίοις ἢ ἐν τόποις, ἄδειαν ἐχέτωσαν ἀναλύειν τὴν γενομένην μετρησίαν.

of the noblemen, anyway, sometimes could keep an inner section deriving from the power of the king as a concession and in that case could be confused with the *pronija*, that is to say the feudal property.

For example, the article 142, punishing the nobleman, superior or inferior, that, after the concession of lands and cities, has badly exercised his power, seems to make any difference between *baština* and *pronija*.

Of course, speaking about feudalism in Byzantium and, of consequence, in Serbia – even if we exclude the particular context of Bosnia, that was more influenced by the Western structures – is absolutely not simple: because of the transplant of a character from a context to another one, that is not automatic, and because of the influence exercised by the Marxist critic on such a historiographic stream[14]; nevertheless, the classic distinction between *dominium eminens* (the property of the emperor and the king), *dominium directum* (the Byzantine *prónoia* or the Serbian *pronija*) and *dominium utile* (the effective use of the land) is useful in order to stress some problems: according to this, the instrument of the *práktikon*/*praktik*, that was the document of concession of a land to a lord, could be considered the symbol of a conditional property, that has become just a function, once lost the original unity.

The noble *baština*, in regard to the ecclesiastical one[15], is more polymorphous. The articles from 39 to 46 concern: the guarantee of the property granted through official documents to Serbian and Greeks landlords (39 and 40, to be red together with 134 and 138)[16]; the conservation of property within the noble family nucleus (41); its freedom from every weight, except the state tax in corn called soća[17] and the recruitment (42); the independence from every eventual violence coming from the king (43); the bond with the land of the servile manpower (44 and 46), and the presence of churches, where the owner preserved the right to choose the priest, the pope (45). The article 174, finally, considers the existence of the peasant property included in the noble one, on the condition to respect certain duties.

This *baština* was coexisting, as we have already said, with the *pronija*, corresponding to the land given as a concession by the king to a submitted subject, the *pronijar*, who, differently from the *vlastelin* (specific term) or the *gospodar* (generic term) was not completely independent because of a possession that was exactly conditional (and, normally, not transmissible) (59); the character of the *pronijar* is evoked also in connection with the quite servile work of the farmers, the *meropsi* (68), and with the criminal trial, when the *privilegium fori* was prescribed (106).

[14] For a first approach see M. Mladenović, "The New Yugoslav Historiography and the Problem of Feudalism in Medieval Serbia", Études Slaves et Est-Européennes 1/1956, 89-99 (together with Id., "Zur Frage der Pronoia und Feudalismus im byzantinischen Reiche", Südost-Forschungen 15/1956, 123-140); anyway, Minale (2022), 763 ss.

[15] We refer to the article 31 together with 65 (On the ecclesiastical properties, when they are given to local priests) and 37 (On their incoms, that must be free from the control of the metropolitan); in different places 25-27 (Churches and monasteries) or 78 (A controversy on the land) - the word is not used.

[16] Useful A. Malenica, "La difesa delle persone nel Codice dello zar Dusan", Diritto@Storia 8/2009), online.

[17] Cf. art. 198. M. Blagojević, "Soća", in: Leksikon srpskog srednjeg veka, Beograd, Knowledge, 1999, 683-685.

It is obvious that the practice of the *pronija* was built on the document that established it and that ruled it, coming from the experience of that part of the Byzantine world[18] that has been included into the Serbian kingdom through the decades, until the proclamation of the empire by Stefan Dušan[19].

Finally, the private property appeared as: absolute (or quite absolute) as the *baština*, that could be ecclesiastic, noble and farming, and conditional as the *pronija*.

Beside, however, there were forms of collective properties of the land, respectively referring to families, villages and territorial unities.

As a matter of fact, exactly the collective property would have been one of the founding mythology of the Slavic character[20], embodied, in the environment of the Balkans, in the *župa*, concerning a politic-administrative field[21], and in the already quoted *zadruga*, concerning an economic-family field, two institutions where the chiefs were the *starečina* on one side and on the next the *domaćin*[22]*:* the *kolo*, that is the Serbian traditional dance and that is danced all together, in a circle, according to a design where everyone is near the neighbour without any space, represents just the sense of community, where everyone is equal to the other.

Moreover, a recall to such a sense of community could be represented also by the criminal institute of the *vražda*, that in the customary law was in the meantime the murder and the revenge occurred even outside the family[23]; and always concerning the criminal law we know that collective subjects as the village and the *župa* were able to promote the accusation against the theft or the robbery[24].

The idea of a sort of Slavic collectivism appears, anyway, in several Byzantine sources describing the settlement of those populations in the Balkans, together with the so called *sclaviniae*[25]*,* but also in some Western sources, for example the Chronica Sclavorum by Helmond of Bosau, that described the process of submission of the Polabs under Otto I of Saxon, and where we read that a German prince *precepit sclavorum populo ut coleret vir agrum suum* (I, 34)[26].

But also here, we must go in order.

[18] Cf. M. C. Bartusis, "Serbian Pronoia and Pronoia in Serbia: The Diffusion of an Institution", ZRVI. 48/2011, 177-216 (together with Id., Land and Privilege in Byzantium. The Institution of Pronoia, Cambridge, Cambridge University Press, 2013, 336 ss.); moreover, E. Naumov, "K istorii vizantijskoi i serbskoj pronii", VV. 34 (1973) 22-31. Among several scholars, we cannot forget G. Ostrogorsky, Pronija, prilog istoriji feudalizma u Vizantiji i južnoslovenskim zemljama, Beograd, Naučna Knjiga, 1951 (then, Pour l'histoire de la féodalité byzantine, trad. H. Grégoire, Bruxelles, Edition de l'Institut de philologie et d'histoire orientales et slaves, 1954).

[19] In particular, P. Stephenson, Byzantium's Balkan Frontier: A Political Study of the Northern Balkans, 900-1204, Cambridge, Cambridge University Press, 2000.

[20] L. Niederle, Manuel de l'antiquité slave. II. La civilisation, Paris, Champion, 1926, 172 ss.

[21] F. Conte, Gli slavi. Le civiltà dell'Europa centrale e orientale, Torino, Einaudi, 1991 (orig. 1986), 226.

[22] Conte, 238 ss.

[23] Cf. artt. 20, 103, 154 e 183.

[24] Cf. artt. 92 e 149.

[25] Prok. Πολ. VII.14.

[26] It is interesting that exactly the German people were described by the Romans as messengers of a certain, different "collectivism": Agri pro numero cultorum ab universis in vicem occupantur, quos mox inter se secundum dignationem partiuntur; facilitatem partiendi camporum spatia praestant (Tac. Germ. 26.2).

4. Zadruga, župa, travnina

The association of families coming from a common ancestor, that originated relevant communities of clans, was object of hostility by the lawgiver, according with the attempt, realized for fiscal reasons, to destroy the big unity and to reduce it in single fires and single houses (70).

The extended family, however, represented the origin of the *zadruga*, that represented in turn one of the centres, maybe the main one, of the experience of the collective property: even if the term – as we have already said – is rather modern[27] (and in the sources it stays for *kuća,* the "home"), the concept is old.

The *župa*, on the other side, is a territorial unity coming from a confederation of villages, testified in particular by founding documents of churches and monasteries: the chief of the *župa* is the *župan*, who became through the time a landlord more and more powerful until the identification with a sort of king, the *veliki župan*[28]*;* Stefan Nemanja, for example, Stefan Dušan's ancestor, is called *veliki župan* of Raška, the region of the first Serbian state, in the charter of Hilandar of 1198[29].

The *župa* appears in several places of the Z: on the right of the king to be accompanied and escorted from city to city and, exactly, from *župa* to *župa* (60), on the identification of a new fiscal subject (108), and of a district, that was the result of a conquest (117), on the relation between a higher landlord and a lower one in the payment of the overnight stay (155), on the collaboration in the military defense (157 and 158), on the role exercised, concerning a suppletive responsibility too, in persecuting thieves and robbers (144 e 145, 149, 191), but mainly on the organisation of the pasture inside the same *župa* (75 together with 74 on the villages, and 79 and 80 on the disputes for their borders); the livestock (*dobitak*)[30] – that called "alive" (*živi*) or "dead" (*mrtvi*) represented, respectively, the richness movable or a sort of real estate – had the permission to graze into the assigned territory, even if in that territory there were a village belonging to the king, to the church or to a landlord.

Other juridical situations related with a conceptual split of the right of property concerned the *iura in re aliena*, as the *servitus* (*rabote*) and the emphyteusis (*nasaždenije*), that arrived into the medieval Serbian law from the Roman one[31] through the translation of the *Prochiron*, made by Saint Sava in his

[27] Vuk Stefanović Karadžić, the father of the Serbian language, remembers it in Srpski rječnik, Wien 1852[2] and Beograd 1972, 173.

[28] G. Tornović, "Župa i Župan", in: Leksikon srpskog srednjeg veka, Beograd, Knowledge, 1999, 195-198; moreover, M. Blagojević, "Grad i župa" - međe gradskog društva", in: Socijalna struktura srpskih gradskih naselja. XII-XVIII veka (eds. J. Kalić, M. Colović), Smederevo-Beograd, Muzej u Smederevu, 1992, 67-84.

[29] Zbornik srednjovekovnih ćirilskih povelja i pisama Srbije, Bosne i Dubrovnika. I. 1186-1321 (eds. V. Mošin, S. Čirković, D. Sindik), Beograd, Istorijski Institut, 2011, 67-69.

[30] Đ. Tošić, "Dobitak", in: Leksikon srpskog srednjeg veka, Beograd, Knowledge, 1999, 160-161.

[31] Cf. S. Šarkić, "Službenosti u vizantijskom i srpskom pravu", ZRVI. 50.1/2013, 1003-1012 and Id., "Rights over «the property of another» (iura in re aliena) in Byzantine and Mediaeval Serbian Law", Vestnik Volgogradskogo Gosudarstvennogo Universiteta 25/2020, 168-179.

Nomokanon (*Zakonopravilo*)[32], and through the more elaborated translation of Matthew Blasteres' *Syntagma Alphabeticum*[33].

The scenario concerning the property of the land – we must add the role played by the cities conquered by Stefan Dušan (124 together with 176; moreover, 126 and 127)[34], and the by the activity of the mines[35], that was ruled by the code issued by the *despot* Lazar Hrebljanović in 1412[36] – results rather complex, absolutely far away from a structure simply characterized by an univocal structure.

So, apart from an interesting sketch of that agricultural economy and society[37], a fragmented system of the rural property is emerging, where the central power of the king coexists with the ecclesiastic power belonging to the monastic centres and to the local churches and with the aristocratic power, in addition to the depending manpower, represented by the *meropsi,* and the servile work, represented by the *otroci*, who were submitted to a kind of collective liability concerning what they had to pay to the village where they lived (67)[38]; another kind of collective liability, characterized by a nature of reparation, existed, in case of arson, for the inhabitants of the village or of its lands, when the guilty has been not given to the justice (99 and 100 together with 58).

We could add, finally, the use – *travnina*, *herbaticum*, *ἐννόμιον* [39] – of the pastures on the mountains, belonging to the king, to the church or to the aristocracy (81), that were occupied by the *vlahi*, latin-speaking populations devoted to the transhumance and on consequence to a certain nomadism[40]: they were protected in their activity, for example, by punishing the ecclesiastics having bad behaviours against, again, the *meropsi*[41]*,* and, exactly, the *vlahi* (32), but they were also controlled by the authority, in their movements (82) and in their temporary places, the *katuni* (22, 94 e 146); also the ethnic group of the Saxons is considered, who are allowed to continue to work into the woods according with a further common use of an economic resource (123).

And exactly the topic connected with the use in common of the land for the pasture (or of the forest for the wood) gives us the occasion to come back to

[32] 38 (περὶ καινοτομιῶν); 15 (περὶ ἐμφυτεύσεως).
[33] K-3 e N-3 (dove vi è il diritto di pascolo); E-8.
[34] S. Šarkic (2023), 106 ss.
[35] S. Šarkic (2023), 113-114. Moreover, A. Katančević, "Pravo na rudarskom zemljištu u srednjovekovnoj Srbiji", Zbornik radova Pravnog Fakulteta u Novom Sadu 54/2020, 1065-1078.
[36] N. Radojčić, Zakon o rudnicima despota Stefana Lazarevića, Beograd, Naucno Delo, 1962 (original text) and B. Marković, Zakon o rudnicima despota Stefana Lazarevića, Beograd, SANU, 1985 (Serbian translation).
[37] Cf. S. Ćirković, Rabotnici, vojnici, duhovnici. Društva srednjovekovnog Balkana, Beograd, Equilibrium, 1997, passim; moreover, M. Popović, S. Marjanović-Dušanić, D. Popović, Daily Life in Medieval Serbia, Beograd, Clio, 2016, 61 ss.
[38] Cf. S. Šarkić, The Legal Status of the Villagers in Medieval Serbia, in: Ünnepi kötet Dr. Blazovich László egyetemi tanár 70. születésnapjára (eds. E. Balogh, M. Homoki-Nagy), Szeged, Hajdú József, 2013, 579-590.
[39] S. Šarkić (2023), 78 ss.
[40] S. Šarkić (2023), 76-78. Cf. E. Miljković, "Vlahi u domaćoj istoriografiji, 1960-2010", Braničevski Glasnik 7/2010, 5-22 and moreover M. Pijović, "Late Medieval Vlachs in the Western Balkans, 13th to 15th Centuries: Orality, Society and the Limits of Collective Identities", Balcanica Posnaniensia 28/2021, 65-92.
[41] They were also quite protected by the central power: cf. artt. 34, but mainly 139.

the Roman past, until the archaic era, when a hypothetical but probable collective system of the property[42], maybe coming from the habits belonging to the Italic populations, which had been gradually conquered and included, would have became, after the acquisition of the *ager publicus* (and *gentilicius*)[43] and its transformation – once the mythical distribution of the *heredium* was realized by Romulus[44] – in *ager divisus et adsignatus*, from dominant to residual[45].

This is not the place to speak about the *compascuus*, that was characterized by a manifold nature, closed between "compossesso, servitù e comunione" and difficult to be understood if observed just through the famous passage by Scevola in D. 8.5.20.1 (4 *dig.*) concerning the *saltus*[46], but now analysed in light of the literature of the *gromatici* (where Hyg. grom. *Const. limit*. 164.11-165.3)[47]: anyway, the recall to a so old institute, quite primordial, could be useful to identify the most authentic core of the collective property, that is to say the common use of a farmland.

But also the Late Antiquity offers some elements, at any rate, concerning exactly a split between ownership and real use of it.

Apart from the identification between *domini* and *possessores*[48], that we found in the Justinian's compilation, the practice of the *adiectio sterilium*, that in

[42] On the primitive agrarian society, first of all M. Weber, Die römische Agrargeschichte in ihrer Bedeutung für das Staatsund Privatrecht, Stuttgart, F. Enke, 1891, 120 ss. (= Storia agraria romana dal punto di vista del diritto pubblico e privato, Milano, Il Saggiatore, 1967, 85 ss.).

[43] Cf., even, L. Capogrossi Colognesi, "Alcuni problemi di storia romana arcaica: ager publicus, gentes e clienti", BIDR. 83/1980, 29-65 and Id., "Ager publicus e ager gentilicius nella riflessione storiografica moderna", in: Studi in onore di Cesare Sanfilippo III, Milano, A. Giuffrè, 1983, 73-106, then, Id., Padroni e contadini nell'Italia repubblicana, Roma, L'Erma di Bretschneider, 2012, 61 ss.

[44] Cf. A. Corbino, "Schemi giuridici dell'appartenenza nell'esperienza romana arcaica", in: La proprietà e le proprietà. Pontignano, 30 settembre-3 ottobre 1985 (ed. E. Cortese), Milano 1988, A. Giuffrè, 3-38, 19 ss.

[45] Again L.Capogrossi Colognesi: apart from La struttura della proprietà e la formazione dei "iura praediorum" nell'età repubblicana I, Milano, A. Giuffrè, 1969, 1 ss. and 349 ss. (in particular, 370-371) and "Proprietà (diritto romano)", in: ED. XXXVII, Milano, A. Giuffrè, 1988, 160-225, 168-170, Pagus e comunità agrarie in Roma arcaica, in: La terra in Roma antica, 81-98; Spazio privato e spazio pubblico, in: La forma della città e del territorio. Esperienze metodologiche e risultati a confronto. Atti dell'incontro di studio. Santa Maria Capua Vetere 27-28 novembre 1998 (ed. S. Quilici Gigli), Roma, 1999, 17-41; Persistenza e innovazione nelle strutture territoriali dell'Italia romana. L'ambiguità di una interpretazione storiografica e dei suoi modelli, Napoli, Jovene, 2002, 22 ss. and 244 ss.; moreover, "Le comunità rurali di Roma arcaica nella storiografia del tardo '800", in Studi in memoria di Giuliana d'Amelio, Milano 1978, 170-201.

[46] Cf. A. Burdese, Studi sull'ager publicus, Torino, Giappichelli, 1952 (together with Id., "In margine a D. 8.5.20.1", Index 26/1998, 321-331); G. Impallomeni, "Il diritto di compascolo di cui a D. 8,5,20,1 di Scevola", in: Studi in onore di Cesare Sanfilippo V, Milano, A. Giuffrè, 1984, 393-408.

[47] Cf. E. Tassi Scandone, Terre comuni e pubbliche tra diritto romano e regole agrimensorie, Napoli, Jovene, 2017 (on the passage, 156 ss.) together with Ead., "Classificazioni gromatiche del territorio e categorie giuridiche. Un primo bilancio", in: Uomini, istituzioni, mercato. Studi di storia per Elio Lo Cascio (ed. M. Maiuro), Bari, Edipuglia, 2019, 399-410 and Ead., "Il cippo di Perugia e i communalia etruschi. Note sugli statuti legali delle terre comuni nell'Italia antica", MEFRA. 133/2021, 85-95; moreover, U. Laffi, "L'ager compascuus", Revue des études anciennes 100/1998, 533-554; finally, M. F. Merotto, "Ager compascuus: un esempio di vincolo di interesse pubblico: fondi contigui e vincolo di destinazione" and G. Guida, "Il regime dell'ager compascuus tra proprietà collettiva e res communes", both in: I beni di interesse pubblico nell'esperienza giuridica romana I (ed. L. Garofalo), Napoli, Jovene, 2016, 193-223 and 225-248.

[48] Cf. F. Sitzia, "Il diritto di proprietà nelle Novelle giustinianee", in: La proprietà e le proprietà, 121-140 (= Scritti di diritto romano. II. Da Giustiniano al Diritto romano d'Oriente, eds. F. Botta, A. Cherchi, O. Diliberto, M. V. Sanna, Napoli, Edizioni Scientifiche Italiane, 2020, 113-132): 138-139 (130-131).

the Byzantine environment is the *epibolé* (that is to say a sort of common fiscal liability consisting in entrusting the uncultivated lands to those who could cultivate them, as if the property represented something useless or even damaging)[49], suggest us the existence of a new connection between use of the land and economic and social function of the property; concerning this, also the slide of the surface in emphyteusis, that we found always in the Justinian's compilation[50], has a remarkable importance.

5. Conclusions

So, at the and, also the Slavic-Byzantine world must be placed in the trajectory represented by the scientific debate on the alternative forms to the private property, that is not the only one glasses to observe the economic-social and the juridical phenomena that characterized in the history the use, again, of the rural soil[51].

The collective property is one of these forms, and it is a form that would have characterized the use of the soil for long centuries, into an independent way from the ownership of the land, and originating that chaos of rights that was the evil soul of the *Ancient Régime*.

But this is, of course, another story.

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[49] Cf. M. de Dominicis, "Aspetti della legislazione romana del basso impero sugli agri deserti", BIDR. 67/1964, 71-85 (= Scritti romanistici, Padova, CEDAM, 1970, 165-179) (together with Id., "I coloni adscripticii nella legislazione di Giustiniano", in: Studi in onore di Emilio Betti III, Milano, A. Giuffrè, 1962, 85-99 = ibidem, 11-24 and "Innovations byzantines au régime des agri deserti", in: Études offertes à Jean Macqueron, Paris, Faculté de droit des sciences, 1969, 245-249 = ibidem, 305-313).

[50] Cf. F. Sitzia, Studi sulla superficie in epoca giustinianea, Milano, A. Giuffrè, 1979.

[51] P. Grossi, "Un altro modo di possedere". L'emersione di forme alternative di proprietà alla coscienza giuridica postunitaria, Milano, A. Giuffrè, 1977 and repr. Milano, A. Giuffrè, 2017), that recalls a famous formula by Carlo Cattaneo (Scritti economici III, ed. A. Bertolino, Firenze, Le Monnier, 1956, 187) (cf. L. Capogrossi Colognesi, "Le forme di proprietà della terra", Studi Storici 20/1979, 431-437) together with Id., "Proprietà (diritto intermedio)", in: Enciclopedia del Diritto XXXVII, Milano, A. Giuffrè, 1988, 226-254 and Id., "La proprietà e le proprietà nell'officina del giurista", Quaderni fiorentini 17/1988, 359-422; moreover, Id., "Domina e servitutes (Invenzioni sistematiche del diritto comune in tema di servitù)", Quaderni fiorentini 18/1989, 331-394.

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MENTIONS AND PERCEPTION OF ZADRUGA – PROPERTY IN AUSTRIAN LITERATURE OF THE 20TH CENTURY

Abstract: *Although never the most relevant form of property in Austrian legal and historic literature, the zadruga was present in many works of the 19th century, due to the existence of the property form in the Austrian Military Frontier and the provinces inhabited by the South Slavs. With the dissolution of the Empire in 1918 the topic became less interesting to authors, due to its now foreign nature. Nevertheless, mentions and even dedicated chapters on zadruga – property can be found throughout the 20th century, and the literature holds some value for contemporary research on the topic. This paper will focus on creating a list of relevant Austrian literature mentioning or focusing on the zadruga property form, especially in the Austrian Military Frontier. It will contain works mentioning or focusing on zadruga – property and analyse the context and scope of these mentions.*

Keywords: *Zadruga, Austria, Military Frontier, Literature.*

1. Introduction

The Zadruga, both as a form of the south Slavic large family and as a form of property has been present wherever there was a significant population of south Slavs. Nowhere was this part of customary law so relevant as in the Austrian Military Frontier, a region of the Austrian, and later, Austro-Hungarian Empire, on the border with Ottoman Turkey. This is owed not only to the Frontiers overwhelmingly Slavic population, but also to the clever way in which the authorities in Vienna used the Zadruga to further their own practical military goals. They moulded the institute in such a way to provide the army whit a large quantity of cheap, high-quality troops, while incurring minimal social backlash since the regulation was in accordance with the local customs. It is therefore no surprise that the literature concerning the Zadruga and Zadruga property is not a rarity in sources written during its existence. Especially during the 19th century, the literature is abundant, culminating in the capital work of František Vaníček from 1875 titled "Specialgeschichte der Militärgrenze: aus Originalquellen und Quellenwerken

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geschöpft" ("Special history of the Military Border sourced from original sources and source compilations") that encompasses the entire history of the Border, the Zadruga included.

The 20th century sees the Border and its Zadruga in a different light. Having been disbanded more than a decade before the beginning of the century it is no longer the topic of research for purposes of legislature and administration nor is it a valid historical topic for the state's narrative. It has become a purely historical subject to the empire, having some relevance but no practical use. After the dissolution of Austria-Hungary in 1918 the practical irrelevance is joined by a territorial one. Since none of the territories where the Zadruga existed in a significant capacity had found themselves in the new Austrian state, the topic was seen a marginal and exotic at best. Nevertheless, the subject of the Zadruga and Zadruga property can still be found in Austrian works of this period, be it ones written and published in Austria or those written by writers of Austrian origin. This literature, though not as detailed and important as the great works of the previous centuries, give a more contemporary view on the Zadruga. They are therefore relevant for anyone researching the topic today and provide some valuable insights into the source material and the institute itself.

The article will present twelve works of literature from the time period, ranging from sparse mentions to books where the Zadruga plays a crucial role in the works focus. With the first piece being from 1915 and the last from 1997 it covers the period evenly, aiming to show the opinions and relevance of the topic at every point.

2. Mentions

In 1915 Otto von Zwiedineck wrote a work titled: "Die handelspolitischen Beziehungen Serbiens zu Österreich-Ungarn "(„The trade policy relations between Serbia and Austria-Hungary "). The focus of the piece was on the analysis of the prewar trade relations between these countries and the political and ideological background of the decisions made in this timeframe. The Zadruga is not the focus of the work and holds little importance to the author, serving only to describe the dwindling agricultural production due to the growing number of dissolutions of the family and property form. This remark is to be found on page 401 describing the reduction of the number of livestock due to the lack of grazing land and manpower to sustain the level of operation of larger communities[1].

The lack of works handling the Zadruga in any form before the second world war shows a lacking relevance of the subject in the science, and even propaganda community of the time. Even when a mention is found, such as in the

[1] O. von Zwiedineck, „Die handelspolitischen Beziehungen Serbiens zu Österreich-Ungarn", *Weltwirtschaftliches Archiv*, 6/1915., 401.

case of Zwiedineck, they are short and used to illustrate or explain a point rather than being the focus of the work. The term is not even explained before being introduced, a practice uncommon for the German speaking world, illustrating the passing nature of the mention.

During the Second World War, with the Germans ones again occupying or puppetting the entirety of the territory populated by the South Slavs, the Zadruga returns into literature. It is present in a book focusing closely on the subject and interestingly in a doctoral thesis on the University of Vienna. Its importance is based on the ideal of a functioning territory with a Slavic population managed by a German ruling class, a concept appealing to the ideology of the time.

The most important author of the period is Rupert von Schumacher. The culmination of his work regarding the Military Frontier is the book "Des Reiches Hofzaun: Geschichte der deutschen Militärgrenze im Südosten" (The Empires Garden Fence: history of the German Military Frontier in the southeast") published in 1942. Since he dedicated the book to his mother and "her border-German homeland" it is safe to assume that his interest on the topic was not purely scientific and the book is written in a strongly romanticised style full of praise and value judgements. It is a general history of the Military Frontier, containing the description of the frontiers founding, existence, legislature, demographics and abolition, among other things.

The Zadruga and the Zadruga property are present throughout the book, the term used often being the German version – "Hauskommunion". The mention can be found twenty-four times (two times as Zadruga and twenty-two as Hauskommunion) and the book contains two chapters dedicated to it titled "Die Hauskommunion: das biologische Fundament" ("The Zadruga: the biological foundation") and "The rechtliche Regelung der Hauskommunion" ("The legal regulation of the Zadruga"). The Zadruga is mentioned on pages 160, 172, 174, 188-193, 246, 248 and 254.

In the chapters dedicated to the Zadruga we find a description and definition, both of the family structure and the property form of the institute[2]. The author gives special consideration to the regulations regarding the Zadruga in the basic law for the frontier from 1807[3]. He lists and comments on paragraphs 55-63 regarding the family structure and 64-72 regarding the nature of property within the Zadruga. The topic of the division of the community, mentioned in most of the contemporary literature on the subject, is also present in the work.

In this period the Zadruga can also be found in a doctoral thesis of Margarete Maschauer titled "Die Auflösung der k.k. Militärgrenze – Unter besonderer Berücksichtigung der Stellungnahme Cisleithainiens und des Reichskriegsministeriums "(„The abolition of the i.r. Military Frontier – Under special consideration of the position of Cisleithania and the Imperial Ministry of War"). The topic is the

[2] R. von Schumacher, *Des Reiches Hofzaun: Geschichte der deutschen Militärgrenze im Südosten*, Kichler, Darmstadt 1942., 188.

[3] R. von Schumacher, 189-193.

abolition of the Military Frontier in the late 19th century, including the legal steps taken to achieve that goal.

The Zadruga and Zadruga property are mostly found in the introductory chapters describing the organisation and the development timeline of the Frontier. There are several later mentions in the chapter regarding the provisory regulation in the Warazdin Frontier during the abolition. Mentions can be found on pages 3-9 and 95.

The definition of the Zadruga is not present in the text nor is a legal definition of the property type. The author uses the term when explaining the contents of privileges[4], or of laws[5] in a manner which predisposes the readers knowledge of its meaning and nature. Given the scarcity of literature about the subject at the time, this may indicate a knowledge of the institute at least among the scholars in the mentoring and grading process within the university.

In 1954 Kurt Wessely published an article titled "Die österreichische Militärgrenze: der deutsche Beitrag zur Verteidigung des Abendlandes gegen die Türken („The Austrian Military Frontier: The German contribution to the defence of the west against the Turks"). The article gives a short overview of the Frontiers history and its cultural significance for the German nation as a whole. As the introduction before the table of contents states, it is meant to help the younger generation of western Germans to get the full picture of the "whole country and nation[6]" alluding to the eastern territories lost after the second world war.

The Zadruga is mentioned in a short paragraph found within the chapter describing the abolition of the Frontier. Wessely notes that the abolition brought an end to the Zadruga as an anachronous institute indivisible from the border itself[7]. The author lists some of the traits of the Zadruga and its property form but doesn't go into detail in accordance with the nature of the article as an overview.

It is important to note that the views Wessely expresses, especially his definition of the German nation and the positive tone in which it is described, were not popular at the moment of publication. Therefore, it is no surprise that the article forgoes details and strong messages in favour of a more descriptive and narrative approach.

A mention of the Zadruga as an institute, but not a detailed description of the property form can be found in the work of Egon Lendl from 1963 titled "Zur politischen Geographie der österreichischen Militärgrenze" ("About the political geography of the Austrian Military Frontier"), a short overview of the border from a geopolitical perspective. It can be found on pages 207, 209-210 and 213.

[4] M. Maschauer, *Die Auflösung der k.k. Militärgrenze: unter besonderer Berücksichtigung der Stellungnahme Cisleithaniens und des Reichskriegsministeriums,* Universität Wien 1944., 3.
[5] M. Maschauer, 5,7.
[6] K. Wessely, *Die österreichische Militärgrenze: der deutsche Beitrag zur Verteidigung des Abendlandes gegen die Türken,* Holzner, Kitzingen/Main 1954., Table of contents.
[7] K. Wessely (1954), 18.

The Zadruga is mentioned as a part of a specific cultural identity[8] of the border's population. It is the holder of rights and obligations rather than the individual or the core family[9]. The article is an overview and does not delve deeper into any of the subjects it touches on, with the Zadruga being no exception.

In 1973 the Austrian museum of military history published a collection of papers on the topic of the history of the Military Frontier. This collection of works contains three articles that mention the Zadruga and the corelating property form.

The first of these articles is the introductory piece by Franz Keindl titled "Die k.k. Militärgrenze — zur Einführung in ihre Geschichte" (The i.r. Military Frontier – Introduction to its history"). The mentions of the Zadruga can be found on pages 22-23 and 26.

Considering that the article is seventeen pages long, the full page of text dedicated to the Zadruga, and its attributes is not negligible. There is a short definition of the Zadruga as an institute and of its leadership and property structure[10]. Though not detailed it shows an interest not only to use the term as a tool to further the narrative focusing on the general history of the border but to define the institute itself in a scientific manner.

The second article by Kurt Wessely, who was considered one of the experts on the subject and was therefore to be expected in this collection of papers, carries the name "Neuordnung der ungarischen Grenzen nach dem großen Türkenkrieg" ("The reorganisation of the Hungarian borders after the great Turkish war"). This article, focusing on the economic, administrative and political organisation of the borders has only two mentions of the Zadruga, namely on pages 64 and 67. In both cases these are used to illustrate a point whose focus is not on the Zadruga itself[11].

The third paper was written by Peter Krajaschich and is titled "Die Militärgrenze in Kroatien mit besonderer Berücksichtigung der sozialen und wirtschaftlichen Verhältnisse in den Jahren 1754 bis 1807"(„The Military Frontier in Croatia with special consideration given to the social and economic relations in the period 1754-1807"). The Zadruga is mentioned on pages 110-112 and 122 but relevant information about the Zadruga property can be found throughout the text in descriptions of the economic and social position of the population. This is especially true of the chapter "Die freibäuerliche Stellung der Grenzer" ("The free peasant status of the frontiersmen") encompassing pages 102-110.

The mentions on pages 110-112 are mainly focused on the Zadruga as a family form and the leadership within it, with sparse mentions of the property

[8] E. Lendl, „Zur politischen Geographie der österreichischen Militärgrenze", *Der Donauraum*, 8(JG) 1963, 210.
[9] E. Lendl, 207.
[10] F. Keindl," Die k.k. Militärgrenze — zur Einführung in ihre Geschichte" in Heeresgeschichtliches Museum, *Die k. k. Militärgrenze: Beiträge zu ihrer Geschichte,* Österr. Bundesverl. für Unterricht, Wissenschaft u. Kunst, Wien 1973., 22-23, 26.
[11] K.Wessely,"Neuordnung der ungarischen Grenzen nach dem grossen Türkenkrieg" in Heeresgeschichtliches Museum, *Die k. k. Militärgrenze: Beiträge zu ihrer Geschichte,* Österr. Bundesverl. für Unterricht, Wissenschaft u. Kunst, Wien 1973., 64, 67.

form[12]. The chapter is focused on the ability of the Zadruga to sustain a family large enough to supply soldiers to the military. The mention on page 122 handles the ability of frontiersmen to leave the Zadruga in order to pursue tradesmen positions[13].

Another doctoral thesis which touches upon the topic of the Zadruga was written in 1974 by Anton Massak. It is titled "Die k.k. Militärgrenze und das Vermessungswesen" („The i.r. Military Frontier and measurements "). Although the work focuses mainly on the measurements used in the frontier there are numerous mentions of the Zadruga. These can be found on pages 9,32,49-50,109,118-119,173 and 189.

On pages 49-50 the author gives a reading of the Statuta Valachorum that regulated, among other things, the property rights of the frontiersmen. He focuses on the rights of the Zadruga and its leader in this regard[14]. The mention on pages 118-119 focuses more on the Zadruga as a family structure[15]. Both accounts are more detailed than the ones in previous works.

Maybe the most important author of the period regarding the Zadruga is Karl Kaser. Two of Kasers works are relevant to this topic: „The Balkan Joint Family: Redefining a Problem[16]" an article handling mostly the sociological side of the Zadruga with focus on its family form and" Freier Bauer und Soldat: die Militarisierung der agrarischen Gesellschaft an der kroatisch-slawonischen Militärgrenze (1535 - 1881)" („Free peasant and soldier: The militarisation of the agrarian society in the Croatian-Slavonian Military Frontier (1535-1881)") which is a capital work analysing all aspects of the Military Frontier including the Zadruga, which plays a large role in the book.

The article has sparse mention of the property aspect of the Zadruga, and it mostly focuses on the complex family form and its prevalence in the south Slavic regions with an emphasis on Lika. Kaser uses the statistical method, mostly based on available archival data, which separates him from the other authors. This is a symptom of his more American oriented style of research, based on a scientific method more usual in the natural sciences.

The book has various references to the Zadruga throughout the text but also encompasses an entire chapter focused on the Zadruga – part two, chapter five (pages 525-598). It is therefore the most extensive work in the Austrian literature on the institute in the 20th century. It begins with a complex definition and explanation of the context within which the Zadruga existed and the traits of the institute. It focuses on all aspects of the Zadruga, from the family structure and

[12] P. Krajaschich,"Die Militärgrenze in Kroatien mit besonderer Berücksichtigung der sozialen und wirtschaftlichen Verhältnisse in den Jahren 1754 bis 1807" in Heeresgeschichtliches Museum, *Die k. k. Militärgrenze: Beiträge zu ihrer Geschichte,* Österr. Bundesverl. für Unterricht, Wissenschaft u. Kunst, Wien 1973., 110-112.
[13] P. Krajaschich, 122.
[14] A. Massak, *Die k. k. Militärgrenze und das Vermessungswesen,* Universität Wien 1974., 49-50.
[15] A. Massak, 118-119.
[16] K. Kaser, „The Balkan Joint Family: Redefining a Problem", *Social Science History,* 18/2 1994, 243-269.

comparison to the other east European complex family forms, to the property type and variations regarding this complex issue[17]. The chapter also contains a detailed overview of statistical data regarding the Zadruga in the various parts and periods of the frontier including charts detailing the number of families living in the complex family structure and their property where it is available. Throughout the text Kaser introduces the legal background that influenced the Zadruga and comments, in a fashion similar to an ex-post analysis on this influence and the changes on the ground as traceable trough the data. This method is also used to tackle the topic of Zadruga divisions, a subject that is unavoidable in all literature concerning the institute. The use of such methods brings a new perspective to the field and enriches the scientific discussion, regardless of the readers agreement with some of the authors conclusions.

3. Conclusion

Although the relevance of the Zadruga and Zadruga property was not high in the Austrian literature of the 20th century certain works mentioning or focusing on the institute can still be found. The mentions are usually found in larger works pertaining to the Military Frontier or relations between Austria and the southern Slavs. These dominantly give short explanations of the institute or use it as a tool to illustrate different points and explore other topics. An exception to this rule is the work of Karl Kaser, whose works have a limited focus on the Zadruga, researching it mostly from a sociological perspective. Kasers work is especially valuable because of the systematisation of statistical data pertaining to the composition of the complex families, a data set useful for a variety of potential scientific endeavours.

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[17] K. Kaser, *Freier Bauer und Soldat: die Militarisierung der agrarischen Gesellschaft an der kroatisch-slawonischen Militärgrenze (1535 - 1881),* Böhlau 1997., 525-531.

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COLLECTIVE FARMING COMMUNITY (*ZADRUGA*) IN SERBIAN CIVIL CODE OF 1844 AND THE ROMAN LAW

Abstract: *The subject of this paper are the norms regarding zadruga, the traditional rural cooperative-farming family-based community, in the Serbian Civil Code of 1844, in the light of the roman law. The authors are making an analysis of the rules of the Serbian Civil Code regarding zadruga with intention of showing possible influence of the roman law on the way in which the traditional serbian institution has been regulated in the Civil Code. The authors also payd special attention to the the influence that the institute of zadruga had in the later serbian legal theory and praxis.*

Keywords: *Collective property; Zadruga; Serbia; Roman Law; Rural Cooperative.*

1. Introduction. Zadruga as a family-based farming community and the rules of the Serbian Civil Code of 1844

The term *zadruga* has been historically used to indicate different types of economic communities existing among southern Slavs in the Balcan peninsula. The exact form and the legal regime of the *zadruga* varied significantly since the high middle ages, when we encounter such communities in the sources for the first time. There were significant differences in regard of what *zadruga* actually means in times, and in different regions of the Balkans. In spite of variations, some traits are common for all *zadruga*-type communities. Traditional *zadruga* is a type of rural extended family, which functions as a cooperative-farming community with collective property of the members on land and other means of production. Although a comparatist research would undoubtfully lead us to find similar communities in othe parts od the world, *zadruga*, in it's purest form, remains an institution typical for the Balcans with particular caracteristics, as we shall see.[1]

Although the term *zadruga* derives from the beginning of XIX century, demographic data indicate that such a type of family, allthough under different

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[1] About history of *zadruga* see for example Н. Илијић, *Исūорија задруīе код Срба*, Службени лист, Београд 1999.

name, might have been dominant form of family in the medieval Serbian villages, althought even at that time has been often divided into smaller, nuclear families. Still, it was regulated only by consuetudinary law, both in medieval Serbia and during the ottoman rule.[2]

The first modern legal act in which the institution of zadruga has been regulated in a systematic way is the serbian Civil Code of 1844 (SCC). Officially Civil Code for Serbian Principality (*Грађански законик за Књажевство српско*,[3] it was one of the first civil codes in Europe (preceded only by the French, Austrian and Dutch). Although abolished in the 1946, SCC influenced heavily later Serbian legislation, and some of it's norms are still in use.

The author of the draft of the Serbian Civil Code, serbo-austrian lawyer Jovan Hadžić, has been criticized by contemporaries as being noting but a copyist of the Austrian Civil Code of 1811. This libel has only recently proved to be false. Hadžić moved away from the Austrian model in several aspects, mostly under the influence of the original roman law and the Serbian customary law, especially in the family and inheritance law.[4]

However, even these "original" parts of the Code have been subject to critique, especially in regard of unequal position of male and female children in inheritance. The second major objection addressed to Hadžić is related to the way of regulating the institution of *zadruga*.[5]

Serbian Civil Code dedicates an entire chapter to this institute and defines a family cooperative as follows:

Article 57: "*A cooperative (*zadruga*) or a cooperative house (*zadružna kuća*) is understood to mean several persons of full age, living alone or with their offspring*

[2] About zadruga in the middle ages see: С. Мишић, *Српско село у средњем веку*, Еволута, Београд 2019, 171-182.

[3] Civil Code for Serbian Principality, proclaimed on Feast of Annunciation 25 March of 1844, Belgrade, Editorial of Serbian Principality.

[4] M. Kulauzov, "Direct Reception of Roman Law in Serbian Civil Code – *consortium ercto non cito* and Serbian Zadruga", *Ius romanum* 2/2017, electronic edition, http://iusromanum.eu, 1/12; S. Aličić, „Sistematika odredbi o obligacionim odnosima u Srpskom građanskom zakoniku u svetlu sistematike Justinijanovih Institucija", *Zbornik radova Pravnog fakulteta u Novom Sadu* 2/2004, 117/134; А. Маленица, „Римска правна традиција у српском праву", *Зборник радова Правног факултета у Новом Саду* 2-2004; С. Аврамовић, „Српски грађански законик (1844) и правни трансплланти – копија аустријског узора или више од тога?", Српски *грађански законик – 170 година*, Правни факултет Универзитета у Београду, Београд 2014, 13-46; М. Ђорђевић, „Pravni transplanti i Srbijanski građanski zakonik iz 1844", *Strani pravni život* 1/2008, 62-84; Ј. Даниловић, „Српски грађански законик и римско право", *150 година од доношења Српског грађанског законика*, САНУ, Београд 1966, 49-66; Д. Кнежевић-Поповић, „Удео изворног римског права у српско грађанском законику", 150 година *150 година од доношења Српског грађанског законика*, САНУ, Београд 1996, 67-78; М. Полојац, „Српски грађански законик и одредбе о присвајању дивљих животиња – рецепција изворног римског права", *Анали Правног факултета Универзитета у Београду* 2/2012, 117-134; С. Аличић, „Уговор о послузи у српском грађанском законику у светлу римског права", *Српски грађански законик – 170 година*, Правни факултет Универзитета у Београду, Београд 2014, 219-230, Valentina Cvetković-Đorđević, „Le basi romanistiche del codice civile serbo fra tradizione e modernità", *Roma e America. Diritto romano comune* 43/2022, 233-294.

[5] For example, С. Јовановић, „Јован Хаџић", *Из наше историје и књижевности*, Београд 1931, 45; see also С. Аврамовић, 19.

in a community. They are mutually cooperative. Where there is no such communal life, they are called inokosni (*single*)."[6]

Another definition of *zadruga* is given in Article 507:

"*A cooperative (*zadruga*) exists, when both the common living and the (common) property are established by the virtue of kinship or adoption. A cooperative is also called a house or a cooperative house (*kuća zadružna*), as opposed to a private (*inokosna*) house.*"[7]

The three elements of the legal notion of cooperative which can be extracted from these definitions are, that *zadruga* is: 1. family-based community; 2. working and living community; 3. community of property.

1. A cooperative assumes at least two persons who are called cooperative members (*zadrugari*). In practice, the cooperative counted a large number of people, sometimes 100 members. A cooperative can only exist between persons who are related to each other. Primarily, it is a community of blood relatives. Although SCC does not specify that cooperative members can only be blood relatives through the male line, as a rule this is the case.[8] *Zadrugari* can be blood relatives both in the direct and collateral lines. They can also be half-brothers on the father's side and on the mother's side, while stepchildren cannot be.[9] Apart from blood kinship, the cooperative can also be based on kinship by adoption.[10] The cooperative consists only of men. Women could not be cooperative members.[11]

2. For the existence of the cooperative it is necessary that its members live and work together. However, this condition could be waived. An individual cooperative member could stay outside the cooperative for a certain period of time, for example while serving in the army or studying. It does not affect his membership of the cooperataive. Moreover, even if a person permanently leaves the common life and work in the cooperative (for example, one son started trading in the city or started working in the civil service), he will be considered a cooperative member until he asked for his share to be separated from the cooperative property. In other words, for membership in a cooperative, it is sufficient that there is a latent

[6] 57 *Под задругом или задружном кућом разумева се више лица пунолетних, самих или са својим потомством у заједнини живећих. Они су у одношају међусобном задружни. Где таква заједнинскога живота нема, зову се инокосни.* The term *inokosni* (*инокосни*) means literally, belonging to a single persone.

[7] 507 *Задруга је онде, где је смеса заједничкога живота и имања свезом сродства или усвојењем по природи основана и утврђена. Задруга зове се и кућа или кућа задружна за разлику од инокосне.*

[8] A cooperative can be formed by both blood relatives on the male and female lines. Children that a woman gives birth to in a cooperative are related by the male line to the members of the cooperative among whom they were born, and related by the mother's line to persons from the family from which their mother came. If, after the death of her husband, the mother returned to her former family with her children, they would, under certain conditions, become cooperative members of that family. Ж. Перић, *Задружно право по Грађанском законику Краљевине Србије* (I vol.), Издавачка књижарница Геце Кона, Београд 1924, 48.

[9] Stepchildren are the children the woman had from her previous marriage, so she brought them to the house of her new husband. They cannot be cooperatives in their stepfather's family. Ж. Перић, (1924), 35.

[10] In order for a person to be adopted, the consent of all cooperative members is required. Ж. Перић, (1924), 36.

[11] Explaining why women cannot be cooperative members, Perić says that the work of men and women in a cooperative is not the same - women's work is smaller and less useful than men's work, therefore it would not be fair to equate them. Ж. Перић, (1924), 29.

common life, which is reflected in the fact that the absent person can always return to the cooperative and live and work together again with the other members.[12]

3. The interpretation of the third element - community of property caused difficulties. On the basis of the art. 507, however, it is not clear, what is the exact nature of the property of a family cooperative? Is it common property that each member can use and dispose of, collective property owned and administrated by all the members of the community, or co-ownership where the ideal parts belonging to each of cooperative member are known and determined?

From other articles of the Code, most of the Serbian doctrine concluded that Hadžić had in mind the co-ownership of cooperative members. This interpretation, which exists since XIX century, seems to be still dominant in the serbian legal thought. It can be summarized in following way. Before SCC, in the consuetudinary law, *zadruga* was a indivisible community, with collective property without defined shares. Hadžić re-defined the property of *zadruga* as co-property of cooperative members, with defined shares of individual co-owners, and *zadruga* became divisible.[13]

The main arguments in favor of this interpretation are, that in the SCC there is a possibility of partition of property on request of individual members of *zadruga* (Art. 492), members have the right to testamentary disposal of their ideal share (Art. 521), and cooperative member is responsible for his personal debts with his ideal share (Art. 515). Taking this conclusion for granted, opponents proceeded to accuse Jovan Hadžić, that by qualifying the cooperative property in this way, he contributed to it's demise. The critique went to the point of accusing Hadžić for the spread of poverty in the Serbian countryside in the XIX century, which poverty was at least in a part consequence of division of cooperatives into less productive small households.

While to this point almost unanimous, the critique was divided on the question, which were Hadžić's motives for this legal solution? Some went so far, to suggest that it was made with the specific aim of destroying the traditional rural cooperative. More moderate theory, which later came to be dominant, is that this solution has been made unconsciously, under the influence of roman law. Namely, taken in consideration that Jovan Hadžić has been educated on the principles of the roman law (which was believed to be generally in favor of the individual private ownership), it seemed plausible that he did not really understand the very essence of the traditional cooperative property. Due to a fundamental misunderstanding of the collectivistic spirit of the traditional cooperative and introducing an individualistic principle, Hadžić changed the nature of the legal institution of traditional collective ownership, and transformed it into a co-ownership. Thus, he practically abrogated the traditional collective cooperative property. In other words, the traditional Serbian rural family cooperative, based on the collec-

[12] Ж. Перић, (1924), 101-103.

[13] Г. Никетић, *Грађански законик Краљевине Србије протумачен одлукама одељења и опште седнице Касационог суда*, Геца Кон, Београд 1922, 317-319; M. Kulauzov, 10.

tive ownership, was reformed using roman contract of partnership (*societas*) as a model, which contract was based on co-ownership. It was in those provisions that Hadžić's critics saw new, externally inserted elements, which abolished the original nature of the cooperative and had a devastating effect on its further survival.

In recent times, the generally unfavorable judgment of contemporaries on Hadžić's legislative work seems to be out of fashion. Nowadays, it is more popular to write apologies than critiques of SCC. In the manner of époque, even the criticisms of norms on *zadruga* became judged to be unfounded. Namely, it has been found that traditional (pre-SCC) *zadruga* was something different than what the critiques of the SCC imagined, and that the rules of consuetudinary law didn't differ that much of Hadžić's legislation. The critique was based on an idealized and inaccurate picture of traditional cooperative family, mostly based on some sketchy ethnographic descriptions, and sentimental stories about patriarchal life in the countryside.[14] The reality, as depicted by authentic legal sources, was different. The property rights of individual cooperative members on the shares in the cooperative property mentioned in the SCC - the right to partition, the right to testamentary disposition of the share, the possibility of guarantee for a personal debt by the share - were by no means unknown in the Serbian legal tradition before the adoption of the SCC. Court rulings from the time before the adoption of the clearly testify that Hadžić's legislation on *zadruga* did not differ from the norms of consuetudinary law and legal practice already in existence.[15]

So, Hadžić can be found "not guilty" for decline in numbers of the family cooperatives in the XIX century. He didn't enable the cooperative members to exercise the right to share it, but rather legalized a trend that existed before. It should be however noticed that some legislations explicitly prohibited division of *zadruga*, while Hadžić didn't even try to do it. Most notably, Austrian legislation prohibited explicitly division of family cooperatives in the Military Frontier (ger. *Militärgrenze*; ser. *Војна Крајина*), a predominantly Serb-inhabited borderland along the border with the Ottoman Empire, whose inhabitants (*Grenzer*) the House of Habsburg granted various privileges as a compensation for their military service. The reason for favoring the collective farming was the fact that it facilitated the continuity of agricultural production in the case of drafting the peasant-soldiers (*Wehrbauer*) into the military. In a larger farming community, missing a workforce of a single person was not that much of a problem like in a small household. However, should be noted that in practice the prohibition on dividing the cooperatives into single family households has often been circumvented. Several elementary families would *de facto* divide the property among them, although they would be formally still united in a *zadruga*.[16]

[14] М. Стефановски, „Кодификаторски рад Валтазара Богишића и Јована Хаџића", in: *Сто педесет година од доношења Српског грађанског законика (1844-1994)* (ed. Миодраг Јовичић), Београд 1996, 133.

[15] M. Kulauzov, „Pravila običajnog prava o deobama porodičnih zadruga južnih Slovena", *Zbornik radova Pravnog fakulteta u Novom Sadu* 2/2010, 281-289; M. Kulauzov, „Pravila običajnog prava o imovini u porodičnoj zadruzi južnih Slovena", *Zbornik radova Pravnog fakulteta u Novom Sadu* 1/2009, 305-315.

[16] M. Kulauzov, (2010), 283-284.

2. Later developments. Zadruga as a modern farmer's cooperative

Serbian Civil Code was *de facto* abolished after the liberation of Serbia in WWII in the 1944 after hundred years of application, and formally abrogated in 1946, although some of it's norms continued to be in use in the case of existence of lacunas in the currently applicable law – a praxis that continues even nowadays in some specific areas of law.

Well before the abrogation of SCC, in spite of both the legal measures and nostalgia for good, old days of idyllic pastoral life in extended family, *zadruga* became rare as a type of family life. However, extended family with common property didn't completely disappear even to this day, especially in the countryside, and it is far from being a defunct legal institute. But the regulation of property relations in extended family after WWII became quiet different from the traditional *zadruga*. It is regulated in the currently valid Serbian Family Law of 2005[17] under the name of family community (*porodična zajednica*; *породична заједница*) in the art. 195. There are many, including very recent, examples in the praxis of serbian tribunals of applications of this rules. But, not only the name, but also the norms for such a community are different than traditional *zadruga*. *Porodična zajednica* is not a legal entity but a group of persons, it is egalitarian and without elected chief, and it is defined as common property of all the owners with undefined shares, so that all the owners can use it directly and make decisions regarding administration of the property.

So, original *zadruga* does not exist anymore in the family law. But it doesn't mean that it is without importance nowadays. Let us remind that a number of historical institutes of private law found application in the public law. The norms of roman law on avulsion in a riverbed are today used for demarcation of not only private properties, but the State borders also. The political representation in modern democracies is also partially based on concept of representation from private law. Something similar happened with *zadruga.* It disappeared from the family law, but it became a basis for a development of a specific type of commercial enterprise.

The idea of *zadruga* had a huge impact on leftist economic and political thought in Serbia in the XIX century. Especially important in that regard is the thought of Svetozar Marković, a very influential Serbian political writer and founder of the Radical party, the leading serbian political party at the end of XIX and the beginning of the XX century. Marković held *zadruga* in high regard, as well as other elements of communitarianism in Serbian tradition: associations who possessed common property like the village commune (*opština*; *општина*); mutual help of the members of a village (not necessarily relatives) in occasion of big works like, harvest or building a house (*moba* and *zamanica*); and material help from common founds in the case of trouble (*pozajmica*). He has seen in

[17] Porodični zakon, *Službeni glasnik RS*, br. 18/2005, 72/2011, 6/2015

them the seed of possible future socialist society, although he considered the patriarchal elements necessary to be eliminated. Svetozar Marković didn't only see *zadruga* as a model for modernization of the agricultural production based on socialist principle. He considered also creation of manufacturing, credit and even consumer co-operatives. A variety of societies and enterprises named *zadruga* were founded in the second half of the XIX century.[18]

Some of them were not even founded with intention of making profit, but with cultural, educational or philanthropic goals, like *Serbian editorial zadruga* (*Srpska književna zadruga*). It was a society founded in 1892 in Belgrade by a group of scientist and writers. It's members had an obligation to pay an annual subsidy, and had a right to get a copy of all the editions published in that year, and to participate in the assembly of *zadruga*. This society exists still as an important learned society.[19]

While the family cooperatives were rapidly disappearing at the end of XIX century, the idea of *zadruga* did not; it continued to exist in a different form, liberated from it's patriarchal elements. First modern village cooperatives, also called *zadruga*, were established at the end of XIX century by the followers of Svetozar Marković, most notably by Mihalo Avramović, which is sometimes called a father of *zadruga movement* (*zadružni pokret*). Rural cooperatives inspired by traditional *zadruga* continued to exist in the Kingdom of Jugoslavia. In the 1937 first law on *zadrugas,* valid for all the territory of Jugoslavia, was enacted. By then, this term indicated modern farmer's cooperatives, inspired by traditional *zadruga* family.[20]

The specific socialist system that has been introduced in Jugoslavia after WWII, so called self-management socialism, was greatly influenced by the ideas of Svetozar Marković. It was based on the ideas of collective property of workers on the means of production, and on the self-management system in which the most important decisions were brought by assembles of workers, and those of minor importance by the organs elected by them. There were experiments of collectivization of land too in the form of *zadruga*, which were, however, considered a failure, and the collectivization was since the 70's generally limited to industrial enterprises. Well before the end of the communist regime, the number *zadrugas* begun to diminish, and this process accelerated after the dissolution of communist system after 1990.

It is interesting to note, that while the industrial social enterprises completely disappeared after the fall of communism, farming cooperatives, which were considered less successful, survived, although in smaller number. Moreover, recently the interest in this type of enterprises rose, and Serbian government

[18] В. Милић, Схватања Светозара Марковића о задругама и њиховој улози у друштвеном преображају, *Анали Правног факултета Универзитета у Београду* 3/1975, 259-272.

[19] Љ. Трговчевић, *Историја Српске књижевне задруге*, Српска књижевна задруга, Београд 1992; D. Stojanović, „Imagining the *zadruga*. *Zadruga* as a Political Inspiration to the Left and to the Right in Serbia", 1870-1945", *Revue des Études Slaves* 3/2020, 333-353.

[20] М. Аврамовић, *Тридесет година задружног рада*, 1894-1924, Земунска штампарија Главног савеза српских земљорадничких задруга, Земун 1924.

even launched recently project of reviving *zadruga*, especially in underdeveloped regions.

The institute of *zadruga* is regulated predominantly with the recent *Zakon o zadrugama* (Law on cooperatives) from 2015.[21] As a curiosity, it is worth mentioning that the current Constitution of Serbia promulgated in 2006[22] protects explicitly the cooperative (*zadruga*) property as one of the forms of the property:

Equality of all types of property

Article 86

Private, cooperative and public property shall be guaranteed. As public property shall be considered State property, property of autonomous province and property of local self-governing units. All types of property shall have equal legal protection.

The existing social property shall become private property under the terms, in a manner and within the deadlines stipulated by the law.

Resources from the public property can be alienated in a manner and under the terms stipulated by the law.[23]

So, property of a *zadruga* is guaranteed as a specific type of property. Obviously, cooperative property is neither public nor private, but *sui generis*. But it is distinguished from social property, a form of collective property inherited from communist period, which, is according to constitution, to be abolished and become private property in the near future. The Law of Cooperatives too, in the art. 108, clearly distinguishes cooperative property from the social property, and it is prescribed a possibility of transformation of social property into cooperative property.

The currently valid *Law of cooperatives* does not define the nature of the cooperative property. It only enumerates in the art. 53 the property rights that can be part of this type of property, establishes how it can be formed or alienated, and briefly proclaims:

Assets of a cooperative are cooperative property.[24]

But again, there is no legal definition of cooperative property.

3. In search of the possible definition of the zadruga property. Serbian Civil Code of 1844 and the roman law

The common misconception, according to which the traditional Serbian *zadruga* property was a form of indivisible collective property, which was trans-

[21] Zakon o zadrugama, *Službeni glasnik RS*, br. 112/2015

[22] Ustav Republike Srbije, *Službeni glasnik RS*, br. 98/2006 i 115/2021

[23] *Равноправност свих облика својине. Члан 86 Јемче се приватна, задружна и јавна својина. Јавна својина је државна својина, својина аутономне покрајине, својина јединице локалне самоуправе. Сви облици својине имају једнаку правну заштиту. Постојећа друштвена својина претвара се у приватну својину под условима, на начин и у роковима предвиђеним законом. Средства из јавне својине отуђују се на начин и под условима утврђеним законом.*

[24] *Имовина задруге је у задружној својини.*

formed in the SCC in a divisible co-property, is, as said before, misleading: cooperative property was divisible even before the enactment of SCC.

But, are the facts, that there is a possibility of partition of property on request of individual members of *zadruga* (Art. 492), that members have the right to testamentary disposal of their ideal share (Art. 521), and that cooperative member is responsible for his personal debts with his ideal share (Art. 515)[25], enough to mark *zadruga* property as a form of co-owned property, as most of scientists does?

It seems that cooperative property, both in serbian customary law, in SCC, and in contemporary law, does not correspond to the roman notion of co-owned property,[26] for a number of reasons:

- co-owned property in Roman law has defined shares; *zadruga* does not (SCC art. 508). If shares are defined, it is not *zadruga* anymore;

- acts of administration in co-owned property (like leasing it) are to be decided by those who have a majority of shares, and it can be even one share holder, if he owns majority of the property. In *zadruga*, it is not the case: organs elected by the members of zadruga are responsible for the acts of administration. In the traditional *zadruga* family, it was usually the oldest male; but it wasn't necessarily the case (SCC art 510).

- the acts of extraordinary administration (like alienating parts of property) in roman co-ownership are to be decided by all the share holders, no matter how small their shares be. In some contemporary civil law legislations it can be a qualified majority (like, the holders of two thirds of the shares in Italian civil code, art. 1008).[27] In *zadruga*, it is most commonly decided by consensus of members (SCC art. 510), or by simple or qualified majority by principle one person-one vote.

- co-ownership does not lead to a creation of a legal person separated by the members. *Zadruga* is a legal person on it's own (SCC art. 58).

- it is true that there is possibility to dispose one's share in *zadruga* by testament, and that a member of *zadruga* in SCC can be responsible for his debts by his share; but otherwise, it is not possible to dispose by own share by legal transactions *inter vivos* like by selling or by gift, what is possible in co-ownership.[28]

[25] About a not directly related but interesting problem in contemporary serbian law (the payment of debt from inherited property) see: V. Čolović, „Stečaj nad imovinom ostavioca (zaostavštinom) kao oblik ličnog stečaja", *Strani pravni život* 3/2020, 75-88.

[26] On roman notion of co-property, see: G. Von Beseler, „Miteigentum", *SDHI* 7/1941, 421-423; S. Perozzi, "Saggio critico sulla teoria della comproprietà", *Scritti giuridici, I - Proprietà e possesso*, Milano, Giuffrè 1948, 437-554; S. Perozzi, "Un paragone in materia di comproprietà", *Scritti giuridici, I - Proprietà e possesso*, Milano, Giuffrè 1948, 555-584; L. Barassi, *Proprietà e comproprietà*, Giuffre, Milano 1951; A. Biscardi, "La genesi della nozione di comproprietà", Labeo 1/1955, 156-165; M. Bretone, *Servus communis. Contributo alla storia della comproprietà romana in età classica*, Jovene, Napoli 1958.

[27] Codice Civile, *Gazzeta Ufficiale* n. 79/1942

[28] Perić had a different attitude according to which members of *zadruga* could dispose of their share also by *inter vivos* legal transactions. Ж. Перић, *Задружно право по Грађанском законику Краљевине Србије*, IV - О постанку и престанку задруге, Издавачка књижарница Геце Кона, Београд 1920, 101.

So, property of *zadruga* is definitely not a co-owned property; but for abovementioned reasons (the possibility of division), it doesn't fit into the classical notions of collective property either. Such a form of property exists in modern Serbian family law. The family property is commonly owned, and there is a possibility of alienation of property by any member of the community, if others do not oppose. In SCC it is not allowed to the members of the family cooperative to alienate the commonly owned assets. Only if chief of *zadruga* alienates a thing belonging to community, and other members do not object within a year, the transaction is valid (SCC art. 510).

On the basis of the right of family members to oppose the transactions ma ()de by the patriarch of *zadruga*, we can conclude that the Serbian family cooperative has also nothing to do wđith the Roman agnatic family. While in Rome the *pater familias* has the right to dispose of the entire property, the head of *zadruga* is more like the first among equals, and has no *abusus* over the cooperative property.

There are much more similarities between *zadruga* and roman *consortium ercto non cito*. These similarities have been noted in literature several decades ago. They might be casual, based on similarities between social and economical development between the ancient Rome and medieval and early modern Serbia. But, recent research provided significant proofs to believe that Jovan Hadzic used ideas from roman law to create the regulation regarding *zadruga* in the SCC.[29]

It is interesting to note that rules regarding *zadruga* are according to the norms of SCC (art. 494) applicable to regulate the hereditary communion too: a obvious association with the roman *consortium ercto non cito* (or *dominio non diviso*).[30] Also, there is possibility for family members to have separate private property, if it is created not by work in community, but in other way – a hint of roman *peculium*. Also, it is interesting to note that apart of the patriarch (*starešina*) of *zadruga*, SCC mentions a matriarch (*starešica*), whose position is similar to that

[29] M. Kulauzov, (2017), 1-12; А. Маленица, 20-21.

[30] On *consortium* in the roman law see: S. Solazzi, "*«Tutoris auctoritas» e «consortium»",* SDHI 12/1946, 7-44; H. Ankum, «La vente d'une part d'un fonds de terre commun dans le droit romain classique», *BIDR*. 83/1980, 67-107; W. Waldstein, „Eigentum und Gemeinahl im römischen Recht", *Für Staat und Recht. Festschrift für H. Schambeck*, Berlin, Duncker & Humblot, 1994, 169-182; T. Drosdowski, *Das Verhältinis von actio pro socio und actio communi dividundo im klassischen römischen Recht,* Duncker und Humblot, Berlin 1998*;* D. Daube, "«Consortium» in Roman and Hebrew Law", The Juridical Review 52/1950, 71-91; W. Kunkel, "Ein unbeachtetes Zeugnis über das römische Consortium", *Annales de la Faculté de Droit d'Istanbul* 4-5/1955, 56-78; H. L. W. Nelson, „Zur Terminologie der römischen Erbschaftsteilung: Ercto non cito. Familia erciscunda", *Glotta. Zeitschrift für griechische und lateinische Sprache* 44/1966, 41-60; S. Tondo, "Il consorzio domestico nella Roma antica", *Atti e memorie Acc. toscana di sc. e lett. «La Colombaria»* 40/1975, 131-218 *;* L. Gutierretz-Masson, *Del « consortium » a la « societas », I: « Consortium ercto non cito »,* Madrid, Univ. Complutense 1987*;* S. Tondo, "Ancora sul consorzio domestico nella Roma antica", *SDHI*. 60/1994, 601-612. Specifically on the rapport between *consortium* and the hereditary communion see: M. Bretone, "«Consortium» e «communio»" *Labeo* 6/1960, 163-215; J. Baron, *Die Gesammtrechtsverhältnisse im Römischen Recht,* M. Keip, Frankfurt 1968; A. Torrent, "Notas sobre la relación entre «communio» y copropiedad" *Studi Grosso 2*, Torino 1968, 95-116; A. Fernandez Barreiro, "La «actio communi dividundo utilis»", *Estudios Santa Cruz Teijeiro 1, Univ. de Valencia, Fac. de Derecho*, 1974, 267-284.

of the roman *mater familias*: she has no rule in administration of the property, but the organization of work of the female members of *zadruga* is her competence (SCC art. 111).

4. Conclusion

Collective farming community or *zadruga*, as regulated in SCC, does not fit in any of modern legal categories of property defined by owner. It is not individual, nor classical common or collective property, but it is also not the co-ownership as often stated. It is a specific type of property that has been developed on the basis of the traditional serbian institution of family community. It was initially regulated by consuetudinary law. For the first time it was regulated in a systematic manner in the Serbian Civil Code of 1844, in a manner that has presumably been influenced by the roman *consortium ercto non cito*.

While some other legislations like Austrian, prohibited division of *zadruga*, SCC allowed it. Still, it is not enough to define the property of *zadruga* as co-property. Rather, it is a specific form of collective property, which can't fit into any modern category.

Just as roman *consortium*, *zadruga* evolved from extended family into a sort of partnership-based enterprise in the XIX century, which was liberated of patriarchal elements, and not based on kinship anymore, although the regime of collectively owned property remained similar to the original family-based community. Since the end of the XIX century, the term *zadruga* started to be used to indicate rural cooperatives, not based on the kinship anymore.

It is, however, not a completely new institute, that only uses the name of the old institute. The Serbian cooperative law distinguishes itself strongly from the solutions that can be found in comparative law by equality of the members and direct decision-making of the members of cooperative. Both principles are inherited from traditional community and the roman law, and are not present in some other legislations. For example, in the Law of the People's Republic of China on Specialized Farmer's Cooperatives of 2006 (emended in 2017)[31] in the art. 22 allows a possibility that members of a cooperative who disproportionally contribute with their shares to the capital of the cooperative have bigger influence on decision-making. For the big cooperatives of more than 150 members the art. 32 allows a possibility of creation of a representative governing assembly, instead of assembly of members.

So, the ownership regime of modern Serbian cooperative is at leas partially inspired by the family-based *zadruga*, which derivates from Serbian consuetudinary law, and it's modernized form is created in the SCC under the influence

[31] Law of the People's Republic of China on Specialized Farmers Cooperatives, adopted at the 24th Meeting of the Standing Committee of the Tenth National People's Congress on October 31 of 2006, enacted by *Presidential Decree No. 57*, last time amended on 27 December 2017

of the roman law. In that light, research of the roman *consortium* family, roman partnership (*societas*) and the connected institutes like *actio familiae erciscundae* could be of great importance to fully understand the regime of the *zadruga* property in contemporary serbian law.[32]

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[32] Serbia is facing the challenge of redefining it's law of corporation in the process of harmonization of law as the part of accession to the European Union, see for example M. Mijatović, „Izazovi recepcije prava Evropske unije u Srbiji – primer korporativnog prava u Srbiji", *Strani pravni život* 1/2019, 91-102.

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ROMAN LAW

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ON THE EFFECTIVENESS OF THE PROTECTION OF COMMON THINGS IN THE ROMAN LAW: THE CASE OF THE SEA

Abstract: *In the Roman law, the way the sea is regulated appears to be strictly connected to the elaboration, by the jurists, of the category of the res communes omnium. However, also before this category had been fully elaborated (in particular due to the contribution of Marcianus), Roman jurisprudence addressed the 'public nature' of the sea from various perspectives and it provoked interesting consequences in the thoughts of the jurists. For the present-day jurists, on the one hand, the category of the res communes omnium provides meaningful elements to be considered; on the other hand, it provides awareness of the relevance that the utilitas communis of certain things can be enjoyed by an individual as long as s/he is a member of the community.*

Key words:: *Res communes omnium; common things; sea; Roman law; actio iniuriarum*.

1. Introduction

The category of the *res communes omnium* has suffered a certain mistrust in the past also because it undermines the exclusively dual representation of the relationship between persons and things as outlined in the liberal state doctrines which do only refer to public and private things. Nonetheless, it has recently received a strong attention and became a subject of fairly intense scrutiny by legal scholars[1].

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[1] See the fundamental remarks by S. Rodotà, *Il terribile diritto. Studi sulla proprietà privata e i beni comuni*, Bologna, 2013, 459 ss.; Idem, *Il diritto di avere diritti,* Bari, 2012, 122 ss.: «Più concretamente e più rigorosamente, si deve guardare ai beni comuni in primo luogo come elemento inseparabile da una persona affrancata dalla dipendenza esclusiva dalla proprietà, in una prospettiva che, seguendo ancora le parole dell'art. 3 della Costituzione, congiunge il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese» (120). The scientific literature on this topic is aboundant, see for instance, M.R. Marella, *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Verona, 2012; F. Cortese, *Che cosa sono i beni comuni?*, in M. Bombardelli (ed.), *Prendersi cura dei beni comuni per uscire dalla crisi*, Napoli, 2016, 37 ss.; D. Dursi, '*Res communes omnium*'. *Dalle necessità economiche alla disciplina giuridica*, Napoli, 2017; A. Lalli, *Per un approccio giuridico ai beni comuni. Questioni di metodo, ambito del problema e spunti ricostruttivi*, in *BIDR*, CXII, 2018, 297 ss; A. Capurso, *The end of the res communes omnium*, in M. Falcon and M. Milani (ed.), *A New Role for Roman Taxonomies in the Future of Goods?*, Napoli, 2022, 58 ss.; P. Lambrini, *Publicus and communis Between*

In the perspective on which the nowadays law is built, problems for the legal protection of common things are descending from its 'abstractness', hence, basically: if the common things are everyone's, therefore they are 'no one's'[2].

This model is very different from those elaborated on the basis of a 'concrete approach' in Roman legal experience.

An example could be the one of the sea and its legal protection. In Roman law, the legal protection of the sea appears to be strictly connected to the elaboration, by the jurists, of the category of the *res communes omnium*[3].

As we know, the sea (including the coast)[4] has been included among the *res communes omnium* by the jurist Marciano in his *Institutiones* (together with the *aer* and *aqua profluens* – air and flowing water)[5].

D. 1, 8, 2, 1 Marc. *l. 3 inst. deve essere minuscolo*

Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.

However, even before this category had been fully elaborated (in particular due to the contribution of Marcianus), Roman jurisprudence addressed the 'public nature' of the sea from various perspectives and it provoked interesting consequences in the thoughts of the jurists.

Before the full 'configuration' of the category of the *res communes omnium* by Marcianus, there is evidence in the sources of a perception of the sea as something 'common to all'[6].

Today and Yesterday/ Publicus e communis tra ieri e oggi, in M. Falcon (ed.), *A New Thinking About 'Res'. Roman Taxonomies in the Future of Goods*, Napoli, 2022, 11 ss. and 97 ss.

[2] See, for instance, R. Marini, *'Mare commune omnium est'. A proposito di D. 47.10.13.7 (Ulp. 57 ad edictum)*, in *BIDR* CXVI (2021), 289-304. It has to be also remarked that the category of 'commons things' is very broad and heterogeneous, see M. Franzini, *I tanti beni comuni e le loro variegate conseguenze economiche,* in va in tondo, *di beni comuni. Studi multidisciplinari*, Roma, 2013.

[3] See D. DURSI, *Res communes omnium*, cit., 1-3.

[4] About the 'functional value' of the coast for the sea, see C. M. Doria, *'Litus maris':définition et controverses*, in*'Riparia', un patrimoine culturel. La gestion intégrée des bords de l'eau*, Oxford, 2014, 233 ss.

[5] On this source see M. Schermaier, *Private Rechte an 'res communes'?*, in E. Chevreau, D. Kremer, A. Laquerrière-Lacroix, (ed.), *'Carmina iuris'. Mélanges en l'honneur de M. Humbert*, Paris 2012, 694 ss.; D. Dursi,*'Res communes omnium',* cit.*,* 21 ss. In this classification it is possible to perceive the echo of Cic. *De off.* I, 7, 20-22 and of the Stoic doctrine connected to it: ([20] *De tribus autem reliquis latissime patet ea ratio, qua societas hominum inter ipsos et vitae quasi communitas continetur; cuius partes duae: iustitia, in qua virtutis splendor est maximus, ex qua viri boni nominantur, et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet. Sed iustitiae primum munus est, ut ne cui quis noceat, nisi lacessitus iniuria, deinde ut communibus pro communibus utatur, privatis ut suis.* [21] *Sunt autem privata nulla natura, sed aut vetere occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt, aut lege, pactione, condicione, sorte; ex quo fit, ut ager Arpinas Arpinatium dicatur, Tusculanus Tusculanorum; similisque est privatarum possessionum discriptio. Ex quo, quia suum cuiusque fit eorum, quae natura fuerant communia, quod cuique optigit, id quisque teneat; e quo si quis [quaevis] sibi appetet, violabit ius humanae societatis.* [22] *Sed quoniam, ut praeclare scriptum est a Platone, non nobis solum nati sumus ortusque nostri partem patria vindicat, partem amici, atque, ut placet Stoicis, quae in terris gignantur, ad usum hominum omnia creari, homines autem hominum causa esse generatos, ut ipsi inter se aliis alii prodesse possent, in hoc naturam debemus ducem sequi, communes utilitates in medium adferre, mutatione officiorum, dando accipiendo, tum artibus, tum opera, tum facultatibus devincire hominum inter homines societatem.*), on these aspects see P. Lambrini, *Alle origini dei beni comuni*, in *IURA* 65, 2017, 402 ss.

[6] See R. Ortu, *Plaut. Rud. 975. Mare quidem commune certost omnibus*, in *JusOnline* 2 (2017), 160 ss.

This can be proved mainly on the basis of two sources. The first source is from the Plautus comedy *Rudens*.

Plaut. *Rud.* 969-975:

[GRIP.] *Dominus huic, ne frustra sis,*

nisi ego nemo natust, hunc qui cepi in venatu meo.

[TRAC.] *Itane vero?* [GRIP.] *Ecquem esse dices in mari piscem meum*? *Quos va portato a capo. La riga deve iniziare con: Quos cum capio, siquidem cepi, mei sunt; habeo pro meis, nec manu adseruntur neque illinc partem quisquam postulat. In foro palam va portato a capo La riga deve iniziare con : In foro palam In foro palam omnes vendo pro meis venalibus.*

Mare quidem commune certost omnibus.

The *Rudens* can be dated back to the decades between the 3rd and 2nd centuries BC[7] and it is particularly useful for the reconstruction of the Roman notion of the sea[8] since it is clearly representing evidence of the idea that the sea is 'common to all'. From it we can actually read '*mare quidem commune certost omnibus*…' (Plaut. *Rud.* 975), and therefore with the '*quidem*' and the '*certost*' we can see how Plautus is evoking an awareness shared with the audience of the comedy: no one could deny that the sea was common to everyone, everyone knew it, it was a matter of common perception[9].

The second source contains the considerations of the Roman jurist Celsus (in the first decades of the 2s century AD).

D. 43, 8, 3, 1 Cels. *l. 39 dig.*

Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit, sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit.

Also in this source it is possible to see a perspective that seems to consider as obvious the use of the sea as common to all human beings ('*maris communem usum omnibus hominibus*')[10].

[7] On the dating of Plautus' activity see R. Ortu, *Plaut. Rud. 975*, cit., 164 and nt. 11.

[8] On the source, for a first reference see L. Pellecchi, *Per una lettura giuridica della 'Rudens' di Plauto*, Parma, 2012, 44 s. About the use of '*manu adseruntur*' and its relevance from a legal point of view, see R. Santoro, *Manu(m) conserere*, in *AUPA* 32 (1971) 513 ss., in particular 524 s.; see also D. Di Ottavio, *Riflessioni a margine di Plaut., Rud. 973: NEC MANU ADSERUNTUR NEQUE ILLINC PARTEM QUISQUAM POSTULAT*, in *Iura&Legal System*, 6 virgola dopo le parentesi 72 ss.

[9] As we known, influential scholars insisted on the need to be very careful in using the work by Plautus in order to reconstruct the Roman law of that historical period; see, in particular, L. Labruna, *Plauto, Manilio, Catone: premesse allo studio dell'*emptio *consensuale*, in *Labeo* 14 (1968), 24 ss. However, following scholars did carefully scrutinize the value that could be ascribed to Plautus for the reconstruction of the III-II century b.C. Roman law and they confirmed the (nonetheless perhaps overemphasized) optimism expressed in E. Costa, *Il diritto privato nelle commedie di Plauto*, Roma 1890 (rist. anast. 1968). See for instance: S. Schipani, *Responsabilità 'ex lege Aquilia'. Criteri di imputazione e problema della 'culpa'*, Torino 1969, 29 ss.; C. ST. Tomulescu, *La 'mancipatio' nelle commedie di Plauto*, in *Labeo* 17 (1971), 284 ss.; G. Rotelli, *Ricerca di un criterio metodologico per l'utilizzazione di Plauto*, in *BIDR* 75 (1972), 97 ss.; M. F. Cursi, *'Iniuria cum damno'. Antigiuridicità e colpevolezza nella storia del danno aquiliano*, Milano 2002, 248 ss.; L. Pellecchi, *Per una lettura giuridica della 'Rudens' di Plauto*, cit., 11 ss. and 67 ss.; R. Ortu, *Plaut. Rud. 975*, cit., 161 ss.; D. Dursi, *Res communes omnium*, cit., 141 ss.

[10] About the Celsus' use of '*usus omnibus hominibus*' in the source, see V. Mannino, *Il «bene comune» tra precedente storico e attualità*, in A. Palma (ed.), '*Civitas' e 'civilitas'. Studi in onore di Francesco Guizzi*, II, Torino, 2013, 529.

However, the 'common use' of the sea by all human beings is, in fact, conceptually different from the idea of the common nature of the sea, the idea of the sea as a thing belonging to everyone – which will later be later on expressed by Marcianus –, but this does not prevent us from seeing in Celsus conception a prodromal idea with regard those later on elaborated by the following jurisprudence, in particular that of the Severan dinasty era.

In Celsus, the configuration of the sea as something common to all the people appears to be strictly built on the basis of its common utility, and not on the basis of the title on it.

In other words: recognizing that there are things that, by their nature, are preordained to a 'common use by all the people', is different from deducing by inference – legally neither necessary nor consequent to it – that these things are 'common'.

The first approach does not exclude the second, but in the same way the second approach is not necessarily a consequence of the first.

In a different way from Plautus and Celsus, Marcianus does actually build his *divisio rerum* just from the perspective of the ownership of the *res*: that of the '*universitas*' for the public ones, that of the 'no one's ownership' for those freely available to anyone, and that 'of the individual ownership' for the private ones.

The category of common things is fully consistent with this perspective, as things 'for everyone', a new idea of 'common' that makes a kind of 'third dimension'[11].

This is a topic of great relevance[12], not only due to the complexity of the concept expressed by the idea of a common thing, but also with regard to the impact of this concept on the exercise of lawful activities such as navigation and fishing in the sea[13].

If the exercise of navigation did not cause particular problems in ancient times – at least not in relation to the aspects relevant for the topic we are dealing with in this paper – the exercise of fishing activity, as a lawful use of the sea common to all, clashed with the 'sovereign' conception of private ownership of the shoreline lands[14].

Considering this, we can therefore notice that 'thing in use by everyone' or 'things for everyone' represent different legal constructions, but could theoretically not necessarily determine differentiated consequences in the relevant legal regime.

[11] On this aspect, see A. Di Porto, '*Res in usu publico' e 'beni comuni'. Il nodo della tutela,* Torino 2013, XX: «la dicotomia pubblico-privato non basta più a contenere ciò che è comune», so as to determine «una terza dimensione, quella appunto delle *res communes omnium*».

[12] See S. Rodotà, *Beni comuni e categorie giuridiche. Una rivisitazione necessaria*, in *Questione giustizia* 2011, 5.

[13] On this activity, see A. Marzano, *Fish and Fishing in the Roman World*, in *Journal of Maritime Archaeology manca il punto dopo le parantesi*

[14] See the important remarks by A. Palma, *Limitazioni negoziali all'esercizio della pesca*, in *Studi per Giovanni Nicosia*, IV, Milano, 2007, 22.

2. *Ulpianus in (Ulp. l. 57 ad ed. D. 47, 10, 13, 7)*

From a source ascribable to Ulpianus – extrapolated from the *liber* 57 of the jurist's commentary on the *edictum de iniuriis* and placed by the Justinian commissioners in the *Digesta*'s title '*De iniuriis et famosis libellis*' (Ulp. l. *57 ad ed.* D. 47, 10, 13, 7)[15] – is possible to see a relevant expansion in the regime of the protection of common use which may have been influenced by the fact that, also with regard to the *res communes*, he completed the elaboration of the legal category of ownership.

D. 47, 10, 13, 7 Ulp. l. 57 ad ed.

Si quis me prohibeat in mari piscari vel everriculum (quod Graece σαγήνη *dicitur) ducere, an iniuriarum iudicio possim eum convenire? sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiatur, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest. conductori autem veteres interdictum dederunt, si forte publice hoc conduxit: nam vis ei prohibenda est, quo minus conductione sua fruatur. Si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? me iniuriarum iudicio teneri an non? et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. in lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum.*

This is a fairly long and complex text[16] that Roman law scholars have often dealt with in connection with the dogmatic elaboration of the category of *res communes omnium*. In fact, the source mentions three (*mare*, *lido* and *aer*) of the four *res communes* which will then be included in the list by Marcianus[17].

However, it seems to me that another meaningful aspect can also be highlighted: the fishing, as a *commodum* deriving from the sea as 'common thing'[18], and, more specifically, the particular protection given to this activity.

[15] See M. Miglietta, *Elaborazione di Ulpiano e di Paolo intorno al «certum dicere» nell'«edictum 'generale' de iniuriis»*, Lecce, 2002, 21 ss.

[16] About this source, see for instance G. Lombardi, *Libertà di caccia e proprietà privata in diritto romano*, in *BIDR* 53-54 (1948) 273 ss.; P. Voci, *Modi di acquisto della proprietà*, Milano, 1952, 18; M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana. Profili di tutela processuale e di inquadramento sistematico*, Milano, 2003, 383 ss.; A. Palma, *Limitazioni negoziali all'esercizio della pesca*, cit., 29 ss.; J. F. Gerkens, *"Aeque perituris…". Une approche de la casualité dépassante en droit romain classique*, Liège, 1997, 135 ss.; R. Ortu, *Plaut. Rud. 975*, cit., 180 s.; D. Dursi, *Res communes omnium*, cit., 11 ss. e 41 ss.; A. Schiavon, *Interdetti de locis publicis ed emersione della categoria delle res in usu publico*, Napoli, 2019, 181 ss.

[17] On the relationship between the two jurists see the remarks by D. Dursi, *Res communes omnium*, cit., 13 ss.

[18] See, for example, also D. 8, 4, 13 pr. (Ulp. *l. 6 op.*, *Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur*) and D. 43, 8, 2, 9

The source begins with a general question: is it possible to act with the *actio iniuriarum* against someone who prohibits me to fishing in the sea or to throwing a net (σαγήνη)[19] into the sea?

From this question, the jurist provides his response through multiple steps.

First of all, Ulpianus recalls that Pomponius, together with other jurists (‘*et ita Pomponius et plerique*’), believed it was possible to act with the *actio iniuriarum* because the case was similar (‘*esse huic similim eum…*’) to that in which someone prevents me from using public places (‘*in publicum lavare…vel in cavea publica sede…vel in quo alio loco agere sede conversari*’) rather than, to that for which someone does not allow me to use my thing (‘*…aut si quis re mea uti me non permittat*’)[20].

Up to this point the position of Ulpianus seems cautious[21].

Then, after a brief excursus on the form of *interdicta* based protection granted by the *veteres*[22] in favor of the person engaged in public affairs and which certainly does not represent an argument to be considered as an antithesis[23], Ulpianus goes back to analyze the initial case but he refers to a specific perspective.

In fact, in this part of the source the issue is addressed from the point of view of the owner of the property located near the coast, who wants to prohibit fishing in the marine area in front of his properties.

The *quaestio* highlights the specific and real interests in conflict in the case considered: on the one hand that of the coastal owner and on the other that of everyone (therefore ‘of all’) to fish in the sea.

Ulpianus reiterates the initial affirmative response and argues for it: the sea is common to all – also the coast and the air – and, for this reason, no one can forbid fishing in the sea (‘*et quidem mare commune omnium est et litora*, … *non*

(Ulp. *l. 68 ad ed*., *Si quis in mari piscari aut navigare prohibe- atur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriarum actione utendum est*), on the sources regarding the practice of fishing ascribable to Ulpianus, see A. Palma, *Limitazioni negoziali all’esercizio della pesca*, cit., 24 ss.; D. Dursi, *Res communes omnium*, cit., 41 ss.

[19] A big net, see C. Ravara Montebelli, *Halieutica. Pescatori nel mondo antico*, Rimini, 2014.

[20] Note the use in the Latin language of the disjunctive conjunction ‘*aut*’ after ‘*vel*’ to refer in the first case to the use of one’s own property and in the others to the use of public things. This fact seems to me to be important in the construction of Ulpian’s narrative. About the difference between the two conjunctions in the Latin language see A. Ernout-A. Meillet, *Dictionnaire étimologique de la langue latine*, (retirage de la 4e éd. augmentée d’additions et de corrections par J. André), Paris 2001, 61, *s.v. aut* «*Conjonction disjonctive qui sert à distinguer deux objets ou deux idées dont l’un exclut l’autre. La différence de sens avec vel est bien marquée par Festus. P. F. 507, 20: « vel » conligatio quidem est disiuntiva, sed non[ex] earum rerum, quae natura disiuncta sunt in quibus «aut» coniunctione rectius utimur, ut: aut dies est aut nox, sed earum, quae non sunt contra, equibusquae eligatur nihil interest, ut Ennius (Var. 4): Vel tu dictatir, vele quorum equitumque magister | Esto, vel consul* […]; on this aspect see also N. La Fauci, ‘*Vel’ o ‘Aut’: la verità vi prego sul piuttosto che*, in *Zurich Open Repository and Archive*, 2016.

[21] On this aspect, see A. Schiavon, *Interdetti de locis publicis*, cit., 182 ss.

[22] About the ‘*veteres*’ see D. Mantovani, *Quando i giuristi diventarono ‘veteres’. Augusto, Sabino, i tempi del potere e i tempi della giurisprudenza*, in *Atti del convegno ‘Augusto. La costruzione del principato*’ (4-5 dicembre 2014), Roma, 2017, 257 ss.

[23] See D. Dursi, *Res communes omnium*, cit., 44 ss.

posse quem piscari prohiberi'); in fact, the jurist recalls that very often ('*saepissime*') even the emperors with rescripts ordered this[24].

In this second part of the source Ulpianus says – without any doubt – that the sea is *commune omnium*, so as to deduce not only it is possible to be used by anyone for fishing, but also – coherently with this juridical configuration – to render a protection through the *actio iniuriarum* against those who prevent its use[25]. Ulpianus in order to remark his view on the point uses two (further) examples: *i)* not even hunting can be prevented, but I can prevent people from entering my land to hunt, and *ii)* it is allowed to prohibit fishing in the lake I own[26].

At the end of his logical-argumentative process, Ulpianus reiterates how it is a 'usurpation without any legal foundation' ('*usurpatum tamen et hoc est, tametsi nullo iure*')[27] to prohibit someone from fishing in front of their *aedes*, and this is why in such a case '*adhuc iniuriarum agi potest*'.

3. Conclusive remarks: a comparison between the two 'models'

It is therefore possible to put in place some concluding remarks.

First of all, Ulpian's source demonstrates the risk of an absence of protection for things common to all which, as such, paradoxically do end up being not protected by anyone, with the possibility of abuses ('*usurpatum*').

Roman jurists tried to avoid this risk by drawing a similarity with the forms of protection offerend in the case of the private *delictum* of *iniuria* against those who prevent someone from using public property or who prevent a private person from using his property. In fact, Ulpianus proposes a very effective protection with the use of the *actio iniuriarum* against the coastal property owner who prohibits fishing in the area in front of his property.

The fundamental focus of Ulpian's considerations concerns the dialectical relationship between two important legal positions which represent – inevitably –

[24] See also another source of Marcianus: D. 1, 8, 4 pr. (Marc. *I. 3 Inst.*), *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monu- mentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus Pius piscatoribus Formianis et Capenatis rescripsit,* on this, see M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana*, cit., 412 ss. R. ORTU, *Plut. Rud. 975*, cit., 181 s.; D. Dursi, *Res communes omnium,* cit., 53 ss.

[25] This approach used by Ulpianus will be radically 'overturned' in a group of *Novellae* of Leo VI the Wise (between 886 and 912 AD, see in particular *Nov.* 56). Since it is not possible here to discuss this problem in detail, see the relevant remarks by G. Purpura, *Liberum mare, acque territoriali e reserve di pesca nel mondo antico*, in *Actes du colloque international 'Ressources et activites maritimes des peuples de l'Antiquite'*, (Boulogne-sur-Mer, 12-14 mai 2005), 527 ss. = in *AUPA*, 49, 2004, 165 ss.; see also A. Capurso, *The end of res communes omnium*, cit., 68 ss.

[26] On this aspect, see R. Marini, *'Mare commune omnium est'*, cit., 300 s.

[27] We can see, the use of '*nullo iure*' – in the same sense – also in another source ascribable to Ulpianus, D. 43, 8, 2, 13 (Ulp. *l. 68 ad ed. Si quid in loco publico aedificavero, ut ea, quae ex meo ad te nullo iure defluebant, desinant fluere, interdicto me non teneri Labeo putat*). On this source, see A. Palma, *Iura vicinitatis. Solidarietà e limitazioni nel rapporto di vicinato in diritto romano dell'età classica*, Torino, 1988, 114 s.

two opposing interests: the legal position of the owner (of the coastal land in the specific case) and the legal position of the individual as a member of the community of human beings who have the right to use the common thing.

Beside a first perspective – on which Ulpianus spent some considerations while commenting the edict part concerning the *actio iniuriarum* – is added a second one which is fairly extreme, a position where the owner of the coastal land abuses ('*nullo iure*') of his position. In these cases – based on what Ulpianus says does not happen so infrequently – since the sea is common to everyone, it would not be possible for anyone to forbid fishing even in front of someone's house. And this is a different approach from that used to deal with the cases where someone can forbid hunting on his land or fishing in a pond or lake in his private property.

By reading this source it seems that the perspective of the belonging ('to all', '*omnium*') of common things that has been then definitively established by Marcianus – in terms of a coherent conceptual presumption of the *divisio rerum* – is already outlined in Ulpian's considerations regarding the sea and its coast.

In my opinion the elaboration of the category of the *res communes omnium* is very interesting also today. In the Roman jurists' thoughts, the *utilitas communis* of certain goods derives from the individual himself and indeed it does so first of all because the individual is a member of a community, of the universal community of human beings. In fact, '*naturali iure*' will be the expression used by Marcianus in the well-known source that contains the list of the *res communes* and he will use it in a way similar to that of Ulpianus.

From this perspective, just as the person who prevents the *dominus* from using his things does not put much in place a patrimonial damage to the property, but rather a damage to the person of the owner himself, so in the same way, whoever prevents the use of common property damages the personal sphere of the individual.

It is a 'tangible', a 'concrete' form of legal protection, not an abstract one like that provided by the nowadays law. The effectiveness of the legal protection is conditioned by the fact that it is not an 'individualistic' perspective[28], but a protection of 'the common' through the individual (as part/'*pars*')[29] of a whole: the individual has that right because that right is by nature inviolable and mandatory for anyone, including for the coastal owner.

The model proposed by Roman law is very different from the models we find in today's legislations. In these models, on the one hand, the individual (and his rights) – among which 'the right to ownership' is standing out[30] – often pre-

[28] Against the 'individualism' of Roman law, see F. De Martino, *Individualismo e diritto romano* (1941), rist. Torino 1999. On the «esasperato individualismo» in the current law see also P. Maddalena, '*Res communes' e ambiente nell'attuale crisi finanziaria (globalizzazione e difesa del territorio "bene comune" del popolo)*, in R. Cardilli and S. Porcelli (ed.), *Aspetti giuridici del BRICS*, Milano 2015, 56 and on this aspect in general 56 ss.

[29] On the idea of *civis* as *pars* populi, see the fundamental remarks by P. Catalano, *Populus Romanus Quirites*, Torino 1974, 97 ss.

[30] On the property as the «perno del sistema borghese», O. Diliberto, *L'eredità fraintesa. Il diritto di proprietà dall'esperienza romana al Code Napoléon (e viceversa). Sulle origini della nozione 'moderna' di proprietà*, in

vails over the community (and its rights)[31]; on the other hand – as the example of the modern notion of 'territorial sea' shows[32] – the dichotomy private ownership / public ownership is so entrenched that public ownership is reinterpreted as a 'private' ownership ascribed to the State[33].

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[31] About the differences between the two 'models', see the important remarks by R. Cardilli, *Archetipi romanistici del «diritto delle persone»*, in R. Marini, (ed.), *Pandemia e diritto delle persone/Pandemia y derecho de las personas*, Milano, 2021, 9 ss.

[32] It is well known that the term refers to the portion of the sea near the coast where the State exercises its sovereignty in a similar way to the onw it does exercises it on the land. This principle of the territorial sea is in contrast with the more general principle of the *free sea*, see A. Lefebvre D'Ovidio, G. Pescatore, L. Tullio, *Manuale di diritto della navigazione*, Milano, 2019[5], 90 ss. On the consolidation of the concept of territorial waters in the 'Age of Discovery', see A. Capurso, *The end of res communes omnium*, cit., 74 ss.

[33] For a critical reconsideration of property rights, see P. Catalano, *Droit naturel, ius Quiritium: observations sur l'anti-individualisme de la conception romaine de la propriété*, in S. Schipani, G. Terracina, (ed.), *Le nuove leggi cinesi e la codificazione. La legge sui diritti reali*, Roma 2009, 121 ss.; O. Diliberto, *L'eredità fraintesa*, cit., 89 ss.

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RES COMMUNES OMNIUM: AROUND THE USE OF NATURAL RESOURCES IN ROMAN LEGAL EXPERIENCE. BETWEEN INCLUSION AND EXCLUSION

Abstract: *The paper analyzes the Marcian category of res communes omnium to outline its legal status, which shows that no one can be excluded from enjoying the resources that nature makes available to all.*

Keywords: *common goods, res communes omnium, natural law, fishing, hunting, water, air, public goods.*

1. The status *of res communes omnium*

The study of *res communes omnium* has long been influenced by the Mommsen's judgment in a letter addressed to Vittorio Scialoja[1], concerning an epigraphic text, in which the distinguished antiquarian defined the *res communes omnium* as a category without head or tail. Given the authority of the definition, for a long time, no importance was assigned to the category, to the point of including it even in the title of a weighty volume on the subject: I refer to Ubaldo Robbe's monographic work *La differenza sostanziale tra res nullius, res nullius in bonis e la categoria pseudomarcianea delle res communes omnium che non ha né capo né coda*[2]. It is worth emphasizing that it was thanks to Giuseppe Branca that a trend reversal and reevaluation of the notion began. In 1942, the author published a monographic work on *res extra commercium humani iuris*, focusing on Marcian's dogmatics, demonstrating its classicism[3].

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[1] T. Mommsen, "Sopra una iscrizione scoperta in Frisia", *Bullettino dell'Istituto di diritto romano*, (BIDR) 2/1889, 129-135.

[2] U. Robbe, *La differenza sostanziale tra 'res nullius' e 'res nullius in bonis' e la distinzione delle 'res' pseudomaricanee "che non ha né capo né coda"*, Giuffré, Milan 1979.

[3] G. Branca, *Le cose extra patrimonium humani iuris*, Edizioni Universitarie, Trieste 1941. More recently, *ex multis* see M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana*, Giuffré, Milan 2003; M. Fiorentini, "L' acqua da bene economico a «res communis» a bene collettivo", *Analisi giuridica dell'economia*, 9.1/2010, 39-78; M. Fiorentini, "Spunti volanti in margine al problema dei beni comuni", *Bullettino dell'Istituto di Diritto Romano* (BIDR), 111/2017, 75-103; M. Fiorentini, "Res communes omnium e commons. Contro un equivoco", *Bullettino dell'Istituto di Diritto Romano* (BIDR), 113/2019, 153-181; P. Lambrini, "Alle origini dei beni comuni", *Iura*, 65/2017, 394-416; P. Lambrini, "Per un rinnovato studio della tradizione manoscritta del Digesto: il caso di aer nell'elencazione delle res communes omnium", *KOINΩNIA*, 44.1/ 2020, 817-827; G. Santucci, "Beni comuni". Note minime di ordine metodologico", *KOINΩNIA*, 44.2/2020, 1395-1406.

The fundamental texts belong to the jurist Marcian[4], who, in his *Institutions,* first asserts that there are things common to all by natural law, things of collectives, things of no one, and things of individuals, which are the majority[5]. He then continues to affirm that the air, the flowing water, the sea, and, in consequence, the seashores are common goods of all by natural law[6].

First of all, it is necessary to clarify how Marcian distinguished this category from that of *res publicae*, in which, for the jurist, rivers and ports, among others, are included[7]. The problem arose because Marcian's enumeration reported in the Digest does not mention *res publicae*, which are, however, used by the jurist in the continuation of his exposition. On the other hand, the text of Justinian's *Institutions*[8] on the division of things, unequivocally derived from Marcian's *Institutions,* due to the almost total coincidence between the texts[9], includes the category of *res publicae* juxtaposed to that of res *communes omnium*. Essentially, it is clear that Marcian distinguished the *res communes omnium* from the *res publicae*. The lack of mention of the latter in the Marcian division of things reported in the Digest, although difficult to explain, could find reason in the conjecture that the Justinianeans omitted the reference to *res publicae* because in the chain of texts in which the Marcian's passage is embedded, the reference to them appeared a few lines above. This intervention did not alter the Severian jurist's thought on goods, considering that in another passage by the same jurist, presumably placed

[4] Among this jurist and his works see L. De Giovanni, *Giuristi Severiani. Elio Marciano*, D'Auria, Napoli 1989; D. Dursi, *Aelius Marcianus. Institutionum Libri* I- V, L'Erma di Bertschneider, Rome 2019.

[5] D. 1.8.2 pr. (Marc. 3 *inst.*): *Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur*.

[6] D. 1.8.2.1 (Marc. 3 *inst.*): *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris*

[7] D. 1.8.4.1 (Marc. 3 *inst.*): *Sed flumina paene omnia et portus publica sunt*.

[8] I. 2.1. pr.: *Superiore libro de iure personarum exposuimus: modo videamus de rebus. quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.*

[9] On this point, I would like to refer to D. Dursi, *Res communes omnium. Dalle necessità economiche alla disciplina giuridica*, Jovene, Naples 2017, 7; Dursi (2019) 80 and 151 ff. and also D. Dursi, "Res communes omnium e outer space. Qualche riflessione", *Bullettino dell'Istituto di diritto romano* (BIDR) 116/2022, 144 ss. In these works, I suggest that the text of the Justinian Institutes could align more closely, than the text of Digest, with the original Marcian's text. A different opinion comes from R. Basile, "Res communes omnium: tra Marciano e Giustiniano", ΚΟΙΝΩΝΙΑ, 44.1/2020, 119 ff. Basile argues that in Marcian's text, there is no conceptual difference between common goods and public ones, as the jurist would have dissolved the category of *res publicae* and divided them into the category of *res communes omnium* and the category of *res universitatis*. Various arguments, in my opinion, oppose this view. Setting aside other arguments, it is sufficient to consider that if the jurist had intended to eliminate the category of *res publicae* from the classification, it would be highly impossible that he would have used it shortly after to specify the nature of rivers and ports. Moreover, it would also be difficult to explain the examples cited (considering them together: sea, air, running water, shore, theaters, and city stadiums) compared to other examples, such as public roads, which are much more significant. Finally, although it is not a decisive argument, it should be noted that Ulpian, who also refers to *res communes omnium* including almost the same res as Marcian, identifies a different regulation for *res publicae*. It seems almost improbable that in the same period, a clear divergence in the regulation of the two categories of *res* would emerge from the writings of two jurists. Furthermore, among all the jurists who deal with the matter - even those who classify them as *res publicae* - the shore and the sea have a different regulation from that of the other *res publicae*.

a few lines after the enumeration of the different types of *res*, there is indeed an unequivocal reference to *res publicae*[10].

The further question to be answered is whether Marcian's category of *res communes omnium* - including air, flowing water, sea, and because of the sea, the shore - should be considered a closed or merely exemplary enumeration. I seem[11] to have found the answer in the analysis of a passage from the third book of Marcian's Institutions, preserved in the Digest just after the one under consideration, and concerning the res universitatis. Marcian states that this category includes theaters, stadiums, and other similar things, et similia. This latter specification clearly indicates that the jurist was describing an open list in this instance, a characteristic that is completely absent in the case of the res communes omnium. Furthermore, the fact that Marcian considered the shore a common good only because it includes the sea reinforce this point of view. The jurist's precise terminology suggests that the list of res communes omnium was closed and exhaustive, which is also consistent with the unique nature of such goods.

It has also been noted how the category was often used by emperors to settle disputes between fishermen and owners of seaside villas. We read of imperial rescripts in both Ulpian[12], for whom they intervened frequently, and in Marcian[13]. These were measures aimed at preventing owners of seaside villas from prohibiting access to the shore for fishing purposes. This highlights how *res communes omnium* had a well-defined practical, far from being - as it has also been argued - a category without practical relevance and resulting from philosophical influences of the jurists who recalled it.

From the reading of the referenced texts, here emerges a precise profile: no one could be prevented from fishing in the sea, although fishing in private pools could be prohibited. Moreover, the same applies to bird hunting. Ulpian relates the common nature of the air specifically to bird hunting, stating that no one can be prohibited from hunting birds, although to someone else's field can be obstructed. In this case, too, there is the memory of an imperial rescript by Antoninus Pius that asserts it was unreasonable - not forbidden - to hunt birds on private property[14].

[10] Dursi (2017), 9.

[11] Dursi (2017), 10-11.

[12] D. 47.10.13.7 (Ulp. 57 *ad ed.*): […]: *si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? me iniuriarum iudicio teneri an non? et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. in lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum.*

[13] D. 1.8.4 pr. (Marc. 3 *inst.*): *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus Pius piscatoribus Formianis et Capenatis rescripsit.*

[14] D. 8.3.16 (Call. 3 *de cogn.*): *Divus Pius aucupibus ita rescripsit: οὐκ ἔστιν εὔλογον ἀκόντων τῶν δεσποτῶν ὑμᾶς ἐν ἀλλοτρίοις χωρίοις ἰξεύειν*

If we add the other *res* falling into the category, of flowing water, a central aspect emerges. These were goods that nature (hence the reference to natural law, which also a broader perspective, which we might call Roman natural law, echoed in Marcian)[15] had made available to all men, to allow them to procure the primordial elements for survival. Hence the economic needs these goods responded to[16].

An additional reflection is warranted on the mechanism set up by Roman jurists to achieve this goal. It is noteworthy that the sources indicate that everything found on a *res communis* was *res nullius*, allowing free appropriation by whoever physically acquired it. Fish in the sea were *res nullius*, as were birds in the air and gems and pebbles on the shores. This was due to the common nature of the place where these goods were found. The sources clearly state that if a fish was found in a private pool, it would belong to the pool owner, and the same applies to gems found on private property.

Now it is time for a coup de théâtre in the strict sense: the regime just described is first enunciated in a comedy by Plautus, in a text rich in legal references, showing how the statute and scheme discussed by Roman jurists likely pre-existed their elaboration. This is a passage from *Rudens*[17], which narrates a shipwreck and the subsequent finding of a chest full of jewels among the wreckage. The chest is accidentally found by a fisherman in his net.

The shipowner claims the jewels, asserting the ownership. However, the fisherman, with crafty reasoning, argues that it is unthinkable to claim that a fish caught in the sea, belongs to the one who catches it, because the sea is common to all. For the same reason, no one could claim the chest. The argument is evidently specious. The chest has a specific owner and is found in the sea by chance. Beyond these aspects, our interest is on Plautus' precise use of legal terminology (expressions like *adserere manum, occupatio, res nullius*) and the emergence of

[15] Dursi (2019) 5 ff. Around the so-called Roman jusnaturalism, see A. Schiavone, *Ius. L'invenzione del diritto in Occidente*, Einaudi, Torino 2017[2], 275 ff.., who dwells, in particular, on the following texts: D. 1.1.4 (Ulp. 1 *inst.*): *Manumissiones quoque iuris gentium sunt. est autem manumissio de manu missio, id est datio libertatis: nam quamdiu quis in servitute est, manui et potestati suppositus est, manumissus liberatur potestate. quae res a iure gentium originem sumpsit, utpote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi*.; D. 50.17.32 (Ulp. 43 *ad Sab.*): *Quod attinet ad ius civile, servi pro nullis habentur: non tamen et iure naturali, quia, quod ad ius naturale attinet, omnes homines aequales sunt*. D. 1.5.4.1 (Flor. 9 *inst.*): *Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.* D. 12.6.64 (Tryph. 7 *disp.*): *Si quod dominus servo debuit, manumisso solvit, quamvis existimans ei aliqua teneri actione, tamen repetere non poterit, quia naturale adgnovit debitum: ut enim libertas naturali iure continetur et dominatio ex gentium iure introducta est, ita debiti vel non debiti ratio in condictione naturaliter intellegenda est.*

[16] Dursi (2017) 64 ff.

[17] *Rud*. 969 – 975: [Grip.]: *Dominus huic, ne frustra sis, nisi ego nemo natust, hunc qui cepi in venatu meo.*

[Trac.] *Itane vero?* [Grip.] *Ecquem esse dices in mari piscem meum? Quos cum capio, liquide cepi, mei sunt; habeo pro meis, nec manu adseruntur neque illinc partem quisquam postulat. In foro palam omnes vendo pro meis venalibus. Mare quidem commune certost omnibus.*

the argument in the 3rd/2nd century BC that since the sea is common to all, fish are appropriable by anyone, i.e., *res nullius*, which, as we have seen, appears in the jurists active between Hadrian and the Severans between the 2nd and the 3rd centuries AD[18].

It should be noted that the comedy was not aimed at legal audience; rather, to evoke humour, it had to allude to notions and concepts familiar to the audience: otherwise, the play on words and ambiguities would not have worked[19]. Given this, we can advance the well-founded hypothesis that the category of *res communes omnium* existed well ahead of the jurists' elaboration during the peak of Roman jurisprudence. One can also assume that this category and its rules sprung in a customary way and only later they were refined by some jurist who created a very precise statute. It emerges, therefore, that since archaic times, the configuration of the sea as *res communis omnium* aimed to guarantee freedom of fishing and thus to meet this specific economic need.

The discussed scheme is confirmed by the regime of constructions on the shore and the sea. These constructions become the property of those who built them, but the jurists' texts emphasize that this is a peculiar form of occupation, as these buildings are considered *res nullius*. In other words, for the jurists, and especially for Pomponius, the act of building constituted the occupation of the structure, through which the builder became the owner[20]. This is particularly relevant because the construction was not of natural derivation. Thus, these goods aimed to protect specific economic needs.

The issue of constructions also raises the question of the legal status that arose over the structure and the surface on which it rested. Various Roman jurists' texts addressing the issue provide significant clues. Firstly, there is never a reference to *dominium ex iure Quiritium*. Instead, expressions like *eius fiet, meum fiat,* and others indicating a factual situation are used[21].

[18] Dursi (2017) 139 ff.

[19] O. Diliberto, 'La satira e il diritto: una nuova lettura di Horat., sat. 1,3,115-117', *Annali del Seminario Giuridico dell'Università di Palermo* (*AUPA*), 55/2012, 387-402; O. Diliberto, „Ut carmen necessarium (Cic. leg. II 59). Apprendimento e conoscenza della legge delle XII Tavole nel I sec. a C.", in *Letteratura e civitas. Transizioni dalla Repubblica all'Impero* (M. Citroni ed.), Pisa 2012, 141-162.

[20] D. 1.8.10 (Pomp. 6 *ex Plaut.*): *Aristo ait, sicut id, quod in mare aedificatum sit, fieret privatum, ita quod mari occupatum sit, fieri publicum*.; D. 41.1.50 (Pomp. 6 *ex Plaut.*): *Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito*

[21] *Ex multis*, D. 41.1.14pr. (Ner. 5 *membr.*): *Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt*.; D. 43.8.3.1 (Cels. 39 *dig.*): *Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit*; D. 39.1.1.18 (Ulp. 52 *ad ed.*): *Quod si quis in mare vel in litore aedificet, licet in suo non aedificet, iure tamen gentium suum facit: si quis igitur velit ibi aedificantem prohibere, nullo iure prohibet, neque opus novum nuntiare nisi ex una causa potest, si forte damni infecti velit sibi caveri.*

Furthermore, it is often emphasized that the surface on which one built returned to its original state, if the structure collapsed, unlike land where ownership was acquired, which persists regardless of the presence of a building on it[22]. Moreover, the jurist Pomponius[23] informs us that no civil law actions, such as *rei vindicatio*, were available to protect such constructions, but one could also resort to physical means. The jurist Cervidius Scaevola deals with of a house built on the shore as a possessed house[24]. Again, the jurist Paulus[25] informs us that one could resort to the interdict *uti possidetis*, a remedy granted by the praetor to protect possession.

Thus, a peculiar possessory form seems to emerge, as – as we also learn from Papinian[26] - it did not lead to *praescriptio longae possessionis*, a procedural remedy with the consequences of usucapion. It was a possession that never resulted in ownership. The reason for this lies, once again, in the necessity to prevent anyone from being excluded from enjoying such goods.

Regarding constructions, the statute of the category has been established through a progressive differentiation within *res publicae*. Construction on public land was prohibited unless authorized[27], unlike construction on the shore, which was generally free. However, where allowed, construction on *res publicae* imposed an obligation on the builder to pay a periodic *vectigal* to the treasury, as the construction adhered to the land and became *res publica*[28]. Conversely, as we observed, the building on the shore belonged to the builder, as the accession principle did not apply, precisely because there was no owner of the land. Thus, some aspects of *res communes omnium* are defined by differentiation from *res publicae*.

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[22] D. 41.1.14.1 (Ner. 5 *membr.*): *Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem.*; D. 1.8.6pr. (Marc. 3 *inst.*): *in tantum, ut et soli domini constituantur qui ibi aedificant, sed quamdiu aedificium manet: alioquin aedificio dilapso quasi iure postliminii revertitur locus in pristinam causam, et si alius in eodem loco aedificaverit, eius fiet.*

[23] D. 41.1.50 (Pomp. 6 *ex Plaut.*). See *supra*.

[24] D. 19.1.52.3 ((Scev. 5 *resp.*): *Ante domum mari iunctam molibus iactis ripam constituit et uti ab eo possessa domus fuit, Gaio Seio vendidit: quaero, an ripa, quae ab auctore domui coniuncta erat, ad emptorem quoque iure emptionis pertineat. respondit eodem iure fore venditam domum, quo fuisset priusquam veniret.*

[25] D. 47.10.14 (Paul. 30 *ex Plaut.*): *Sane si maris proprium ius ad aliquem pertineat, uti possidetis interdictum ei competit, si prohibeatur ius suum exercere, quoniam ad privatam iam causam pertinet, non ad publicam haec res, utpote cum de iure fruendo agatur, quod ex privata causa contingat, non ex publica. ad privatas enim causas accommodata interdicta sunt, non ad publicas.*

[26] D. 41.3.45pr. (Pap. 3 *quaest.*): *Praescriptio longae possessionis ad optinenda loca iuris gentium publica concedi non solet. quod ita procedit, si quis, aedificio funditus diruto quod in litore posuerat (forte quod aut deposuerat aut dereliquerat aedificium), alterius postea eodem loco extructo, occupantis datam exceptionem opponat, vel si quis, quod in fluminis publici deverticulo solus pluribus annis piscatus sit, alterum eodem iure prohibeat.*

[27] D. 43.8.2pr. (Ulp. 68 *ad ed.*): *Praetor ait: "Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est. de eo, quod factum erit, interdictum non dabo".*

[28] D. 18.1.32 (Ulp. 44 *ad Sab.*): *Qui tabernas argentarias vel ceteras quae in solo publico sunt vendit, non solum, sed ius vendit, cum istae tabernae publicae sunt, quarum usus ad privatos pertinet.*

2. A Final Consideration

Lastly, from the textual reading, it appears that natural goods, or, more specifically, natural resources, belong to everyone, allowing each person to have the minimum necessary for survival. However, this also means that no one could use them in a way that excludes others or even deteriorates the conditions of usability for others. Therefore, no ownership rights could exist over such goods, only forms of *de facto* belonging, compatible with the *usus omnium hominum*.

In conclusion, with due caution, it seems that the category of *res communes omnium* was a legal concept developed by the Romans to prevent the abuse of natural resources.

Perhaps, unintentionally, and despite the lack of modern environmental awareness, it also helped maintain a balance between humanity and nature. To achieve this goal, the Romans forged a category based on the paradigm of inclusion, the opposite of the idea of exclusion on which private property is founded.

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ROMAN LAW AND THE JAPANESE CIVIL CODE: THE COLLECTIVE AND COMMON PROPERTY

Abstract: *Legal systems at European or Latin American level are understood thanks to Roman law, their indisputable source. However, other civil codes also contain Roman law influence, such as the Japanese, Chinese, Turkish, and even Filipino codes.*

The Meiji modernization project is one of the most studied points not only by the Japanese themselves, but also by foreign academics. Specifically, this phenomenon involved importing Western legal institutions into what we know as "the Roman-Germanic tradition".

Throughout this paper I will try to briefly expose the study of Roman law in Japanese universities, taught in Tokyo Kaisei-Gakko since 1874 by an English professor, which continues to this day as a subject different from modern civil law but without forgetting the relationship between both rights.

In this regard, I will make a special reference to the collective and common property in the Japanese Civil Code so that we can analyze its differences in relation to other codes, such as Spanish, as well the influence that Roman law may have in this area.

Keywords: *transfer of ownership, collective and common property, Japanese civil code, reception of Roman Law.*

1. Introduction

When we refer to the "*realm of Roman Law*," we are not speaking of the study of the elementary norms of the Roman positive law (what is referred to in Germany as "*Grundzüge*"), but rather we aim to understand the fundamental institutions regarding law and justice of the Romans who engaged in legal formation. These institutions gave rise to the provisions of Roman positive law, as they constitute the true "principia," the genuine foundations of Roman Law. Schulz thus offers us the starting point for considering Roman Law from a dual perspective: as a set of positive law provisions or as a legal system.

As Professor Fernández de Buján and Professor Cardilli[1] assert, "*Roman Law represents the most paradigmatic legal experience in European history.*" The

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[1] R. Cardilli, "Lo studio del Diritto romano e i fondamenti del Diritto europeo", *Fondamenti del diritto europeo. Esperienze e prospetive",* Università di Trieste, 2019, 57-60.

Roman state expanded over most of the European continent, North Africa, and the Near East of Asia. It served as a cohesive element among various political communities and disseminated Greco-Roman culture.

Therefore, when we refer to "Roman Law," we mean a set of norms and principles created by the Roman people to regulate the relations of its members over time: from the 8th century B.C. to the 6th century A.D., that is, from the foundation of Rome to the decline of the Roman Empire in the West, marked by the so-called Justinian era (527-565 A.D.). This is not a single legal system or an organic integrated system, though it is comprised of norms underpinned by principles that impart dynamism and transcend concreteness. It is not a closed legal system, since we know of its development up to the Justinian era.

Koschaker[2] notes that the scientific and cultural superiority of Roman Law is particularly evident in the reception of the Romanistic system in cultures and systems as distinct from the European as Japan. According to Koschaker, "*When Japan became Europeanized, despite maintaining very intense cultural relations with the U.S., it did not adopt Anglo-American Law, but rather the French Civil Code and, above all, the drafts of the German Civil Code.*"

As we will see, the Western legal system penetrated Japan through its contact with European codes, following the work of commissions of experts, academics, and legal professionals, including judges and professors responsible for the interpretation and translation of these codes.

In the present article, we analyze an example of current Japanese law in the field of property transfer. Although Japanese civil law regulation is heavily influenced by German law, we have found it interesting to note the break in this connection in the subject under study. Throughout these pages, we will attempt to explain not only the causes but also the system followed by the Japanese Civil Code and its consequences.

2. The Japanese Civil Code and Real Rights

Japanese scholars Kenjiroh Ume, Yatsuka Hozumi, and Massakira Tomii were responsible for the final drafting of the Japanese Civil Code, which came into force in 1898 and has been modified several times. None of them were Roman law experts, but Ume and Tomii, in particular, had extensive knowledge of Roman law, as their doctoral theses defended in Lyon were solidly based on this subject[3].

When reviewing the history of Japanese codification, we obtain a first impression that there was a polarization between French and German codification. The very fact that the codification efforts were interrupted and a shift towards

[2] P. Koschaker., *Europa y el Derecho romano*, Madrid, 1955, 22-39.

[3] M. Stolleis, *Juristen: ein biographiches Lexikon; von der Antike bis zum 20 Jahrhundert,* München, C.H. Beck, 295, 618 – 627.

German law occurred fueled this idea of confrontation between the two legal traditions. Thus, we encounter Kitagawa's opinion: "*The Civil Code is a product of the reception of elements from various foreign codes, the most important being the French and the German*."

Kitagawa[4] explains that "the history of modern civil law in Japan can be divided into three phases. In the first phase, the 'era of commentaries,' the first efforts were made to comment on the Japanese Civil Code using tools from other Western codes. The second phase, known as the *'development of a reception theory*,' occurred at the end of the Meiji Era and until World War I, where the dogmatic construction of civil law was done according to the German model. In the third phase, or 'era of comparative law,' Japanese comparativists stopped emphasizing German law excessively and began to use various local and foreign legal systems equally."

Regarding real rights, Professor Fernández de Buján[5] asserts that "*the expressions real right, ius in re, and real rights over another's property (iura in re aliena) are not properly Roman, but are the result of the dogmatic elaboration by medieval interpreters, who coined them based on expressions contained in Roman texts. What is genuinely Roman is the distinction between real rights or credit rights, or rights of obligation*."

Real rights are constituted as a power that directly projects over a thing, as in the case of ownership, or over someone else's property, as with servitude. Thus, the holder of the real right has power *erga omnes*, against any person. In Roman law, real rights are governed by the *numerus clausus* system, which implies that the rights protected by real actions are: ownership, servitude, usufruct, use, habitation, emphyteusis, superficies, pledge, and mortgage. Outside of this list, we do not find other real rights in the sources.

Regarding real rights (物権, *bukken*) in Japan[6], these refer to the rights a person can have over a thing, whether movable or immovable. They are divided into ownership rights and limited rights. This indicates that, in some way, although with different terminology, ownership is the quintessential real right, and the rest have some type of limitation[7].

[4] Z. Kitagawa; K.Riesenhuber, *The identity of German and Japanese Civil Law in Comparative perspectives,* Gryyter Press, 2007, Germany, p.5- 6; T. Kinoshit, "Legal System and Legal Culture in Japan, en *Zeitschrift für Japanischs Recht,* Bd. 6, Nr. 11, 2001, 8 indicate's *"Japanese law is part of the Romano-Germanic family of law, with some elements of US law"*. K. Zweigert and H. Kötz , *"Einfürhrung in die Rechtsvergleichung auf dem Gebiete des Privatsrechts"*, 1996, 65. *"It is true that for a long time the many codes which were enacted in Japan based on the European model had very little influence on the realities of legal doctrine there, but it now appears that the traditional distaste for written rules of law and litigation is so much on the wane that it can no longer be classified in the family of oriental systems";* In the same ssense, R.David, *"Los grandes sistemas jurídicos contemporáneos"*, Aguilar, 1969, 16.

[5] A. Fernández de Buján, *Derecho romano,* Dykinson, 2023, 280 - 285.

[6] M. Dernauer, "La Ley civil", *Japón. Una visión jurídica y geopolítica en el siglo XXI, http://ru.juridicas.unam.mx:80/xmlui/handle/123456789/57209.* Last visited on 12 July 2023, 141-145.

[7] A. Fernández de Buján, ídem., 280 -285. cites the limitations of the landlord as foreseen in the texts and of religious, social, urban, neighbourhood relations, aesthetic content, with criteria of public utility, etc., all of

Regarding the limitations of ownership in our legal system, these can only be for two reasons: either for the general or public interest, or in the interest of individuals in the case of neighboring property owners, where there must be an agreement between the parties to ensure that the limitation causes the least possible harm.

If we look at the Japanese Civil Code, we initially notice that it adopted the German Pandectist system. However, according to Hayashi[8], "for those familiar with Gaius or Justinian's Institutional system, the way the Japanese Civil Code deals with real rights is somewhat strange: people are considered subjects of rights and things as objects of rights, and both are clearly defined in Part I General Provisions. Then, Part II 'Real Rights' covers the matter in detail. In any case, the modes of acquiring and losing ownership are treated in Part III Obligations and Part V Inheritance Law" (arts. 555, 176 and following, 896 and following regarding succession transfer).

Perhaps the reason for this diverse division compared to other consulted codifications is that the Code establishes that ownership is transferred merely by consent, as in the French Code. Therefore, they might understand it more appropriate to treat it in the context of sale rather than in real rights, although the reality is that, even in a mere sale, this contract, in Japanese law as in French law, transfers ownership, which is clearly a real right.

It is noteworthy that the architects of the Japanese Civil Code and its subsequent modifications did not detect (and have not until now) the current concept of the distinction between real rights and rights of obligation, which governs all civil law in both Europe and Latin America. However, it is the Second Book that contains most of the Japanese property law. The principles that govern it are fundamentally the absolute (*bukken* no *zettaisei*) and exclusive (*bukken* no *hitasei*) nature of real rights, the determination of such rights based on the law (*numerus clausus,* art. 175[9]), and the necessity of determining the property as the object of a real right. Both movable and immovable properties are subject to real rights. Moreover, there is a subdivision into full ownership rights (*shoyū-ken*), limited real rights (*seigen* bukken), and possession (*senyū-ken*)[10].

Lastly, the Japanese Civil Code states that ownership of property is transferred through contracts and other specific legal acts. The most common method for transferring ownership is the contract of sale.

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them from the classical stage and subsequent periods, and which show that restrictions on the exercise of their right by the owner, especially in relation to real estate, are subject to a process of continuous development, which manifests more attenuated in the first centuries, and with greater emphasis in later centuries especially in post-classical and justinian times

[8] T. Hayashi, "El Derecho romano y el Código Civil en el Japón moderno", *Revista chilena de derecho, vol. 36, nº 1, 2009*, 11-13.

[9] Art. 175: *"Real rights may not be acquired, modified or lost except as provided by the law".*

[10] M. Dernauer, "La Ley civil", in *Japón. Una visión jurídica y geopolítica en el siglo XXI,* http://ru.juridicas.unam.mx:80/xmlui/handle/123456789/57209, 141-145.

3. Transfer of Ownership in the Japanese Civil Code

Regarding real rights, the Japanese legislators of 1889 did not adopt the German principle of abstraction (*Abstraktionsprinzip* §929 BGB) but inclined toward the French spiritualist principle of property transfer (art. 176 JCC), where the principle of constitution and transfer of real rights by mere declaration of will is enshrined. This is one of the most important points where the influence of the French Code over the BGB is evident[11].

Therefore, it is clear that in the matter of transfer of ownership, the Japanese moved away from the Germanic theory to follow the French and its "spiritualist" spirit.

As provided by art. 206 of the Japanese Civil Code, "*the owner has the right to use, enjoy, and dispose of their property within the limits of the law and regulations*." This trilogy (use, enjoy, and dispose) is sometimes attributed to Roman law, especially by Japanese civilists. However, the Japanese Romanist Harada already warned in 1937 that the legal maxim "*Dominium is ius utendi et abutendi re sua, quatenus iuris ratio patitur*" belongs to the 16th century at the earliest[12].

Indeed, after the discovery of the manuscript of Gaius *Institutions* in Verona in 1876, we highlight that in Gaius II, 20 the requirements for the transfer of ownership are delivery, justa causa, and the property of the transferor, which Gaius generalizes in 2,62-64 when talking about potestas alienandi. But curiously, in the classic Japanese version of Gaius' Institutions by Funada, we find the error in translating potestas in Gaius 2,62 as *noryoku*, which technically means capacity. Instead, potestas alienandi should be translated as *shobunkenryoku* or better as *shobunkengen*, but never as *shobunnoryoku*[13].

In any case, the right of ownership is the full right over a thing. We do not find a definition of ownership in the Roman sources. The reason for this, according to Miquel[14], is that Roman jurists felt an aversion to abstract concepts, so they tended to approach problems from the perspective of action. On the other hand,

[11] R. Domingo; F. Barberán, *Código civil japonés, Navarra, Aranzadi,* 2006: 9 - 11 They cite aspects incorporated into the Japanese Civil Code (CC jap.) independently of the BGB: the apparent representation in Article 109 of the Japanese Civil Code is inspired by Article 33.e of the Swiss Code of Obligations; the mandate in Article 656 of the Japanese Civil Code also derives from the Swiss Civil Code. Article 599 of the Japanese Civil Code, which considers the death of the borrower as a cause for the termination of the loan, is also inspired by the Code of Obligations (Article 311), unlike the provisions of Article 1879 of the Code from which our Article 1742 of the Civil Code originates The doctrine of the abstract real contract, which was adopted in the BGB, has no basis in Roman sources. In Spain, it has been practically eradicated since the 1980s.

[12] T. Hayashi, ídem., 2009, 12.

[13] J. Miquel, Derecho romano, Marcial Pons, 2016, 1- 5.

[14] J. Miquel, Derecho romano, 167- 170. He states that, although we do not find any definitions in Roman sources, we do find multiple Roman law definitions in Common Law. For him, a famous definition of property is the following: "Ius utendi et abutendi, quatenus iuris ratio patitur" (The right to use and abuse the thing as far as the reason of the Law permits). However, he acknowledges that it is the German Pandectist School in the 19th century that develops the concept of property that best suited the needs of a society in the midst of the industrial revolution, characterized by abstraction and elasticity. This is why it is often said that property is the "most general dominion, in act or potential, over a thing".

there was a difficulty in encompassing the various forms of ownership within a single definition, although for the Professor, this argument is less convincing.

Indeed, according to art. 206 of the Japanese Civil Code[15], the right of ownership is the full right over a thing. The owner can do whatever they wish with the thing, use it, benefit from it, or dispose of it. It is considered a real right (*buk-ken-teki seikyū-ken*) that implies a real right to reclaim the thing against an unauthorized possessor, but it is debated whether it also includes a right to prevent and eliminate disturbances or interferences with the property[16].

Already, art. 175 establishes the *numerus clausus* system for real rights. Thus, the Japanese Civil Code regulates, apart from possession, within the scope of real rights, ownership, superficies, emphyteusis, servitude, retention, the right of privilege, pledge, mortgage, and the genuine Japanese right of iriai as a right of communal use[17].

Evidently, if we consider art. 176[18], we appreciate that ownership is acquired through the contract of sale and is realized simply by the declaration of will of the parties. Additionally, in the case of immovable property, the registration of the acquirer as the owner in the property register is required (art. 177)[19]:

Art. 177: "*The acquisition of real rights over immovable property cannot be asserted against third parties unless the right is registered in the property register, except as otherwise provided by the law.*"

This implies that in Japanese law, real rights can be acquired or lost solely through the agreement of the involved parties, without the need for an additional act or formality, such as physical delivery or registration, although the latter may be required for publicity purposes against third parties. Without this registration, the rights cannot be asserted against other people.

It is noteworthy that this stance indicates that the legal text establishes the effects of ownership transfer and, thus, adheres to a consensualist or spiritualist theory, akin to the French tradition, distancing itself from the Germanic tradition. This marks a clear divergence from the Germanic system, which requires both the agreement and the transfer for ownership to be transferred.

In summary, the Japanese system follows a consensualist theory of ownership transfer, focusing on the agreement between the parties. This contrasts with the Germanic system, which requires both the agreement and the transfer of the object for the ownership to be transferred. This approach reflects the French

[15] "*.The owner has the right to use, enjoy, and freely dispose of the thing they possess, within the limits of laws and regulations*".

[16] H.Nemoto "Gundlagen des zivilrechtlichen Beseitungs- und Unterlassungsanspruchs in Japan", *Zeitschrift für japanisches Recht/Journal of japanese Law, vol. 20, nº 40, 2015. 193 – 209.*

[17] S. Cámara Lapuente, "Estudio preliminar, traduction y notas al Código civil japonés", review from R. Domingo; N.Hayashi, Anuario de derecho civil, Vol. 54, nº 2, 761-77, Madrid, 2000, 323 - 325.

[18] Art. 176 Cc jap.: *"La adquisición y la pérdida de derechos reales tienen efecto por sola la manifestación de la voluntad de las partes."* https://www.japaneselawtranslation.go.jp/en/laws/view/4275

[19] M. Dernauer, 142 indicates that the registration of in the real estate register (of land and buildings) is regulated by the law on registration in respect of immovable property (*Fudōsan tōki-hō*), Ley nº. 123/2004.

influence on the Japanese Civil Code, emphasizing the importance of the parties' intention and agreement in the transfer of ownership.

As Dernauer points out, there can be legal issues related to the assignment of property, if a new transfer of property is made without the proper registration and delivery of the item. The same would occur if the item were acquired by persons without the right to do so.

Another issue would be the delivery of a movable item, if there were good faith regarding the ownership or the seller's right to dispose of it. In this example, protection of good faith is generated in favor of the acquirer; in the case of immovable property, no similar protection is apparent.

We can include Article 94.2 of the Japanese Civil Code, where jurisprudence protects, under certain conditions, the acquisition of property in good faith from a registered but unauthorized seller[20]:

Article 94: "*A false declaration of intention made by a person in collusion with another is null and void.*"

Article 94.2: "*The nullity of a declaration of intention pursuant to the preceding paragraph cannot be duly asserted against a third party acting in good faith.*[21]"

In other words, if someone knowingly makes a false declaration, such declaration will be invalid, but this nullity will not affect third parties who acted in good faith and without knowledge of the falsity.

Indeed, according to Zufall[22], this issue originates from the historical context of the distinction between the influence of the German BGB and the French Code on the Japanese Civil Code: whether priority should be given to the parties' will or to the protection of legal transactions in the transfer of property. To answer this question, we must look primarily at the French Civil Code.

At the same time, it is important to highlight the significance of trust between the parties in a relationship. As René indicates, the binding force of the contract is founded on this trust, on the friendly ties that unite the parties. The clauses of the contract must be agreed upon by the parties, and jurisprudence itself speaks of "the relationship of trust" that allows for both flexible application of contractual obligations and the protection of the weaker contractual party. Good faith? Indeed: Japanese jurisprudence has thus allowed good faith to play an essential role in private law[23].

[20] F. Zufall, "Das Abstraktionsprinzip im japanischen Zivilrecht", *Zeitschrift für japanisches Recht, Journal of japanese law, vol 15, nº 29, 2010, 202-212.*

[21] https://www.japaneselawtranslation.go.jp/en/laws/view/3494/en. *Last visited on 12 July 2023.*

[22] F. Zufall, 202. "*Die Diskussion konzentriert sich auf die Auslegung des § 176 ZG2, der die Übertragung dinglicher Rechte regelt (C.). Dem vorgelagert ist die Frage nach der Notwendigkeit eines Publizitätsmittels für die Übertragung (C.I.). In konstruktiver Hinsicht ist die Annahme einer getrennten dinglichen Einigung (C.II.) erst Bedingung für deren Abstraktion.*"

[23] R. David, *"Los grandes sistemas jurídicos contemporáneos",* Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2010, 413-416.

3.1. The French Civil Code on Property Transfer

To answer the question, Pérez Álvarez[24] believes that the study of property transfer systems must be preceded by a historical-legal study, both in practical and legislative and doctrinal terms, given that in this matter, "*scientific elaboration decisively influenced the institutional configuration and ultimately the positive regulation adopted by the various national Codes*."

Therefore, to explain this topic, we must start with Roman Law, which is the set of legal norms in force during the different stages of the Roman political community. In the words of Professor Fernández de Buján[25], "*it is the legal system that has achieved the highest degree of perfection in the history of humanity, not only because of the justice of its contents, but also because of the perennial technique and logic of legal argumentation*."

In Roman Law, a distinction was made between res mancipi and res nec mancipi. For the former, mancipatio (a formal legal transaction of archaic origin) was required and was only intended for Roman citizens. Over time, mancipatio transformed into an imaginary venditio used, as Díaz Sazo[26] points out, in Classical Law for various purposes, such as the transfer of ownership of res mancipi. The Roman expansion and the massive influx of foreigners prevented them from accessing mancipatio as a form of transferring ownership of mancipable goods.

In contrast, res nec mancipi ownership was transferred by mere traditio, a derivative mode of acquisition of ownership that refers to the simple delivery of the item.

Since non-Roman citizens could not access mancipatio, they acquired ownership through traditio and usucapio[27].

It is worth noting, as Díaz Sazo points out, the relationship of the usucapio of the good faith possessor with the French system of mere consent. In this sense, he cites Bucher[28], who asserts that "*France is an exception to the system implemented in Roman Law, because it is based on the consensual principle that implies the transfer of ownership by mere conclusion of the contract and denies that the French system derives from the spiritualization of the Roman traditio*."

[24] M: P. Pérez Álvarez, "La compraventa y la transmisión de la propiedad. Un estudio histórico-comparativo ante la unificación del Derecho Privado europeo", *Revista Jurídica Universidad Autónoma de Madrid, nº 14, 2016, 202 - 205.* addresses in depth the issue of the transfer of property from its origins to the present. The author analyzes not only the romanistic bases with rigour but also in European law.

[25] A. Fernández de Buján, A., "Tradición romanísitica", *Revista General de Derecho Romano, nº 36,* 2021, 1-3.

[26] V.D.Díaz Sazo, "La transmisión de la propiedad en el Derecho francés", *Revista General de Derecho romano, nº 32, 2019, 3 - 5.,* article in which the author makes an in-depth study of the subject starting from Roman law and demonstrating extensive knowledge of the subject and with extensive bibliography and sources that clarify the transfer of property in the French Civil Code that is really influencing in the Japanese Cc in the field of study.

[27] V.D.Díaz Sazo, 4 - 8. indicate the requirements for the transfer of ownership through traditio: *iusta causa traditionis,* mode of *traditio* or physical delivery. In the classical period, there are two types of *usucapio*: that of the bonitary owner and that of the possessor in good faith.

[28] E. Bucher, "Die Eigentums-Translativwirkung von Schuldverträgen: Das Woher und Wohin dieses Modells des Code Civil" *Zeitschrift für Europäisches Privatrecht (ZEuP), 1998,* 615

Conversely, Díaz Sazo cites Planiol, who defends the position of transferring ownership by mere consent, deriving from Roman tradition, specifically traditio brevi manu or longa manu, as mere examples.

All this leads us to conclude that different forms of property transfer can coexist[29]:

- By mere consent of both parties without the need for traditio (French system). The material act of delivery is waived, as is publicity. Therefore, the acquirer is more protected, since the property is transferred solely by consent, and from that moment, the acquirer has the reivindicatory action in their favor.

- Separating the system of property transfer from its cause (German system). The transfer is understood to be effected through an abstract real contract based on the agreement of the parties to transfer and acquire ownership. Registration is required for immovable property and delivery for movables. The acquirer is essentially protected in the interest of legal certainty and real estate credit.

- Other cases where both a contract and traditio are required (Spanish, Austrian systems, among others)[30].

Article 544 of the Napoleonic Civil Code states that "*property is the right to enjoy and dispose of things in the most absolute manner, provided that no use is made of them prohibited by laws or regulations.*" Brahm García[31] interprets this provision as having a predominantly subjective character, the most suitable for enabling development of the economic liberalism advocated by the bourgeois sectors that took control of France with the Revolution. Thus, it is concluded that the French legislator did not intend to establish an absolute, exclusive, and perpetual right, but to end the property structures of the old regime with the authorization of the State under the sign of equality[32].

For Savigny[33], the right of ownership is not just the "absolute and unlimited dominion that a person has over a thing," but he also asserts that "ownership and obligation extend the dominion of our will over a portion of the external world." Therefore, ownership is based on the free will of the owner as a person, apprehending the thing as a relationship of subject to object: the law of freedom determines the right of ownership.

Thus, for the Napoleonic Code system, territorial property is transferred by mere consent of the parties. Real contracts themselves produce an obligation to give that is understood to be executed as soon as it appears; its birth is the sign of its extinction. Everything is reduced to a mentally executed operation. The tradition that may or may not follow the agreement is a simple fact that does not

[29] M.P. Pérez Álvarez, 223-224.

[30] V.D. Díaz Sazo, 9.

[31] E. Brahms García, "El concepto de propiedad en el Código Napoleónico", *Revista chilena de Derecho, Vol. 23, nº 1,* p. 7.; F. Tomás y Valiente, Manual de Historia del Derecho, Madrid, 1990, 478-480.

[32] In this sense, E. Laboulaye, *"Histoire du droit de proiètè foncière en Occident,* París, 1839, 59, maintained in 1839 that *"the right of property is a social question*" for it, proper of a man inserted in society.

[33] F.K von Savigny, in *"Sistema del Derecho Romano Actual"*, Madrid, 1879, 53-56.

have the virtue of making the acquirer the owner but simply putting them in a position to use the thing.

In conclusion, in the French system, property transfer arises by mere consent of the parties, without the need for the material delivery of the item, as opposed to the German abstract real contract system, forming two exceptions to what was applied for centuries in common European law with the theory of title and mode.

For Díaz Sazo, the evolution of the French system is not progressive, as its antecedents are found in the studies of French Natural Law authors until the arrival of Napoleon. It was at this moment that the consensual system was codified with the Civil Code of 1804[34].

While these are the positions we find, the question we can now ask is what happens in Japanese law? Does it follow the BGB as in other matters, or does it align with the French law trend?

To answer this question, we follow Domingo's opinion[35], which we understand to be the appropriate one: it would not be correct to understand that the Japanese Civil Code is more or less influenced by the BGB and, in some aspects, like the one we are dealing with, by the French Civil Code. Rather, it should be stated that not only did both codes influence the content of the Japanese code, but it is also inspired by other codes, all of which have their roots in Roman Law. Therefore, we can assert without fear of doubt that the Japanese Civil Code is an example of codification influenced by Roman Law through the various European codifications with Romanistic bases.

In other words, and in line with Bueno Delgado[36], "*it is essential to study Roman Law to understand the content of the Civil Code and German Civil Law; and not only German, for Roman legal principles underpin the solutions formulated in the Napoleonic Civil Code of 1804, one of the most important events in the history of modern European law, later adopted by the Spanish, Italian, Dutch, Portuguese, Belgian Civil codes, etc., and even influenced, through these codes, the codes of other continents' states; for example, the French system inspired the civil codes of almost all Latin America, or states such as Louisiana in the United States, Quebec, Egypt; the civil codes of Japan or Brazil, for example, were strongly influenced by the German Civil Code, etc. The phenomenon of codification facilitated the penetration of Roman Law, of the Roman spirit, into territories where it would have been unthinkable before.*"

In conclusion, while the Japanese Civil Code follows a parallel line to the BGB and other codes of Romanistic influence, in the area of property transfer, the

[34] V.D Díaz Sazo, 9 - 10. makes a study on Conducts an in-depth study of the two systems: the German and the French. This study highlights the different positions of the Romanists Bucher and Planiol or Wieacker (who refer to authors of Rationalist Natural Law such as Grotius or Pufendorf).

[35] R. Domingo, 270 believes that the opinion of the legislative commission was eclectic. To demonstrate this, he cites some examples such as the regulation of compensation (arts. 505-512 Cc) where the legislator took into account not only German law but also French (art. 6 of the Code and §134 of the BGB.

[36] J.A. Bueno Delgado, "La importancia de un Derecho histórico, el Derecho romano, como base de un Derecho europeo común", *Revista General de Derecho Romano, nº 21, 2013.*

predominance of the French Code is clear. Both follow the consensual theory with the possibility or recommendation in certain cases of registration as a guarantee.

4. Basic Structure of the Japanese Co-Ownership System

Co-ownership can be established through juristic action, such as through a contract or legal provisions on accession (§ 244), mixture (§ 245), inheritance, marriage, etc. Japanese civil code, which follows the Pandekten system, regulates co-ownership with general rules found in § 249 to § 264 of Part II (Real rights)[37].

One of the foremost representatives of Germanism in Japan was Yoshitaro Hirano[38], who began his academic career as a professor of civil law and evolved into a Marxist-oriented legal theorist and political activist. In his first book, titled "Minpoh ni okeru Roma-Shisoh to German-Shisoh" (Roman and German Thought in Civil Law), he delivers a strong critique of the pandectistic nature of the Japanese Civil Code, basing his argument primarily on Von Gierke and secondarily on Anton Menger. Alongside his critique of property, he is particularly harsh regarding the treatment of co-ownership in the provisions of the Japanese Civil Code.

Article 249–§ 264 of Part II are common rules to regulate when two or more persons own one thing, referred to as 'joint ownership' or 共有 (kyōyū) in Japanese. The 16 provisions (§ 249–264) regulate internal relationships between co-owners and external relationships with third parties.

First, the co-owners' shares are presumed to be equal in principle (§ 250). When a property is in co-ownership, each co-owner may use the entire property in proportion to their share (§ 249), but no co-owner may make any alteration to the property without the consent of the other co-owners (§ 251). There are no provisions on the disposal of shares, but according to the principle of freedom of disposal of ownership by the owner, disposal of individual shares of each co-owner is allowed.

While there is no provision in the Japanese civil code, scholars have determined that this can be assumed from the intention of the legislation[39]. The particulars of the management of a co-owned property are determined by a majority agreement in accordance with the value of the shares of the co-owners, except for cases of alteration to the property (§ 252).

However, any of the co-owners may perform acts of preservation alone (§ 252 proviso clause). Each co-owner is responsible for the expenses of management and bears burdens regarding the property in co-ownership in proportion to their share.

[37] M., Kim, 2021, "The system of co-ownership in Japan" *Vestnik of Saint PetersburgUniversity. Law 2,* 375.

[38] Y. Hirano, *Minpoh ni okeru Roma-shisoh to German-shisoh* [El Pensamiento Romano y el Pensamiento Alemán en el Derecho Civil] ,Tokio, Yuhikaku,1924, 165-189.

[39] T. Kawai, 2007. *Japanese Civil Law Annotated*, vol. 7: Real Rights. 2nd ed. Tokyo.

If a co-owner does not fulfill their obligations for one year, the other co-owners may acquire that co-owner's share by paying them reasonable compensation (§ 253), and if one of the co-owners holds a claim against other co-owners with respect to the property in co-ownership, the claim may be exercised against their successors (§ 254).

If one of the co-owners waives his or her share or dies without an heir, the waived share belongs to the other co-owners (§ 255). Each co-owner may demand partition of the property in co-ownership at any time. However, this does not preclude a contract agreeing not to partition the property for a period not exceeding five years (§ 256.1). This contract may be renewed within five years (§ 256. 2).

If no agreement is reached among co-owners with respect to the partition of property in co-ownership, a request for the partition of the same may be submitted to the court (§ 258, para 1). If the property in co-ownership cannot be partitioned in kind, or it is likely that the value thereof will be significantly reduced by the partition, the court may order the sale of the same at auction (§ 258. 2).

If one of the co-owners holds a claim regarding co-ownership against other co-owners, upon partition, the portion of the property in co-ownership that belongs to the obligor may be appropriated for the payment of the same (§ 259. 1). If it is necessary to sell the portion of the property in co-ownership that belongs to the obligor in order to obtain the payment referred to in the preceding paragraph, the obligee may demand the sale of the same (§ 259. 2).

A person who holds a right to the property in co-ownership, or a creditor of any of the co-owners, may participate in partitions at their own expense (§ 260. 1). If, despite the request for participation, the partition occurs without allowing the participation of the individual that submitted the request, that partition may not be duly asserted against the person that submitted the request (§ 260. 2).

After partition, each co-owner must provide the same warranty as that of a seller in proportion to each co-owner's share with regards to the property that the other co-owners have acquired from the partition (§ 261). Additionally, there is a concept called 'quasi co-ownership' that, unless otherwise provided by laws and regulations, requires that if two or more persons share property rights other than ownership, the provisions of this section shall be applied mutatis mutandis (§ 264).

Otherwise, a regulation in Part III "Claims" on partnership defines the property to be co-owned by all partners (§ 668). Part IV "*Relatives*" explains that a married couple's property follows the same principles of an individual's property; however, when the property does not clearly belong to either the husband or the wife, it shall be presumed to be held in co-ownership (§ 762). Article 898 in Part V "Inheritance" regulates that if there are two or more heirs, the inherited property shall belong to those heirs in co-ownership. The Japanese also refer to this as 共有 *(kyōyū*), exactly the same term as in Part II. Otherwise, there is no

provision in the Japanese civil code on the property of unincorporated association, but judicial precedents have applied a theory that approves another type of co-ownership, called 総有 (*sōyū; 'Gesamteigentum'* in German)[40].

Tomoyoshi[41] takes community rights (*iriai-ken*) as an example. The recent resurgence in interest in community rights (*iriai-ken*) among civil law scholars and sociologists is termed the "*Renaissance of Communities*." These rights, historically rooted in customs allowing rural residents to use forest resources, are briefly regulated by the Japanese civil law, leaving detailed regulation to local customs through two articles:

- Art. 263: Applies to community rights with the nature of co-ownership, alongside local customs.

- Art. 294: Applies to community rights without the nature of co-ownership, alongside local customs.

Historical context shows these rights were affected by the Meiji Restoration and subsequent reforms, which divided land into public and private and allowed the government to retain forest ownership, unless private ownership was proven. The Japanese Civil Code of 1898 significantly altered these traditional rights.

Hirano's[42] criticisms of the Roman notion of co-ownership highlight the inadequate protection of community rights in the Japanese Civil Code, justifying the dispossession of older rights. However, not all of Hirano's critiques were historically accurate.

Civil law scholar Yoshioka recently analyzed the legal theories of the Meiji period regarding community rights, focusing on the work of Koru Nakata.

5. Conclusions

In summary, Roman law's influence extends beyond European and Latin American codifications, reaching Asian codifications such as the Japanese Civil Code. While the Japanese Civil Code is often cited as being influenced by the German BGB, this is not entirely accurate. Roman law principles are evident, especially in the distinction between the transfer of ownership of "*res mancipi*" and "*res nec mancipi*," which helps explain the difference between the German "*Abstraktionsprinzip*" and the French *spiritualist* principle. The latter principle allows the transfer of real rights by mere declaration of will, unlike systems requiring delivery and registration.

The Japanese Civil Code incorporates Roman law interpretations in property transfer, showing its clear backing by Roman law, similar to European and

[40] M. Kim, "The siystem of co-ownership in Japan" *Vestnik of Saint Petersburg University, Law 2, 374-377.*

[41] H., Tomoyoshi, El Derecho romano y el código Civil en el Japón moderno, en *"Revista Chilena de Derecho, Vol. 36 nº 1*, 16-17.

[42] Y. Hirano, *Minpoh ni okeru Roma-shisoh to German-shisoh* [El Pensamiento Romano y el Pensamiento Alemán en el Derecho Civil] ,Tokio, Yuhikaku,1924, 165-189.

Latin American codifications. This influence is also seen in tort liability (Art. 709), contractual freedom (Article 6), and *l'action oblique (*Art. 423). Furthermore, the Swiss Code of Obligations inspired parts of the Japanese Civil Code, supporting the theory that the Commission studied various Roman law-influenced codifications to create a Westernized Civil Code.

Co-ownership in Japan can arise through contracts or legal provisions, with general rules outlined in §§ 249-264 of Part II of the Japanese Civil Code. The code regulates internal and external relationships among co-owners, presuming equal shares unless otherwise stated, and allowing the use and management of co-owned property in proportion to shares. Disposal of individual shares is permitted, and the code outlines the management of co-owned property, partition procedures, and the responsibilities and rights of co-owners.

German legal theorist Yoshitaro Hirano critiqued the pandectistic nature of the Japanese Civil Code, particularly its treatment of co-ownership, influenced by Von Gierke and Anton Menger[43]. He emphasized the inadequacy of the code in protecting traditional community rights (iriai-ken), which are briefly regulated and significantly altered by the Meiji Restoration reforms and the Japanese Civil Code of 1898. Despite Hirano's criticisms, recent analyses by scholars like Yoshioka focus on the legal theories of the Meiji period, highlighting the complex evolution of community rights in Japanese civil law.

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[43] O. von Gierke, Political Theories of the Middle Age. F. W. Maitland (trans.) Boston: Beacon Press, 1958

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COLLECTIVE ASPECTS IN ROMAN LAW MODELS OF 'PRIVATE OWNERSHIP'

Abstract: *Nowadays it is generally believed that people have rights on things, which makes things merely at the disposal of people's will. Under the influence of this mentality, notwithstanding that some scholars have hinted at the fact that this approach is heavily influenced by a certain ideological setting that has taken shape in the last centuries, it is still possible to find scholars who maintain that the relationships between persons and things, also in Roman law, were regulated in such an 'individual will centered' approach as the one we use today. However, it is not difficult to find elements that disclose how the Roman mentality - and the related regulations - have considered this relationship from a different perspective. In fact, as many evidences suggest, a very relevant role in the relationship between persons and things was played by the family, so that - although to a different extent throughout the time - even what could seem to be somehow similar to the nowadays 'private ownership', should nonetheless be considered within the scheme of a family based community that may be framed as a kind of a 'collectivisme consanguin'.*

Keywords: *Individual Ownership, Collective Ownership, Paterfamilias, Ius abutendi, Legal Grammar, Mentality.*

1. Introduction

It is generally believed, even by leading scholars, that today's forms of 'private ownership'[1] and their main features are related to the 'private ownership' in Roman Law[2].

Nonetheless, if we abandon the law's *Isolierung* approach as well as the too formalistic approach, and we do consider the relevance of the connection between the way the law may regulate the people-thing relationship in terms of ownership and the mentality of a certain society in a certain time and in

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[1] In this paper "ownership" has been chosen to render the latin words *dominium*, *proprietas*, in *bonis habere* etc. since it seems to be the best possible choice among the options offered by the English language, see for instance the entries for "*Property right*", "*Real right*", "*Ownership*", "*Bonitary ownership*", "*Naked ownership*" etc. in B. A. Garner (ed. in chief), *Black's Law Dictionary*, St. Paul (MN), 2009, respectively at 1437 and 1215.

[2] See for instance P. Grossi, *Assolutismo giuridico e proprietà collettiva*, available in P. Grossi, *Il dominio e le cose*, Milano, 1992, at 732 and following pages.

a certain place[3], the above-mentioned belief does immediately show its fallacies.

If on the one hand, in Rome, over the centuries, largely thanks to the contribution of the Roman jurists, it has been outlined a set of legal tools which bear a high degree of universality, legal tools that have been considered as a kind of a "legal grammar"[4], the 'building blocks' of the law; on the other hand, due to the limits of the formal expressions and the related systems[5], also when employed in the law[6], due to the influence of the relevant anthropology related vision of the human being in the world, the connection between the law and the more specific interests of human beings or groups of them[7] and so on, it has to be taken into account the fact that it is not possible to keep the law away from the influence of culture, values shared within a certain community and the like[8]. Hence, it is not possible to avoid the influence of a certain mentality shared among the members of a given community about the law, an influence that in some fields, such as the field of ownership, can be quite strong, to the extent that it has been maintained that "ownership is mainly mentality"[9].

Scholars have come up with such a statement by observing the shift, in the mentality and in the ownership regulation, from the Middle Ages' conception towards the 'modern', 'individual will centered', models of ownership[10].

However, it is quite difficult to think that such an 'individual will centered' approach (either based on the will of a natural person or the one of a legal person, including the the state), as the one in a fair amount of jurisdictions the rules of ownership are built on, could be exactly the same as the Roman approach, despite the fact that, when in the last centuries this 'individual will centered' approach has been gradually shaped, in order to give it authority, it has been connected to the Roman Law[11]. The reference to the Roman law in order to provide authority to these new models of ownership did actually bring about, among others, a further consequence: the Roman Law sources started being interpreted in an ideological-

[3] See for instance the remarks put in place in P. Grossi, *La proprietà e le proprietà nell'officina dello storico*, available in P. Grossi, *Il dominio e le cose*, Milano, 1992, at 620 – 621 and 625.

[4] See P. Birks, *Foreword: Peter Stein, Regius Professor of Civil Law in the University of Cambridge, 1968-1993*, in A.D.E. Lewis, D.J. Ibbetson (eds.), *The Roman Law Tradition*, Cambridge, 1994, at xi. See also U. Eco, *Trattato di semiotica generale*, Milano, 2016, at 230; P. Grossi, *La proprietà e le proprietà…*, at 621; S. Porcelli, *Diritto e logica. Da Roma alla Via della seta*, in *Roma e America. Diritto romano comune*, 39/2018, at 201 and following pages.

[5] See F. Heylighen, *Advantages and limitations of formal expressions*, in *Foundations of Science*, 4/1999, at 32 and following pages.

[6] See Y. Stoeva, *The 'Uncertainty Hypothesis' in International Economic Law*, in *The Chinese Journal of Global Governance*, 2/2016, at 57 and following pages; S. Porcelli, *Diritto e logica…*, at 212 and following pages.

[7] P. Grossi, *La proprietà e le proprietà…*, at 625.

[8] S. Porcelli, *Diritto e logica…*, at 212 and following pages.

[9] P. Grossi, *La proprietà e le proprietà…*, at 620 and following, in particular 625.

[10] It is not possible to refer here to the different steps which took place during this transition, for detailed and persuasive arguments, see P. Grossi, *La proprietà e le proprietà…*, at 603 and following pages.

[11] See S. Porcelli, Salva rerum substantia *e principio verde. Per una critica della proprietà attraverso il diritto romano e il diritto cinese*, Torino, 2023, at 73 and following pages.

ly driven perspective and therefore, through "self-projections"[12], that 'reshaped' their content so that a stronger foundation has been given to the belief that the modern, individualistic, private ownership and the Roman Law private ownership are very similar and that they basically bear the same features.

Even if such individualistic outline of the ownership in Roman law has been questioned by some of the brightest scholars[13], in order to displace the aforementioned common belief it is necessary to analyze the Roman law mentality, and the related regulation, not only with regard to the models of ownership that are already considered in terms either of public, or common, or collective ownership, but also, for instance, with regard to the so-called Quiritarian ownership[14], that exerted such a strong influence on the models elaborated in the modern age[15].

Actually, it has been clarified some decades ago that, in Roman time, and therefore in Roman law, the community related aspects played a very strong role[16]. Considering this along with the remarks already made about the relevance of the mentality, the outcome is that attention should be devoted not only to the community related aspects in the 'inter-family' models of public, common or collective ownership, but also to the collective aspects in what on the surface may seem to be a mere the 'individual ownership', but that cannot be fully understood if the aspects related to the family community, the 'intra-family' collective aspects are neglected.

2. On the role of community and the extent of relevance of the individual ownership

The role of the community in the Roman society and therefore in the Roman mentality shows already in the fact that the largest part of the land[17], which was extremely important in Roman society and economy, was not framed as individual ownership.

Even if the *dominium* is perhaps the Roman legal category which could be considered as the closest to the modern models of 'individual ownership', even if there may be other regimes that could be considered as relatively close to the

[12] See P. Catalano, for instance, in *Diritto e persone. Studi su origine e attualità del Sistema romano*, Torino, 1990, at VII.

[13] See, for instance, F. Stella Maranca, *Ius utendi et abutendi*, in *Rivista giuridica abruzzese*, 1/1925, at 1 and following.; F. De Martino, *Individualismo e diritto romano privato*, in *Annuario di diritto comparato e di studi legislativi*, 16/1941, available in F. De Martino, *Individualismo e diritto romano privato*, Torino, 1999; P. de Francisci, *Appunti intorno ai* 'mores maiorum' *e alla storia della proprietà romana*, in Aa. Vv., *Studi in onore di Antonio Segni*, Roma, 1967, at 615 and following; P. Catalano, *Populus Romanus Quirites*, Torino, 1974, at 145 and following; O. Diliberto, *L'eredità fraintesa. Il diritto di proprietà dall'esperienza Romana al Code Napoléon (e viceversa)*, in P. Bonin, N. Hakim, F. Nasti, A. Schiavone (eds.), *Pensiero giuridico occidentale e giuristi romani. Eredità e genealogie*, Torino, 2019, at 89 and following.

[14] See for instance the entry "Quiritarian", B. A. Garner (ed. in chief), *Black's Law Dictionary*, at 1368.

[15] See for instance P. Grossi, *Assolutismo giuridico e proprietà collettiva*, at 732.

[16] Fundamental on this topic the research in P. Catalano, *Populus Romanus Quirites*.

[17] On the relevance of the land in Rome, see for instance the remarks on its inclusion among the *res mancipi* put in place in the following pages.

modern models of 'individual ownership' such as the so-called bonitary ownership (by considering which that the Roman jurists talked about a *duplex dominium*)[18], nonetheless, the *dominium* was mainly recognized only to the *cives*, and the largest part of the land was, broadly speaking, 'public'. Furthermore, despite the fact that in some cases, for instance in the case of the *civitates* and *collegia*, it was somehow recognized a certain possibility to have legal effects ascribed to these groups of people, nonetheless, in Roman law there was not a recognition of a 'personality' to entities other than the human beings so that also the 'public ownership' could not be considered, as it is today, as the ownership of a legal person (the state)[19]: the one that can be broadly speaking considered as 'public ownership' (such as the *ager publicus*, *ager occupatorius*, *ager scripturarius*, *ager compascuus* etc.) was not an ownership more or less conceived as a private ownership but ascribed to any artificial 'public person'. The *populus* was not as abstract notion, but the union of the single persons, a union made of a plurality[20] and the land was, in different ways, reconnected to it, to its members, or to groups of its members.

In the archaic time, the farming or pasture lands were mainly framed as a collective or public land – such as in the case of the *ager* defined as *ager publicus*, *ager occupatorius*, *ager scripturarius*, *ager compascuus* etc.[21] – and, even when, around the end of the republican age, in the Italian peninsula the land framed as *ager publicus* was shrinking, beside some exceptional cases where there was a recognition of the *ius Italicum*, as we read for instance in Gaius with regard to the provinces: the land could not be ascribed to an individual ownership, the individuals *possessionem tantum et usumfructum habere videmur*[22].

Therefore it has to be highlighted the fact, too often underrated, that already from a merely quantitative point of view, it has to be noticed that the individual ownership may have not had such a central role as it has nowadays and it shows already from the fact that the individual ownership schemes were not used to such a large extent with regard to the one that was probably the most important among the things at Roman time: the land.

3. Collective aspects in the Roman 'individual ownership'

After having gathered elements with regard to what could have been the potential extent of relevance of individual ownership in the Roman mentality, it

[18] See Gai. 1, 54.

[19] See, on this topic, the remarks I have already made in S. Porcelli, *Riflessioni preliminari sulla questione del riconoscimento di una 'personalità' giuridica a delle 'cose' come risposta a dei problemi di gestione dell'imputazione di effetti giuridici*, in R. Marini, S. Porcelli, *Persone e cose*, Milano, forthcoming (2024) and in S. Porcelli, *Salva rerum substantia*…, at 263 and following pages.

[20] See for instance Cic. *De re publica*, 1, 25, 39. Fundamental on this topic, P. Catalano, *Populus Romanus Quirites*, 61 or the summary at 155 and following pages.

[21] See S. Porcelli, *Salva rerum substantia*…, at 99 and following pages.

[22] See Gai. 2, 7. See also the remarks in R. Cardilli, *Fondamento romano dei diritti odierni*, Torino, 2023, at 283.

can be however noticed that, even the legal schemes that could seem to be more similar to the modern schemes of individual ownership, were nonetheless substantially different.

In order to better clarify this aspect, the Roman mentality regarding the person itself has to be considered in the first place. The person in Rome was not perceived as an abstraction, but rather as a human being having a certain role in a certain community[23], the same as the etymology reconnecting *persona* to the Greek πρόσωπον, in case it would be considered as acceptable[24], may suggest.

By taking into account the mentality underlying the elaboration of legal schemes at the different times over the Roman history, in order to understand the main features of the 'individual ownership' in Rome it is very useful to consider an (other) aspect that seems to be (too) often neglected by those who deal with the topic: generally speaking, the only one in the family to whom rights and duties on things could be ascribed, and therefore the only one to formally have a 'title' on things, was the *paterfamilias*[25].

Then, as already clarified by historians with regard to the Roman society, but of course with relevance to the topic we are dealing with (considering the already mentioned role with regard to the law and in particular the ownership related regulation), the perfect example of a man in the Roman mentality was the vir bonus colendi peritus whose model is possible to be found in Cato's thoughts and who is representing the leader of the family who works for its sustenance[26], the one who is explaining to his son that "*vir bonus est, Marce fili, colendi peritus, cuius ferramenta splendent*"[27].

Actually, it has been already remarked a few decades ago that if the *paterfamilias* was the only one formally having a title on the goods (as well, more in general, on the legal relationships ascribable to the family group) and if everything that was acquired by his sons would have been formally acquired by him, it means that the Roman family was structured in a fairly different way from ours and it means that also the way the things were ascribed to people was quite different from the ways it has been ascribed to people later on[28]. Of course this is showing that there was a fairly sharp difference compared to the modern models of private ownership, ascribed to each individual and not, basically, on a family basis; a difference in the legal schemes that could be well grounded in a different mentality and that could be further clarified by taking into consideration other elements.

[23] See for instance R. Cardilli, *Fondamento romano dei diritti odierni*, at 159 and following pages.

[24] On the possible etymologies of the term *persona*, see for instance S. Tafaro, Ius hominum causa constitutum. *Un diritto a misura d'uomo*, Napoli, 2009, at 14 and following and R. Cardilli, *Fondamento romano dei diritti odierni*, at 168 and following pages.

[25] Of utmost relevance on this aspect, the explanation offered in F. Gallo, «Potestas» *e* «dominium» *nell'esperienza giuridica romana*, in *Labeo*, 16/1970, at 35 – 36.

[26] Extremely relevant on the topic are the remarks by P. Fraccaro, *Vir bonus colendi peritus*, in Opuscola. *Scritti vari di Plinio Fraccaro raccolti per iniziativa dei discepoli in occasione del suo LXX genetliaco*, Pavia, 1954, at 43 and following.

[27] See Serv., *ad Georg.*, 1, 46; see also Cato, *De agri cultura*, *Praef.*

[28] See F. Gallo, «Potestas» *e* «dominium»…, at 35 – 36.

Elements that can be extracted from the sources, and that show how the system was based on the sustenance of the family, sustenance to which all the family members in condition to do so were supposed to offer their contribution, and that was led by the *pater* formally considered as the head of such a community.

Actually, based on such a family structure, the *paterfamilias* could be either considered, as it has been in the last centuries along with the mentality connected with the rise of the modern forms of individual ownership[29], as a kind of (potentially ruthless given his *ius vitae ac necis*) tyrant ruling his family through his *potestas*, *manus*, *dominium* etc., or, as it seems more realistic, as the head of a community, the family, that he was supposed to lead through life by using his *potestas*, *manus*, *dominium* etc. (and by being eventually entitled to use sanctioning rights/powers such as the *ius vitae ac necis*, in case it would be necessary to protect the family, and therefore the social, order)[30].

Simply to mention some of the elements which may led to this kind of assumptions, it can be taken then, for instance, into consideration the relationship between the *patris peritia* referred to the *auspicia* and the *potestas*[31], *a potestas* that was not conceived as a 'power against someone' (it was possible to be in someone else's *potestas*, but also in someone's own *potestas*)[32]. Furthermore, it is possible to find in the sources evidences of the fact that the *pater* and the *filii* could have been considered as the same person, *eadem persona*, with the *filii* sometimes also considered, as if they are the *dominus*, *quodam modo domini*[33], *or the uxor* as well considered *quodam modo domina*[34]. The *res mancipi*, that were once the most pre-

[29] On the *paterfamilias* in the legal scholarship of the last centuries see S. Porcelli, *Salva rerum substantia*…, at 183 - 189. On the connection between such a view on the *paterfamilias* and the ideologies emerged along with Enlightenment movement, the Natural School of Law etc., see G. Lobrano, Pater et filius eadem persona. *Per lo studio della patria potestas*, Milano, 1984, at 1 and following.

[30] As the one responsible for the family community, a right such as the *ius vitae ac necis* connected to the *potestas* could be considered as a sanctioning device to be used in case there would have been any need, and not necessarily as evidence of an individualistic power in the hands of the *paterfamilias*: also in the nowadays communities there are people vested with sanctioning powers, but it does not necessarily mean that they can arbitrarily use them on a merely individual will based way. Furthermore, it has to be considered that the possibility to use such rights/powers connected to the *potestas* had met over time more and more restrictions. See S. Porcelli, *Salva rerum substantia*…, at 221 – 225.

[31] See on the connection between *auspicia* and *potestas* Servio, *Ad Aeneidem* 4, 102, Servio, *Ad Aeneidem* 4, 340, Servio, *Ad Aeneidem* 7, 257 on which P. Catalano, *Contributi allo studio del diritto augurale*, I, Torino, 1960 at 338 and in the following pages and on the *patris peritia* Serv., *Ad Aeneidem*, 2, 704 and the explanation offered in G. Lobrano, Pater et filius eadem persona…, at 51 and in the following pages. See also S. Porcelli, *Salva rerum substantia*…, at 189 and in the following pages.

[32] See for instance D. 50, 16, 195, 2 (Ulpianus *libro quadragensimo sexto ad edictum*), D. 1, 6, 4 (Ulpianus *libro primo institutionum*) on which G. Lobrano, Pater et filius eadem persona…, at 25 and in the following pages. See also S. Porcelli, *Salva rerum substantia*…, at 195 and in the following pages.

[33] See for instance C.I. 6, 26, 11, 1 *Imp. Iustinianus A. Iohanni pp.*; Gai. 2, 157; D. 28, 2, 11 (Paulus *libro secundo ad Sabinum*) on which G. Lobrano, Pater et filius eadem persona…, at 30 and in the following pages, but also, already some interesting considerations in C. Accarias, *Précis de Droit romain*, I, Paris, 1874, in particular at 144 – 147. See also S. Porcelli, *Salva rerum substantia*…, at 197 and in the following pages.

[34] See for instance, among others, D. 32, 41 pr. (Scaevola *libro vicesimo secundo digestorum*); D. 25, 2, 1 (Paulus *libro septimo ad Sabinum*); D. 23, 2, 1 (Modestinus *libro primo regularum*); Iuv. *Satura*, 6, 210 – 215 etc. on which, G. Lobrano, "Uxor quodammodo domina" *Riflessioni su Paul. D. 25.2.1*, Sassari, 1989 in particular at 39

cious, the *res pretiosiores*[35]*, were not including jewels, precious stones, money or the like, but rather cows, donkeys or other things that could be used to sustain the family and, most probably, at the beginning, among the res mancipi*, were not included the land and unmovable property: the *heredium*. Actually it has been persuasively argued that, back in the most ancient times, the *heredium* was not possible to be transferred to others by the *pater* during his life because it was too relevant for sustaining the family, and it was only transferred by inheritance[36] (eventually producing a *consortium ercto non cito*)[37].

All of these elements may hence lead to the conclusion that also the forms of individual ownership which may look more similar to the modern forms, and to which in the previous centuries reference have been made in order to provide authority to the – at the time – newest forms, were not structured in such an individualistic way. The modern forms of ownership are centered on the individual will of the (artificial) 'subject of rights', but given the mentality and the evidences possible to be derived from the sources, it can be rather considered that, in the Roman ownership regulation, the collective aspects were fairly relevant not only from an inter-family perspective, but also from an intra-family perspective. The *pater*, who was in general the one to which the title on things was ascribed, was the head of the family, a community to the sustenance of which every member should have contributed so that it would not be that far from the reality to think about it, under many aspects, as a form of *collectivism consanguin*[38].

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and and in the following pages; F. Lamberti, *La famiglia romana e i suoi volti. Pagine scelte su diritto e persone in Roma antica*, Torino, 2014, in particular at 22 and in the following pages. See also S. Porcelli, *Salva rerum substantia*…, at 202 and in the following pages.

[35] Gai. 1, 192, on which F. Gallo, *Studi sulla distinzione tra* res mancipi *e* res nec mancipi, Torino, 1958, at 13.

[36] See F. Gallo, *Studi sulla distinzione* …, at 70 and in the following pages.

[37] See for instance S. Porcelli, *Salva rerum substantia*…, at 150 and in the following pages as well as at 205 and 337 and following as well as the sources therby recalled.

[38] P. Lafargue, *La propriété. Origine et évolution*, Paris 1890, at 357 - 358.

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BONA MATERNA AND *DOMINIUM POSSESSIONIS*: DISSOCIATION BETWEEN FORMAL PROPERTY AND ACTUAL OWNERSHIP RIGHTS IN CONSTANTINE'S LEGISLATION

Abstract: *The purpose of this paper is to analyze the unique regulations concerning maternal property (bona materna), introduced by Emperor Constantine in the early fourth century. This can be seen as one of the most significant reforms affecting family relationships. For the first time, the absolute authority of the pater familias was weakened to protect the economic interests of descendants alieni iuris.*

The first section will examine the specific constitutions that established these regulations (CTh. 8, 18, 1-3). The essence of the reform was to enhance the mother's role in the mortis causa transfer of her property. It allowed direct inheritance between her and her liberi in potestate, while excluding the husband from the succession process.

The second section will focus on the concept of property within Constantine's legislation. It aims to discern the actual powers retained by the pater familias and the corresponding strengthened position of filii in potestate. Despite the pater familias being considered as a temporary dominus for the period necessary to achieve sui iuris status, he did not exercise a true ownership over maternal assets. For example, he was prohibited from executing sales or donations that would have deplete the family estate. Particularly interesting is the expression "dominium possessionis", used in CTh. 8, 18, 2, which may help describe the distinction between the formal status of dominus and the actual owner of maternal property.

Keywords: *bona materna; dominium; ownership; dominium possessionis.*

1. Introduction

The issue of legislative or administrative rules that place a constraint on the use or "destination" of a property remains highly relevant in several modern legal systems, including the one I will choose as a reference for comparison to Costantine's legislation, i.e. Italy's present legal framework.

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Destination constraints continue to elitic doctrinal debates and divergent judicial rulings.

In this context, modern legislation aimed at protecting specific categories of individuals or entities through destination limitation is relevant. In Italy, the introduction of Article 2645-ter in the Civil Code by Law No. 51 of February 23, 2006 was especially interesting. This law provided for regulations concerning acts of destination and their recordability in immovable property registers. More recently, Law No. 112 of June 22, 2016 (the so-called "After Us" Law – Legge sul dopo di noi) specifically aims to protect individuals with disabilities, introducing under its Article 6 special measures to encourage "the establishment of trusts and special funds governed by fiduciary contracts that include property subject to destination constraints". This need for protection has facilitated the introduction of a unique type of real property right, distinct from traditional ownership, favoring the holders of such a right. Initially, these beneficiaries do not hold legal title, nor can they independently manage the property, but they acquire ownership upon the termination of the destination arrangement[1].

The development of a destinatory mechanism and of similar ones in different modern legal frameworks – along with related difficulties in doctrinal classification – are, indeed, firmly anchored in Roman legal experience, particularly in the Late Antique period. As a matter of fact the safeguarding of economic interests for specific categories of persons frequently served as the underlying principle of Constantinian legislation in the realm of family law. Notably, the laws of that period often aimed to protect the future estates of so-called *alieni juris* children, who, considered vulnerable due to their inability to act, could not directly acquire property and become owners. Furthermore, Costantinian legislation provided that any transfers made to benefit descendants under *patria potestas* would necessitate a temporary devolution of assets to the *pater familias*, the only family member with full legal rights.

Thus, an early form of the destination constraint is identifiable in Constantine's legislation concerning *bona materna*. The reform significantly disrupted the traditional structure of family relationships, primarily altering its patrimonial aspects. It granted the disposing mother an unprecedented ability to bequeath her assets to an *alieni juris* child, uniquely exempting these assets from the control of the *pater familias*.

This innovative legal category offers a privileged viewpoint, allowing us to appreciate how, already in the early fourth century, the institution of destination made a complex theoretical framework necessary, resulting in a fragmentation of property rights over maternal succession assets.

[1] Cf. Gaetano Petrelli, *Vincoli di destinazione ex art. 2645-ter c.c. e trust, quindici anni dopo*, in *Rivista del Notariato*, 6, 2020, 1090 etc.

2. The beginnings of the constantinian reform

The constitution that initiated the reform was as follows:

CTh. 8, 18, 1 IMP. CONSTANTINVS A. CONSULIBVS, PRAETORIBVS, TRIBVNIS PLEBIS, SENATVI SALVTEM DICIT. *Placuit salva reverentia et pietate sacris nominibus debita, ut potestas quidem et ius fruendi res liberorum suorum in sacris constitutorum in maternis dumtaxat facultatibus penes patres maneat, destituendorum autem liberorum eis licentia derogetur. Cesset itaque in maternis dumtaxat successionibus commentum cretionis et res, quae ex matris successione fuerint ad filios devolutae, ita sint in parentum potestate adque dominio, ut fruendi pontificium habeant, alienandi eis licentia derogetur. Nam maternum patrimonium, quod filiis in potestate constitutis obvenerit, cum patre mortuo sui iuris fuerint, praecipuum habere eos et sine cuiusquam consortio placuit. Quod si pater suum filium patremfamilias videre desiderans eum emancipaverit, repraesentare ei maternam debebit substantiam, ita ut filius accepto munere libertatis reique suae dominus effectus, ne videatur ingratus, tertiam partem custoditae sibi rei muneris causa parenti offerat, aestimatione, si res dividi coeperint, bonorum virorum arbitrio permittenda, quam tertiam alienare quoque pater, si hoc maluerit, habebit liberam potestatem. Ante emancipationem autem parentes, penes quos maternarum rerum utendi fruendique potestas est, omnem debent tuendae rei diligentiam adhibere et quod iure filiis debetur in examine poscere et sumptus ex fructibus inpigre facere et litem inferentibus resistere adque ita omnia agere, tamquam solidum perfectumque dominium et personam gerant legitimam, ita ut, si quando rem alienare voluerint, emptor vel is cui res donatur observet, ne quam partem earum rerum, quas alienari prohibitum est, sciens accipiat vel ignorans. Docere enim pater debet proprii iuris eam rem esse quam donat aut distrahit; et emptori, si velit, sponsorem aut fideiussorem licebit accipere, quia nullam poterit praescribtionem opponere filiis quandoque rem suam vindicantibus*. DAT. XV KAL. AVG. AQVIL(EIAE), RECITATA APVT VETTIVM RVFINVM P(RAEFECTUM) VRBI IN SENATV NON. SEPT. CONSTANTINO A.V. ET LICINIO C. CONSS.

Issued in Aquileia between 315 and 319, this *lex* ensured the direct transfer of assets *mortis causa* to *filii familias*, albeit constrained by the persistence of a potestative bond[2]. The term "*res suorum liberorum*" explicitly highlighted the aim pursued: to secure title for descendants only once they attain full legal *status*. Prior

[2] The constitution is included in *Corpus Iuris Civilis* in C. 6, 60, 1. The date is doubtful; the *subsciptio* does not offer guarantees of certainty from a chronological point of view. The reference to the *praefectus urbi* Vettio Rufinus (who held the magistracy between 315 and 316) suggests a temporal placement in 315; however, the mention of the consulship of Constantine and Licinius leads to the belief that the measure was issued in 319. About this constitution, see. O. Seek, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.,* Stoccarda, 1919,59; G. Archi, *Contributo alla critica del Codice Teodosiano* cit. (later in *Scritti di diritto romano*, 3, Milano, 1981, 1716 ss); E. Volterra, *Il senatoconsulto Orfiziano e la sua applicazione in documenti egiziani del III d.C.*, in *Atti del XI convegno internazionale di papirologia,* Milano, 1966, 574 etc.; C. Castello, *Rapporti legislativi tra Costantino e Licinio alla luce dell'*inscriptio *e della* subscriptio *di CTh. 8.8.1*, in *Atti dell'Accademia Romanistica Costantiniana*, *II convegno internazionale,* Perugia, 1975, 33; M. Sargenti, *Il diritto privato nella legislazione di Costantino* cit., 247 etc.; J.D. Harke, *Utilitas Constantiniana* cit., 103.

to achieving full legal and economic autonomy, the father would have held title to the assets, which, however, consisted solely of the right to use, with the specific deprivation of the power to dispose (*res, quae ex matris successione fuerint ad filios devolutae, ita sint in parentum potestate adque dominio, ut fruendi pontificium habeant, alienandi eis licentia derogetur*). The Constantinian chancellery further elucidated the *ratio* behind these provisions: the maternal estate, belonging to children under *patria potestas*, became theirs alone upon their legal autonomy acquired by way of their father's death, not to be shared with others (*Nam maternum patrimonium, quod filiis in potestate constitutis obvenerit, cum patre mortuo sui iuris fuerint, praecipuum habere eos et sine cuiusquam consortio placuit*).

In addition to the father's death, the capacity to act could also arise from a discretionary act of the family head, namely emancipation. Here, the *lex* encouraged ending the potestative bond by requiring the emancipated son, now *sui iuris*, to compensate the father with a third of the maternal assets *muneris causa*, acknowledging the custodial benefits accrued until that point (*Quod si pater suum filium patremfamilias videre desiderans eum emancipaverit, repraesentare ei maternam debebit substantiam, ita ut filius accepto munere libertatis reique suae dominus effectus, ne videatur ingratus, tertiam partem custoditae sibi rei muneris causa parenti offerat*). The father is fully entitled to own and may alienate such one-third share, if he so wishes (*quam tertiam alienare quoque pater, si hoc maluerit, habebit liberam potestatem*)[3].

Before emancipation, fathers with rights to maternal assets must act with diligence to safeguard the same assets, seeking legal redress for what is due to their children, promptly managing expenses from the assets' yields, and defending against legal challenges that threaten asset integrity. Essentially, *patres* must manage the assets as though they held full and legitimate dominion, ensuring that any potential alienation is carefully scrutinized to prevent unlawful transfers (*Ante emancipationem autem parentes, penes quos maternarum rerum utendi fruendique potestas est, omnem debent tuendae rei diligentiam adhibere et quod iure filiis debetur in examine poscere et sumptus ex fructibus inpigre facere et litem inferentibus resistere adque ita omnia agere, tamquam solidum perfectumque dominium et personam gerant legitimam, ita ut, si quando rem alienare voluerint, emptor vel is cui res donatur observet, ne quam partem earum rerum, quas alienari prohibitum est, sciens accipiat vel ignorans*).

The constitution concludes by addressing the consequences of fraudulent reductions in estate value through unfair sales or donations, establishing that purchasers or donees cannot claim ignorance in defense against claims by children reclaiming their estate (*Docere enim pater debet proprii iuris eam rem esse quam donat aut distrahit; et emptori, si velit, sponsorem aut fideiussorem licebit accipere, quia nullam poterit praescribtionem opponere filiis quandoque rem suam vindicantibus*).

[3] Regarding the obligation to pay the *pater* the third part of the maternal estate *muneris causa*, see the monograph by D. Dalla, *Praemium emancipationis*, Milano, 1983, 1 etc.;

The above clearly shows that the legislative provisions mark a significant shift in family economic relationships. The need to protect descendants' future rights diminishes the dominance of *patria potestas*, which had governed family economics until the Constantinian reforms. Concerns about potential decrease in the value of *bona materna* due to paternal negligence or risky disposals prompt a protective regime favoring children until they achieve *sui iuris* status[4].

Hence, the complex mechanism of *mortis causa* raises hermeneutic issues of considerable significance. On one hand, the provisions' protective intent is evident; on the other, they introduce a notable inconsistency in terms and substance: while *dominium* remains nominally with the *pater*, it shifts towards preventing dominion over the assets, imposing an unusual obligation for their careful preservation and augmentation[5]. Observing the language of the Constantinian chancellery reveals a significant doctrinal disarray, yielding systemic contradictions of considerable import.

Initially, as noted, the designation of the ultimate recipients of maternal economic resources—phrased as "res suorum liberorum"—clearly indicates the intent to transfer these assets to the children. Yet, the notable inconsistency in terms becomes apparent when detailing the powers granted to *patres familiarum*. Here, the term *potestas fruendi* is introduced, explicitly removing the power of disposition. Further into the law, paternal rights are articulated as *utendi fruendique potestas.*

A first review of the constitution immediately highlights the fragmentation of property rights. Legal ownership, while ostensibly residing with the *pater* holding *potestas*, is stripped of its core meaning to embody a right that grants only the ability to use, strictly prohibiting the dispersal of the assets. Essentially, the father's right to use the maternal estate does not imply total enjoyment but rather constitutes a duty to manage and enhance the estate with an eye towards its eventual transfer to the descendants. The *lex*'s primary goal—protecting the integrity of *bona materna*—is manifest in the rigorous stewardship required of the *pater*, encompassing the rightful claims in court, prompt expense management from yields, and defensive legal actions to safeguard the assets, ensuring the assets are managed as if by a legitimate and complete owner.

[4] Pithy is the commentary by M. Sargenti, *Il diritto privato* cit., 98, who states that "si pongono, agli occhi del legislatore, gli interessi dei *filii familias* e non più i diritti assoluti del *pater*". Also M.A. De Dominicis, *Spunti in tema di* patria potestas *e cognazione*, in *Studi in onore di Antonino Segni*, 1, Milano, 1967, 610 etc. who asserts that "nel quarto secolo la *patria potestas* non è più che un *munus*, cioè un dovere potere riconosciuto al *pater* dall'ordinamento giuridico nell'esclusivo interesse dei minori".

[5] On the protection of the patrimonial interests of children in Late Antiquity, see A. M. Demicheli, *La novella 98 e la tutela patrimoniale dei figli nella legislazione post-classica e giustinianea*, in *Studi in onore di Remo Martini*, 1, Milano, 2008, 855 etc.; A. Ariava, *Paternal power in Late Antiquity*, in *Journal of Roman Studies* (rivista online,), 2012, 1 etc.; P. Garbarino, *Sulle tracce dei doveri del* pater. *Brevi riflessioni sulla* patria potestas *in età tardoantica*, in Civitas et civilitas. *Studi in onore di Francesco Guizzi*, A. Palma (a cura di), Torino, 2013, 388 etc. The author, analyzing the set of duties imposed on the father in the management of the maternal estate, hypothesizes an assimilation of the figure of the *pater* to that of a guardian.

3. Further legislation of Constantine

Continuing our analysis, the next Constantinian constitution, issued in Milan in 319 and addressed to Julius Severus is as follows:

CTh. 8, 18, 2 IMP. CONSTANTINVS A. IVLIO SEVERO. *Cum ad patrem aliquid ex materna successione interposita cretione pervenerit et ad liberos maternarum rerum successiones defluxerint, ita eas haberi placet in parentum potestate, ut dominium tantum possessionis usurpent, alienandi vero licentiam facultatemque non habeant, ut, cum aetates legitimae liberorum ad emancipationem parentes invitaverint et patresfamilias videre liberos suos voluerint, tertiam partem maternorum bonorum eis filii tamquam muneris causa offerant; quam si suscipiendam patres putaverint, faciendae divisionis arbitrium permitti oportebit iustitiae bonorum virorum, per quos facta divisione tertiam partem oblatam parentes ita accipient, ut alienandae quoque eius partis habeant facultatem, si modo ullus potuerit inveniri, cui placeat hanc amplecti licentiam, cum omni modo filios conducat adniti, ut pio sedulitatis affectu mereantur accipere eam, quam patribus dederint, portionem.* DAT. VII ID. SEPT. MED(IOLANO), ACC. NON. OCT. CONSTANTINO A.V. ET LICINIO CAES. CONSS.

The *lex*, despite some terminological inconsistencies compared to CTh. 8, 18, 1, confirms the legal foundations of the succession discipline[6]. The gradual erosion of paternal absolutism, particularly apparent in the fragmentation of the family's asset unity, follows naturally from the formal separation of *bona materna* from the family's economic framework. It is emblematically stated that assets derived from maternal succession fall under the control of the fathers (*in parentum potestate*), allowing them free control over these assets (*dominium possessionis*), yet without the right to alienate them.

The characterization of paternal rights as *dominium possessionis* introduces additional complexities. The use of legal terminology to describe a dominion that is in practice merely factual prompts questions about the nature of paternal authority over maternal assets[7]. Does this represent a form of ownership, re-

[6] The same substantive content, reiterated in another legislative measure, has sparked a debate, particularly regarding the sole point of divergence between the two constitutions concerning the *cretio*, which was formally abolished in CTh. 8, 18, 1 and reproposed in CTh. 8, 18, 2. In particular, see. O. Gradenwitz, *Beiträge zum* Codex Theodosianus, in *Zeitschrift der Savigny Stiftung für Rechtsgeschicte*, 37, 1916, 91, fn. 1; G. Archi, *Contributo alla critica del Codice Teodosiano* cit.,41; M. Sargenti, *Il diritto privato* cit.,260; C. Castello, *Rapporti legislativi tra Costantino e Licinio* cit., 46 ss; B. Biondi, *Degenerazione della* cretio *ed accettazione espressa non formale*, in *Studi Solazzi*, Napoli, 1948, 85 etc.; F. La Rosa, *Accettazione ed acquisto dell'eredità materna attraverso il Teodosiano*, in *Annali Catania* 4, 1950, 379, fn. 21; V. Arangio Ruiz, *Istituzioni di diritto romano,* Napoli, 1960,554, fn. 2.; P. Voci, *Il diritto ereditario romano nell'età del tardo impero*, in *Iura*, 29, 1978,58; D. Dalla, *Praemium emancipationis* cit.,6.; On the abolition of *cretio* in the post-classical period, see S. Puliatti, De cuius hereditate agitur. *Il regime romano delle successioni*, Torino, 2016, 37 etc.

[7] About *dominium possessionis* see. A. Tartufari, *Della acquisizione e della perdita del possesso*, 1, Milano, 1887,80; M. Fuenteseca Degeneffe, *La formación romana del concepto de propriedad (*dominium, proprietas *y* causa possessionis), Madrid, 2004, 19 etc.; F. Grelle, *Diritto e società nel mondo romano*, L. Fanizza (a cura di), Roma, 2005, 254 etc.; L. Solidoro, *Dalla dominicalità al neoproprieratismo. Storia e narrazioni di un percorso*, Torino, 2023, 126 etc.

stricted by the inability to alienate, or is it merely a practical control that lacks formal legal title?

The relegation of the *pater* to the periphery of succession highlights an even stricter regulatory focus, especially in cases of second marriages. This specific scenario is addressed in another provision by Constantine aimed at preventing the potential depletion of *bona* from a first marriage.

CTh. 8, 18, 3 IMP. CONSTANTINVS A. AD SEVERUM COM(ITEM) HISPANIARVM. *Insinuatum est quosdam patres principalis coniugii copulatione destitutos in perniciem filiorum ultra misericordiam sanguinis properare et receptis deinceps aliis matrimoniis maiorem sibi in rebus filiorum vindicare personam: qui quoniam in his usufructuarii remansisse videntur, usurpare ea ac pervertere confidunt, ut per hoc his, qui in orbitate remanserunt, nulla nec possidendi nec litigandi tribuatur occasio. Ideoque placet, ne quis pater receptis deinceps matrimoniis earum rerum, quae prioris coniugis fuerunt, sibi ius defendendum existimet nisi tutelae vice, donec minores probate aetate esse videantur. His autem moderatio nostra cuncta iubet servari adque restitui.* P(RO)P(OSITA) III KAL. APRIL. CONST(ANTINO)P(OLI) OPTA[TO] ET PAVLINO CONSS. The provision, addressed to the *comes Hispaniarum* Severo and *proposita* in Constantinople in 334, consists of a descriptive first section and a prescriptive second section. From the outset it outlines a social issue perceived as recurrent and dangerous. Here, fathers who remarry are depicted as rushing to act *ultra misericordiam sanguinis* against the interests of their first marriage's children, claiming undue control over the children's assets and effectively blocking their access to these assets, thus preventing them from asserting ownership or pursuing legal action (*Insinuatum est quosdam patres principalis coniugii copulatione destitutos in perniciem filiorum ultra misericordiam sanguinis properare et receptis deinceps aliis matrimoniis maiorem sibi in rebus filiorum vindicare personam*). The deceitful family conflict is addressed by safeguarding the designated purpose of *bona* originating from maternal inheritance, imposing a strict non-disposability restriction on the unfaithful spouse (*Ideoque placet, ne quis pater receptis deinceps matrimoniis earum rerum, quae prioris coniugis fuerunt, sibi ius defendendum existimet nisi tutelae vice, donec minores probate aetate esse videantur*).

The legal framework for succession, set against a backdrop of recurring issues, helps reconstruct the structural attributes of this novel legal category. The instance of fraudulent appropriation necessitates clarifications regarding the powers held by family members involved in disputes: the father is designated as a usufructuary, tasked solely with asset preservation when dealing with immature descendants; the children are seen as potential *domini*, entitled to have the estate preserved and eventually restored to them (*qui quoniam in his usufructuarii remansisse videntur* […] *His autem moderatio nostra cuncta iubet servari adque restitui*).

Assigning the role of usufructuary over *bona materna* to a father who remarries introduces complexities into the interpretation of this legal setup[8]. It should be noted that traditionally, establishing a legal usufruct would require a prior *cautio fructuaria*, a condition necessary for enjoying the property rights. However, the regulatory context emerging from the discussed provisions does not appear to involve such guarantees. Moreover, the administrative powers assigned to the *pater*, as detailed in the series of constitutions under review, exceed those typically granted to a usufructuary. The stipulation for diligent management involves active administrative and judicial actions aimed at preserving the estate, not confined within the usual limits of usufruct actions, thereby requiring the father to act as though he were the legitimate full owner of the assets. Additionally, the obligations regarding maintenance expenses extend beyond *modica refectio* typical of usufruct arrangements, covering all necessary actions to preserve the estate.

Furthermore, the impossibility of elevating a *filius* under potestative control to the status of a bare owner becomes apparent when considering the language used by the Constantinian chancellery. The continual reference to paternal *potestas*, under which the assets are temporarily grouped, affirms the proper attribution of legal ownership to the father, albeit devoid of the traditional powers associated with a *dominus* in civil law.

Conversely, the substantive dissolution of the potestative bond reflects a protective mechanism benefiting family members traditionally viewed as passive. The stringent protection of potential rights for descendants arises naturally from the disintegration of the family's asset unity, essentially challenging the conventional automatic inclusion of *filii familias*'s assets within the *pater*'s economic realm.

While the substantial innovations do not fully reject the potestative bond, during the necessary period for executing succession processes, ownership remains nominally with the *pater familias*, albeit under significant constraints that preclude a *stricto sensu* recognition of full ownership. It is also important to recall that the implementation of succession provisions depends on a discretionary act by the father, such as emancipation, which incentivizes the required transfer of one third of the maternal assets *muneris causa* from children who have attained legal autonomy (*sui iuris*).

[8] On this point, see specifically P. Bonfante, *Corso di diritto romano* 1, *Diritto di Famiglia*, Milano, 1925, 111 etc., who states that the father acts as a necessary representative; *Contra* M. Sargenti, *Il diritto privato* cit., 94 etc. who highlights the differences between the ordinary usufruct and the special usufruct proposed in CTh. 8, 18, 1-3. On the concept of *diligentia* to be understood as a legal obligation or merely a moral obligation, see P. Bonfante, *Corso di diritto romano* 1, cit., 110 etc., who leans towards an interpretation of CTh. 8, 18, 1 as assigning a moral obligation; M. Sargenti, *Il diritto privato* cit., 96 who leans towards the opposite thesis. In this regard, the author states that "Si può osservare, contro la tesi del Bonfante, che l'obbligo del *pater familias* alla diligenza è previsto da una costituzione imperiale e accompagnato da minute prescrizioni sui compiti che al *pater* spettano come amministratore; così che sarebbe stato difficile ammettere che in una norma giuridica sia statuito un semplice obbligo morale senza rilevanza per il diritto".

Reflecting on the documented regulations and historical context, one might contemplate the establishment of a new type of real right introduced with the Constantinian reform. The primary goal, aimed at preserving the quantitative integrity of the *bona materna* to safeguard the future *dominium* of the children, could have led to the creation of an unprecedented real right related to maternal succession. This right grants the *pater* temporary ownership with the duty to preserve the assets, while the beneficiaries of the succession hold an expectation of eventual *res* ownership. In essence, the *dominium* granted to the *pater* manifests as a type of property finalized to protecting the children's interests, confined to the time before they achieve full legal capacity.

4. Earlier historical development and the legislation of Constantine.

Moreover, expanding the analytical perspective to include historical developments might be fruitful, particularly if one recalls the meaning attributed to the expectation of dominium for *filii familias*. Despite the formidable barriers posed by the potestative bond to the direct acquisition of assets by descendants, certain legal texts underscore the need to protect even what amounts to a mere legal expectation. Ulpian's commentary, for instance, offers crucial insights:

D. 36, 1, 17, 11-13 Ulp. 4 *fideicomm.*: *Si pater filio, quem in potestate habet, rogetur restituere hereditatem: an filius patrem suum, si suspectam dicat hereditatem, cogere possit? et non est dubium, patrem a filio per praetorem cogi posse. Sed et si id fideicommissum ad castrense peculium spectaturum est, et filius familias is fuit, qui munus militiae sustinebat, alione quo officio praeerat: multo magis dicendum erit, posse eum postulare, ut pater suus cogatur adire et restituere hereditatem, quamvis contra obsequium patri debitum videtur id desideraturus. Sed si servo suo rogatus sit cum libertate quis hereditatem restituere, sive directa data sit libertas sive fideicommissaria, dici poterit eum a servo suo non posse cogi adire hereditatem, quamvis, si sponte adisset, cogeretur praestare fideicommissariam libertatem et hereditatem: idque Maecianus libro septimo de fideicommissis scribit.*

This passage addresses the nuanced question of whether a son, still under paternal authority, can legally obligate his father, burdened by a trust for restitution, to accept an inheritance that has not yet been claimed due to its perceived lack of profitability (*Si pater filio, quem in potestate habet, rogetur restituere hereditatem: an filius patrem suum, si suspectam dicat hereditatem, cogere possit?*).

The legal scholar affirms the son's indisputable right to protect himself from potential paternal neglect. Accordingly, the son is entitled to approach the praetor and legally compel his father to take possession of the inheritance (*Et non est dubium, patrem a filio per praetorem cogi posse*). Moreover, if the *filius familias* holds a *peculium castrense*, having served in a military capacity or other public office, he would be even more justified in seeking judicial enforcement to ensure his father

fulfills the inheritance obligations, despite potential conflicts with filial piety (*Sed etsi id fideicommissum ad castrense peculium spectaturum est, et filiusfamilias is fuit, qui munua militia sustinebat, aliore quo officio praeerat: multo magis dicendum erit, posse eum postulare, ut pater suus cogatur adire, et restituere hereditatem: quamvis contra obsequium patri debitur videtur id desideraturus*)[9]. Conversely, if an heir is tasked through a trust to emancipate his slave and transfer inheritance bequests, the *dominus* would not face coercive demands to accept the inheritance (*Sed si servo suo rogatus sit cum libertate quis hereditatem restituere: sive directa data sit libertas, sive fideicommissaria, dici poterit, eum a servo suo non posse cogi adire hereditatem*).

The compulsory enforcement of testamentary provisions primarily aims to safeguard the inheritance expectations of the *filius fideicommissarius*, circumventing the risk that these expectations might not be realized due to paternal inaction. Additionally, the text's reference to economic disadvantages that might dissuade the father from accepting an inheritance underscores the primacy of the son's still-potential rights over the father's practical considerations. The father, designated as the heir, would personally bear any economic burdens resulting from accepting a *hereditas suspecta*. The emphasis on the future economic standing of the son, considered *alieni iuris*, becomes even more apparent when considering another legal passage:

D. 28, 2, 11 Paul. 2 *ad Sabinum*. *In suis heredibus evedentius apparet continuationem domini eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur. unde etiam filius familias appellatur sicut pater familias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit. itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. hac ex causa licet non sint heredes instituti, domini sunt: nec obstat, quod licet eos exheredare, quod et occidere licebat.*

The jurist in the second book of his commentary *Ad Sabinum* draws a direct connection between hereditary succession among fathers and sons and the concept of *continuatio dominii* (*In suis heredibus evedentius apparet continuationem domini eo rem perducere*)[10]. He argues that descendants might be considered, in a sense, as already holding ownership of the paternal estate during the father's lifetime, rendering the actual inheritance process somewhat ceremonial. (*ut nulla videatur hereditas fuisse, quasi olim hi domini essent, qui etiam vivo patre quodammodo domini existimantur*). Furthermore, the legal scholar posits that the future legal ownership of the *heres suus* can be inferred even by comparing

[9] On the issue of passage interpolation, see. H. Fitting, *Das castrense peculium*, Halle, 1871,177, fn. 6; S. Solazzi, *Sulla* condicio emancipationis, in *Archivio Giuridico*, 86, 1922-23, 486; D. Daube, *Actions between* paterfamilias *and* filiusfamilias *with* peculium castrense, in *Studi in memoria di E. Albertario*, 1, Milano, 1953, 54 etc.

[10] Abouti *continuatio dominii* see. M. Avenarius, Continuatio dominii. *Die vorklassiche Mitberechtigung der künftigen Hauserben und der Vonselbsterwerb der klassichen Rechts*, in *Studi in onore di Luigi Labruna*, 1, Napoli, 2007, 231 etc.; G. Rizzelli, *La figura paterna nel principato fra rappresentazioni e* ius, in *Tesserae Iuris*, IV.1, 2023, 105 etc.

the designations used for a son under authority (*filius familias*) to those typically used for the father (*pater familias*). The notable similarity between these terms, aside from the distinctions of 'son' or 'father' which differentiate the parent from the offspring, conveys a sense of belonging to the same *familia*. This, in purely economic terms, translates into a cohesive patrimonial entity (*unde etiam filius familias appellatur sicut pater familias, sola nota hac adiecta, per quam distinguitur genitor ab eo qui genitus sit*). Thus, following the father's demise, the children do not so much inherit as they take over the free management of assets, a role previously constrained by the *pater*'s authority. Instead, they secure the right to freely administer the assets, a right they were previously denied (*itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur*).

This perspective does not change even if the possibility of disinheritance exists, paralleling the father's theoretical right to disinherit or even execute his child, which contrasts sharply with a social reality more focused on protecting offspring's economic interests (*nec obstat, quod licet eos exheredare, quod et occidere licebat*).

Examining these legal texts from the Severan era reveals a societal inclination, already present at that time, toward safeguarding children's assets to ensure the preservation of their future economic interests, realizable only upon attaining *sui iuris status*. The ability of a son to safeguard against paternal negligence in managing an inheritance highlights the particular focus on protecting the substantial integrity of the estate he would eventually own upon the fulfillment of the trust. Moreover, describing the succession process as a *continuatio dominii* underscores the significant legal expectation placed on descendants, who, prior to achieving full legal capacity, are seen as potential *domini*.

It is also worth noting that the protection of interests deserving of safeguard in the Constantinian legislation aimed at mitigating the risk of potential asset dispersion is not confined to issues of succession concerning the *bona materna* alone. Its applicability extends much further.

An additional constitutional provision concerning the regulation of guardianship and curatorship relationships is particularly telling:

C. 5, 37, 22 IMP. CONSTANTINVS A. AD POPULUM: *Lex, quae tutores curatoresque necessitate adstrinxit, ut aurum argentum gemmas vestes ceteraque mobilia pretiosa, urbana etiam mancipia, domos balnea horrea atque omnia intra civitates venderent omniaque ad nummos redigerent praeter praedia et mancipia rustica, multum minorum utilitati adversa est. Praecipimus itaque, ut haec omnia nulli tutorum curatorumve liceat vendere, nisi hac forte necessitate et lege, qua rusticum praedium atque mancipium vendere vel pignorare vel in dotem dare in praeteritum licebat, scilicet per inquisitionem iudicis, probationem causae, interpositionem decreti, ut fraudi locus non sit. Ante omnia igitur urbana mancipia, quia totius suppellectilis notitiam gerunt, semper in hereditate et in domo retineant: nam*

boni servi fraudem fieri prohibebunt, mali, si res exegerit, sub quaestione positi poterunt prodere veritatem. Atque ita omnia observabunt, ut nec inventaria minuere nec mutare vel subtrahere aliquid tutor valeat: quod in veste margaritis gemmis et in vasculis ceteraque suppellectili necessarium est. Et tolerabilius est, si ita contigerit, servos mori suis dominis, quam servire extraneis. quorum fuga potius tutori adscribitur, sive neglegentia dissolutam patiatur esse disciplinam, sive duritia vel inedia atque verberibus eos adficiat. Nec enim dominos execrantur, sed magis diligunt, ita ut haec lex per hoc quoque melior antiqua sit: tunc enim remota servorum custodia etiam vita minorum saepius prodebatur. Nec vero domum vendere liceat, in qua defecit pater, minor crevit, in qua maiorum imagines aut videre fixas aut revulsas non videre satis est lugubre. ergo et domus et cetera omnia immobilia in patrimonio minorum permaneant, nullumque aedificii genus, quod integrum hereditas dabit, collapsum tutoris fraude depereat. Sed et si parens vel cuiuscumque heres est minor reliquerit deformatum aedificium, tutor testificatione operis ipsius et multorum fide id reficere cogetur: ita enim annui reditus plus minoribus conferent quam per fraudes pretia deminuta. Servi etiam, qui aliqua sunt arte praediti, operas suas commodo minoris inferent et reliqui, qui in usum minoris domini esse non poterunt quibusque ars nulla est, partim labore suo partim alimoniarum taxatione pascantur. Lex enim non solum contra tutores, sed etiam contra feminas immoderatas atque intemperantes prospexit minoribus, quae plerumque novis maritis non solum res filiorum, sed etiam vitam addicunt. Huic accedit, quod ipsius pecuniae, in qua robur omne patrimoniorum veteres posuerunt, fenerandi usus vix diuturnus, vix continuus et stabilis est: quo facto saepe intercidente pecunia ad nihilum minorum patrimonia deducuntur. Iam ergo venditio tutoris nulla sit sine interpositione decreti, exceptis his dumtaxat vestibus, quae detritae usu aut corruptae servando servari non potuerint. Animalia quoque supervacua minorum quin veneant, non vetamus. D. ID. MART. SIRMI CONSTANTINO A. VII ET CONSTANTIO C. CONSS.

Issued in 326, this edict aims to protect minors' estates from unfair alienations potentially conducted by their guardians or curators. The provisions effectively repeal an earlier regulatory framework deemed harmful to wards' interests, establishing a strict general prohibition against the sale of estate components, except for worn-out clothing and excess livestock (*Lex, quae tutores curatoresque necessitate adstrinxit, ut aurum argentum gemmas vestes ceteraque mobilia pretiosa, urbana etiam mancipia, domos balnea horrea atque omnia intra civitates venderent omniaque ad nummos redigerent praeter praedia et mancipia rustica, multum minorum utilitati adversa est*). In cases where a transfer is necessitated by specific conditions, the imperial chancellery mandates thorough judicial review followed by a formal decree to avert fraudulent activities (*Praecipimus itaque, ut haec omnia nulli tutorum curatorumve liceat vendere, nisi hac forte necessitate et lege, qua rusticum praedium atque mancipium vendere vel pignorare vel in dotem dare in praeteritum licebat, scilicet per inquisitionem iudicis, probationem causae, interpositionem decreti, ut fraudi locus non sit*). This ensures that the conversion

of properties to liquid assets does not open opportunities for misappropriation by guardians.

The detailed rationale for maintaining certain *res* underscores their importance in safeguarding minors' interests. For instance, the presence of servants is deemed crucial, as they play a vital role in monitoring inventory and valuable properties, ensuring these are not mishandled by guardians (*Atque ita omnia observabunt, ut nec inventaria minuere nec mutare vel subtrahere aliquid tutor valeat: quod in veste margaritis gemmis et in vasculis ceteraque suppellectili necessarium est*).

The prohibition also extends to the sale of the family home, emphasizing its cultural and sentimental significance as a space where minors grow and where *maiores* are revered, thus necessitating its preservation. Guardians are required to manage properties diligently, potentially restoring them to enhance their value, thus benefiting the minors more substantially than if the properties were sold under duress or mismanagement (*Nec vero domum vendere liceat, in qua defecit pater, minor crevit, in qua maiorum imagines aut videre fixas aut revulsas non videre satis est lugubre. ergo et domus et cetera omnia immobilia in patrimonio minorum permaneant, nullumque aedificii genus, quod integrum hereditas dabit, collapsum tutoris fraude depereat. Sed et si parens vel cuiuscumque heres est minor reliquerit deformatum aedificium, tutor testificatione operis ipsius et multorum fide id reficere cogetur: ita enim annui reditus plus minoribus conferment quam per frauds pretia deminuta*).

Moreover, skilled servants are expected to employ their abilities for the minors' benefit, while those lacking specific skills should contribute through their labor or receive sustenance adequate to their needs (*Servi etiam, qui aliqua sunt arte praediti, operas suas commodo minoris inferent et reliqui, qui in usum minoris domini esse non poterunt quibusque ars nulla est, partim labore suo partim alimoniarum taxatione pascantur*). This legislative framework not only protects against potential abuses by guardians but also addresses the misconduct of mothers who might squander their children's inheritance through remarriage, thus placing their personal interests above those of their offspring (*Lex enim non solum contra tutores, sed etiam contra feminas immoderatas atque intemperantes prospexit minoribus, quae plerumque novis maritis non solum res filiorum, sed etiam vitam addicunt*).

In conclusion, this law imposes a temporal limit on the practice of money lending, deemed acceptable only for short durations to prevent the dissipation of financial assets, thus safeguarding the minors' estate from potential depletion (*Huic accedit, quod ipsius pecuniae, in qua robur omne patrimoniorum veteres posuerunt, fenerandi usus vix diuturnus, vix continuus et stabilis est: quo facto saepe intercidente pecunia ad nihilum minorum patrimonia deducuntur*)[11].

[11] Cf. A. Lovato, *Su di una 'misteriosa'* lex *in CI. 5.37.22 pr.*, in *Atti dell'Accademia Romanistica Costantiniana*, 8, Napoli, 1990, 535 etc.; A. Torrent, *Actividad bancaria e inflación en epoca dioclecianea-constantiniana*, in *IURA*, 57, 2008-2009, 87 etc.; F. J. Casinos Mora, Iuris civilis notae ad vestem seu textile pertinentes: *Notas sobre Vestimenta en el Derecho de Propriedad Romano,* in *Revista Diálogos Mediterrânicos*, 13, 2017, 21 etc.; P. Capone,

5. Conclusions

The analysis of the edict deepens our understanding of the rationale behind the Constantinian statutes that introduced the *bona materna*. The requirement for both quantitative and qualitative safeguarding of assets ties back to the significant emphasis placed on the expectation of dominion, a principle also supported by jurisprudential excerpts from the Severan era, demonstrating a longstanding commitment to child protection. The progressive family ideology evident in the examined constitutions is particularly observable in the limitation of absolute power in favor of advancing protectable interests.

In the specific context of maternal succession, the expectation of inheritance is augmented by establishing an innovative and distinct form of *dominium*. This arrangement constitutes a form of ownership that is restricted and functional, designed for the future benefit of the descendants, who are regarded as vulnerable due to their incomplete legal capacity. The stringent prohibition against alienation imposed on the *pater* aims to prevent potential diminution of the estate that rightfully belongs to the genuine heirs of the succession.

Moreover, the involvement of judicial authorities, tasked with monitoring the appropriateness of potential asset transfers by guardians and curators, aligns with the same protective *ratio*. This ensures that the wards' expectation of *dominium* is protected from negligent or fraudulent acts by their custodians.

Ultimately, the nuanced examination of the *bona materna* regulations allows for an in-depth exploration of the intrinsic challenges in safeguarding certain groups. Remarkably, the relevance of these issues persists—they are both systemic and interpretative—rooted deeply in Roman legal traditions, illustrating the profound complexity of a topic of significant historical and contemporary interest.

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COMPARATIVE LAW

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INNOVATION AND DEVELOPMENT OF COLLECTIVE OWNERSHIP IN CHINA

Abstract: *Collective ownership in China is a unique system distinct from the traditional ownership in the civil law system. Within the Chinese legal framework, collective things primarily refer to rural collective land and other rural collective property. Collective ownership not only embodies the ownership of collective property enjoyed by the rural collective, but also emphasizes the effective utilization of collective property. Driven by the market economy, there has been a gradual transition from regulating collective ownership itself to utilizing collective property, resulting in a series of innovative achievements such as "the division of three rights". Collective ownership is not an isolated right, but interacts with bundles of rights, such as the right to contractual management of land and land management right, jointly affecting the utilization of collective property. The ownership subject of collective property is specific, as the subject acquiring usufructuary rights through contractual management also entails identity attribute characteristics. However, through the design of land management right, the subjects and forms of utilization of land have been expanded, thereby establishing a peculiar system of security rights in collective property.*

Keywords: *collective land; collective ownership; the division of three rights; right to contractual management of land; land management right.*

1. The Unique Connotation of Collective Property and Collective Ownership in China

Unlike the collective ownership of clan land in early Roman society and the communal land ownership of the Marches in Germanic society, collective ownership in China is a unique system that differs from traditional ownership in the civil law system, and presents a model of "attribution of rights" based on socialist ideology.[1] Chinese legislation and doctrine categorize ownership of the means of production into state ownership, collective ownership, and private ownership. This trichotomy reflects a theoretical perspective on ownership rather than the actual classification of ownership rights. Collective ownership

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[1] J. Li, "L'utilizzo collettivo e la proprietà collettiva terriera nell'esperienza cinese", *BIDR*, 4/2016, 309-330.

in China is a legal form of public ownership, which serves a social security function in rural society.

In the Chinese legal context, Article 10 paragraph 2 of *the Constitution of the People's Republic of China* explicitly states, "Land in the rural and suburban areas is owned by collectives except for those portions which belong to the state in accordance with the law; house sites and privately farmed plots of cropland and hilly land are also owned by collectives." The collective land system in China developed from various political and economic actions. The main purpose of this system, which is clearly shown in how the property is used, is to ensure that the land is used by the community as a whole. Consequently, the land belongs to the members of the community, establishing a socialist agricultural system within the community. Moreover, distribution of the collective land is detached from market competition rules, allowing community members to use the land in a non-commercial manner without profit motivation.[2]

In this setup, rural land in China operates under a special framework, where economic groups (collectives) own the land, but individual members of these groups use it. This creates a unique combination of "collective land ownership" and "individual rights to manage the land through contracts", known as the "right to contractual management of the land". Households acquire this right based on their membership in a specific economic group through allocation.

In practice, under the urban-rural dual system in China, rural areas have not fully benefited from the social security system, and in the context of land ownership being entirely state-owned or collectively-owned, the right to contractual management of land and the right to use a house site have undertaken a part of the social security function in the rural areas. The right to contractual management of land, rooted in collective ownership, essentially functions as a form of social security. It appears to be a private right but is designed to aid in social governance, acting as a substitute for social security under the guise of private rights.[3]

2. "Division of Three Rights"

The division of the three rights over land, which are "collective ownership – right to contractual management of land – right of land management", is a pivotal policy in China's collective ownership system. This policy not only influences land management, but also has a profound impact on the economic and social development of rural areas.

[2] J. Li, "L'utilizzo collettivo e la proprietà collettiva terriera nell'esperienza cinese", *BIDR*, 4/2016, 309-330.
[3] Q. Zhu, *The General Theory of Civil Law*, Beijing, 2013, 464.

2. 1. "Division of Three Rights" Aiming to Remove the Identity Attribute Restrictions on the Right to Contractual Management of Land

The "right to contractual management of land" is a unique land management system specific for China. Under this system, farmers can obtain the right to contract land owned by the state or collectives for agricultural production and management. This right encompasses the rights to contract, operate, and transfer the land. From the definition and function of the right to contractual management of land, it is evident that this right is closely linked to membership in a rural economic group. As a result, the right to contractual management of land cannot be traded in the market, which limits its value and the optimal use of the rural land. In light of this, restrictions on transfer have gradually been relieved in national policies, allowing holders of contractual management rights to subcontract or lease the land to others with purpose of management. With the aim to support intensive rural management, enhance farmland transfer, stabilize farmland management rights, and enable financing related to farmland, the reform of the "division of three rights" in rural collective land has progressively matured. [4]

The 2013 Central Rural Work Conference highlighted a new trend in separating the subjects of the right to contractual management of land and the right of land management. This introduced new requirements for improving the rural management system and necessitated ongoing exploration of effective forms to realize collective ownership of rural land.

In 2016 *Opinions of the General Office of the CPC Central Committee and the General Office of the State Council on Improving the Measures for Separating Rural Land Ownership from Contracted Management Right*, the separation of ownership and contractual management rights on land was emphasized, with ownership belonging to the community and contractual management rights to the households. This separation aims to boost farmers' enthusiasm for agricultural production and represents a significant institutional innovation in rural reform following the household contract responsibility system.

The policy concept of the "division of three rights" was ultimately addressed in the 2018 amendment to the *Law on Contracting of the Rural Land* and was explicitly included in the Civil Code of the People's Republic of China (CCC) of 2020. Article 340 of the *CCC* stipulates that "within the time limit as agreed in the contract, the person with the right of land management is entitled to possess the rural land, to carry out agricultural production and management on his own, and to benefit therefrom".

Since then, the right of land management was formally separated from the right to contractual management of land in the perspective of the law, becoming an independent right. This has led to achieving legalization of the "division of three rights" policy. "Three rights" refers to the three types of rights established over rural

[4] J. Liu, *Real Right in Civil Law / Minfa Wuquan*, Beijing, 2023, 215.

collective land: ownership, contractual management rights, and management rights. Under this framework, collective ownership by economic group is the essence, household contracting right is the foundation, and the right of land management is the key point, all unified under the basic rural operating system.[5] The so-called "division" refers to the fact that these three rights are enjoyed by different civil subjects. To be more specific, the ownership of rural collective land belongs to the economic group, the right to contractual management of land is enjoyed by a household, and the right to management is held by civil subjects other than group members. This "division of three rights" realizes the shared rights over collective land among the collective economic group, households, and other civil entities.

The "division of three rights" of rural land in China is the latest significant reform achievement, which has sparked extensive academic debate in view of its legal construction. Questions include whether the right of land management be considered a real right or merely a creditor's right?[6] Whether it is necessary to clearly distinguish the right to contractual management of land and establish independent land contracting rights in the Civil Code?[7] Other debates focus on whether the "division of three rights" aligns with the logic of creating *ius in re aliena* and whether separating the rights to contractual management and land management will cause conflicts?[8] In spite of the mentioned disputes, it is clear that the goal of the division is to make the best use of land.

2.2. Sorting Out the Connotation of the Right of Land Management from the Right to Contractual Management of Land

The right of land management is separated from the right to contractual management of land and becomes an independent and transferable capability. Households, as members of the economic group, still qualify for land contracting, which means that the civil subjects capable of contracting rural land remain unchanged. That is to say, only members of the rural economic group, not all civil subjects, are qualified to contract rural land.

Therefore, this retention still reflects the identity attribute and welfare aspect of the right to contractual management of land. Since the right of land management is derived from the right to contractual management of land, it should be naturally subject to the latter. For instance, when the right to contractual man-

[5] J. Cui, *Real Right: Norms and Doctrine / Wuquan: Guifan Yu Xueshuo* (II), Beijing, 2021, 37.
[6] S. Gao, "The Reform of Separation of 'Three Rights' of Rural Land and the Codification of 'Real Right Law' in the Civil Code of PRC", *ECUPL Journal*, 2/2019, 14-24; P. Shan, "Interpretation of Characterizing the Land Management Right as Creditor's Right", *The Juris*, 4/2022, 146-160; J. Cui, *Real Right: Norms and Doctrine / Wuquan: Guifan Yu Xueshuo* (II), Beijing, 2021, 41-44.
[7] S. Han, "Understanding the Regulations for Contractual land Management in the Property Chapter of China's Civil Code in the Context of 'Reconfiguration of Three Rights'", *Tsinghua University Law Journal*, 5/2018, 112-125.
[8] P. Shan, "A Rethink on the Theory of 'Three Rights Separation' and the Solution to the Dilemma of Land Contractual Management Right", *Law Science*, 9/2016, 54-66.

agement of land is transferred, the agreed-upon management period should not exceed the land contracting period (cfr. Article 38, Paragraph 3 of *Law on the Contracting of Rural Land*). This could be explained by a Roman law maxim that "no one can transfer to another a right which he himself does not possess" (*Nemo plus juris ad alium transferre potest, quam ipse habet*).

2.3. The Right to Use One's Possessions is One of the Most Crucial Aspects of Ownership

Under the "division of three rights", the use function of the rural land, namely the right to management, has been independently separated. The rural economic group retains bare ownership (nue-propriété), while its members retain the right to contractual management of land. What is the significance of this? Essentially, retention of the so-called collective land ownership by the rural economic group confirms that rural land is collectively owned. It is an affirmation of the system of collective land ownership.

Establishing the right to contractual management of land above the land ownership of the economic group allows members of the group to utilize the collective land in a regulated manner. It also indicates that the economic group has the authority to reclaim the land once the right to contractual management of the land expires. In this way, the economic group can provide social security for farmers who have lost land by redistributing the right to contractual management of land, and addresses worries about non-members gaining control of collective land. This approach balances efficient land use with the goal of safeguarding farmers' livelihoods.[9]

Members of the rural economic group retain the qualification to contract land. On the one hand, as mentioned above, this confirms, in the perspective of the law, the group's ownership over the land and restricts leasing to its members. On the other hand, it also safeguards the livelihoods of farmers. Specifically, when the agreed management period expires, control of the land reverts to the farmers with the management right, allowing them to decide how to utilize the land.

3. Land Management right with Emphasis on Utilization Functions

3.1. Land management right in pursuit of efficiency

Land management right emphasizes the utilization of land, its separation from the right to contractual management of land makes the real and direct

[9] P. Shan, "A Rethink on the Theory of 'Three Rights Separation' and the Solution to the Dilemma of Land Contractual Management Right", *Law Science*, 9/2016, 54-66.

utilizers of rural land no longer limited to members of the economic group, thus maximizing the benefits of utilizing scarce land resources. With regard to rural land such as barren mountains, ditches, hills and beaches (referred to as the 'four types of barren lands') that are under household contract, in accordance with Article 342 of *CCC* and Articles 48-54 of the *Law on Contracting of the Rural Land*, land management right may be established through bidding, auction, or open negotiations. As part of the reform of the "division of three rights", the contracting of the "four types of barren lands" no longer requires prior establishment of the right to contractual management of land, but it is rather defined directly in terms of the right to management of land that has no strict limit on the identity of the contractor and circulation.[10]

For rural land managed under household contract, households can extend management rights to others based on their own contractual rights, which is also the main reform under the "division of three rights". According to Article 339 of the CCC, "a person with the right to contractual management of land may decide on his own to transfer the right to management of the land to others by leasing, contributing it as shares, or other means in accordance with the law". Article 341 further specifies that "the right to management of land which is transferred for a term of five years or longer is created when the contract for the transfer enters into force. The parties may apply to the registration authority for registration of the right to management of land; without registration, such a right may not be asserted against a bona fide third person". While the land management right is now open beyond members of the rural economic collective, they still have the right of first refusal under equal conditions compared to non-members (Article 38, Paragraph 5, and Article 51 of *the Law on the Contracting of Rural Land*).

Furthermore, the person holding land management rights must adhere to certain restrictions of operation in terms of use and methods, specifically prohibiting changes to the agricultural use of the land and preventing harm to the comprehensive agricultural productivity and agro-ecological environment. (Article 38, Paragraph 2 of *the Law on Contracting of the Rural Land*). Additionally, they are required to possess necessary agricultural skills or qualifications (Article 38, Paragraph 4 of *the Law on the Contracting of Rural Land*).

3.2. The release of the intrinsic value of the rights over land

Within the logical framework of collective ownership in China, the rural land's value is enhanced through the right to contractual management of land and land management right as collateral. Farmers' right to contractual management of land constitutes an independent usufructuary right, allowing the contracting party to use the land management rights of the contracted land as collateral for financing from financial institutions. After being separated from the right of contractual

[10] J. Liu, *Real Right in Civil Law / Minfa Wuquan*, Beijing, 2023, 215-216.

management of land, the land management right can be transferred and used as collateral for mortgages. According to Article 341 of the *CCC* and Article 31 of the *Law on Contracting of the Rural Land*, the land management right with a term exceeding five years shall become effective against a third party once registered. In this way, the land management right acquires the appearance of property rights.

However, under Article 47, paragraph 1, of the *Law on Contracting of the Rural Land*, although the land management right may be financed and secured, the consent of the contractor is required. This provision essentially denies the right of disposition to the holder of the right of management of land. Additionally, the objects of financing guarantees are limited to financial institutions, which means that the right to management of land does not possess the attributes of a general mortgage property.[11] Thus, while the current laws recognize the financing potential of land management rights, they impose specific restrictions to accommodate the unique nature of "farmland mortgages".[12]

Regarding enforcement of the mortgage over land management right, the creditor holding security rights holds priority of repayment. Whether the mortgage is based on contractual management rights or direct management rights, if the debtor fails to repay the debt on time, the creditor has the right to be paid first from the proceeds of the land management rights, while the debtor's qualification for land contracting remains unchanged. According to Article 410 of the *CCC*, this priority repayment is achieved through property appraisal, auction, or sale of the mortgaged property. Thus, if the right to contractual management of land or land management right are mortgaged, and the debt fails to be repaid when due, the right to management of rural land could be disposed of through appraisal and acceptance, as well as the auction or sale of the mortgaged property, with the mortgagee having priority in the proceeds.

Additionally, to enforce the security right, implementing a mandatory management system is practical. This involves commissioning the management of the mortgaged property to a third party and using the resulting proceeds to prioritize debt repayment. This method of preferential repayment targets the proceeds from the rural land, allowing the debtor to retain the land management right. After the debt is completely settled using these proceeds, the debtor regains direct enjoyment of the land management rights.[13]

4. Conclusion

Collective ownership in China highlights the characteristics of public ownership and carries the responsibility of providing social security in rural areas.

[11] J. Liu, *Real Right in Civil Law / Minfa Wuquan*, Beijing, 2023, 217.

[12] S. Gao, "The Legal Dilemma of the Financialization of Agricultural Land and a Way Forward", *Social Sciences in China*, 8/2014, 14-24.

[13] S. Fang, "On the Institutional Construction of Mortgage of Land Contract Management Rights", *The Jurist*, 2/2014, 41-47; S. Gao, "The Legal Dilemma of the Financialization of Agricultural Land and a Way Forward", *Social Sciences in China*, 8/2014, 14-24.

Driven by the market economy, normative focus has gradually shifted from collective ownership itself to the utilization of collective property. This shift led to the institutional reform known as the "division of three rights", which established the unique structure of "collective ownership – right to contractual management of land – land management right". Separation of the land management right breaks the restriction on the subjects that can utilize collective land, expands the forms of land utilization, and maximizes the use of rural collective land. This reform represents a significant institutional innovation in contemporary China.

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COLLECTIVE PROPERTY LEGAL REGIMES AND THE EVOLUTION OF CHINESE ENTERPRISE REFORMS: A HISTORICAL APPRAISAL

Abstract: *In the experience of Chinese economic reforms a capital role has been played by those collective institutions derived from the dismantlement of the communes established during the Maoist era. Legal regimes governing collective rights over both land and enterprises, starting from the early 1980s, empowered local communities to foster private-led economic initiatives. The Township and Village Enterprise became, in those years, the leading force of Chinese economic development. Collective enterprises constantly sought a balance between theoretical frameworks of property rights, rooted in socialist legal theory, and the increasing necessity for a diversification of instruments able to grant families and private individuals the powers to undertake economic endeavours. A historical appraisal of the role played by collective enterprises in the transformation of Chinese economic law is essential to understand how the current, highly diversified, regime of property rights in China came to be.*

Keywords: *Township and Village Enterprises; China's Collective Economy; Chinese Enterprise Law; History of Chinese Economic Reforms; Chinese Development Planning.*

1. Introduction

Collective property is unanimously regarded as a basic element of the system of Chinese property rights, in a triad together with state property and private property[1]. Its role is now enshrined in the civil code[2]. However, its relevance for the development of the current Chinese industrial model has been, in recent times, often neglected, overshadowed by the emphasis placed on other vectors of market and enterprise reforms.

Historically speaking, the industrial structures of the socialist market economy all arose from the gradual transformation of the productive relations existing under the planned economy system, which was partially dismantled and partially

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[1] Xi Zhiguo, 中国物权法论 (*Introduction to Chinese Real Rights Law*), China University of Political Science and Law Press, Beijing 2016, 177 etc.

[2] See Articles 260 and following.

reinvented after the beginning of reforms in the late 1970s[3]. Those relations covered, essentially, either state-led economy or collective economy, i.e. those productive units established and managed by collective entities recognized under the Chinese socialist law[4].

It is therefore easy to imagine to what extent collective property regimes were at the core of the reform process. It was under those regimes, in the 1980s, that private-led enterprises first flourished in China; it was under those regimes that agriculture was gradually boosted thanks to the abolition of fixed planning schemes. Still today, albeit to a minor extent than in the past, enterprises established under collective property rights play a significant role in Chinese economic development.

How was such a role made possible over the course of economic reforms? Which are the collective institutions involved in Chinese economic development? How is their involvement regulated? This paper will provide a brief answer to these basic questions.

2. China's Collective Economy from its Soviet Roots to the Market Economy (1949-1978)

The recent legal history of collective property in Chinese law reflects, essentially, a series of complex variations, developed over the course of the past seven decades, upon theoretical bases set by Soviet legal thinking[5].

The triad shaping Chinese property law – i.e. state property, collective property and private property – inherently conceives state property as the most relevant[6], while retaining collective property as an essential expression of socialist economy, meant to empower collective communities such as rural villages and townships (thus, essentially local communities) to own the land they live in. The State and the collectives are the only subjects eligible to own land[7].

Such an approach draws heavily from the tripartite scheme conceived in Soviet law distinguishing state property, property of collective organizations and individual property, which by the 1940s had been thoroughly established so as to serve the mechanisms of Stalinist economic planning[8]. It was therefore almost inevitable that, in its process of economic "Stalinization"[9], Maoist China imported

[3] G. Ajani, A. Serafino, M. Timoteo, *Diritto dell'Asia Orientale*, Utet, Torino 2007, 308 etc.
[4] *Ibid.*
[5] Hu Zhimin, 苏联法学理论对新中国法学的影响 (*The influence of Soviet legal theory upon New China's legal theory*), Renmin University Press, Beijing 2020, 319 etc.; Xu Guodong, "La "de-sovietizzazione" e il ruolo dell'economia politica nella bozza di Codice civile del 1964 e nell'attuale Codice civile cinese", *Codex*, 3/2022.
[6] *Ibid.*
[7] See Chinese Civil Code, Book 2, Part 2, Chapter V.
[8] A. V. Venediktov, *Gosudarstvennaja Sotsialist'it'eskaja Sobst'vennost'*, Academy of Sciences of the USSR, Moscow-Leningrad 1948.
[9] H. Li, *Mao and the Economic Stalinization of China, 1948–1953*, Rowman & Littlefield, Lanham 2006.

the Soviet property triad[10]. At the same time, Chinese law incorporated the most fundamental corollary of Soviet property law, i.e. the distinction between ownership and management rights, thus allowing spaces for managerial autonomy in state enterprises[11].

As far as collectives are concerned, however, a thorough and accurate importation of Soviet models was not feasible. While in the USSR collective property regimes were for the most part an epiphany of the process of centralization/collectivization of agricultural production and of bureaucratization of social life[12], in China collective entities, such as villages, had historically played a capital role in the economic management of the countryside[13]. Furthermore, Chinese socialism always retained a certain tendency towards decentralization, thus conceiving collectivization of economic activities as a way to empower local communities, run by local party cadres[14].

It was under such premises that collective enterprises appeared for the first time in the history of the People's Republic of China. It happened during the so-called "Great Leap Forward" in 1958. As known, the collectivization of agriculture took the form of great People's Communes (人民公社 - *renmin gongshe*) which became the highest administrative unit in rural areas[15]. However, such Communes were soon empowered also to carry out industrial activities and, therefore, entrusted with the management of local enterprises: enterprises managed by rural cooperatives, small and medium-sized state-run enterprises as well as newly built enterprises were all transferred into the hands of the Communes[16].

This system, however, soon suffered from the overall failure of the Great Leap Forward, which, in the early 1960s, led to a renewed emphasis on state enterprises[17].

A new phase opened with the launch of the Cultural Revolution in 1966. Under the theoretical umbrella of Maoist thoughts about further decentralization – albeit strictly led by local party cadres and red guards – collective entities were to play an even bigger role. Rural enterprises were transferred once again into the hands of Communes' sub-units such as, especially, industrial brigades[18]. Brigade-run enterprises (社队企业 - *shedui qiye*) became a feature of Chinese countryside and drew workforce, especially after 1968, from the pool of educated urban youth (知识青年 - *zhishi qingnian*, abbreviated as *zhiqing*) which, either voluntarily or under

[10] Hu Zhimin, 321-323.
[11] A. V. Venediktov; G. Ajani, *Diritto dell'Europa Orientale*, Utet, Torino, 1996, 281; T. Vendryes, "Les droits fonciers en Chine rurale depuis 1978", *Perspectives chinoises*, 4/2010, 93-106.
[12] G. Ajani, *La proprietà delle organizzazioni sociali nel diritto dei paesi socialisti*, Giuffrè, Milano 1988.
[13] X. Fei, *From the Soil. The Foundations of Chinese Society*, University of California Press, Berkeley 1992.
[14] L. Zhou, *Incentives and Governance: China's Local Governments*, Gale Asia, Singapore 2010.
[15] T. Vendryes; H. Kang (ed), *China's Township and Village Enterprises*, Foreign Languages Press, Beijing 2006, 23; J. Li, "L'utilizzo collettivo e la proprietà collettiva terriera nell'esperienza cinese", *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 6/2017, 1-22.
[16] H. Kang, 23.
[17] *Ibid.*, 36.
[18] *Ibid.*, 45.

different forms of coercion, took part in the rustication movement, which led them to go working in rural areas[19].

In times of general distrust towards legalization and heavy ideologizing of economic activity, such enterprises were often run according to purely political and ideological purposes. The very notion of collective property was at that time conceived as a sort of temporary stage, which should have led, through the ideological rejuvenation of the Cultural Revolution, to a dissolution of established forms of property into the ownership of the whole people, of the mass.

On the other hand, however, the emphasis placed on such Commune-run enterprises helped establishing a solid industrial environment in the Chinese countryside, whose industrial output grew steadily in the early 1970s[20]. A valuable example for the future development of collective industry in rural areas was set.

3. The Township and Village Enterprise (乡镇企业 - xiangzhen qiye) and the other Collective Enterprises (集体所有制企业 - jiti suoyouzhi qiye)

When Chinese economic reforms began, in 1978, the conceptual structures of collective enterprises were initially left untouched. Brigade-run enterprises continued to exist[21].

However, they soon endured the inevitable spill-over effects of the gradual transformation of collective property regimes, both in the cities and in the countryside. In rural areas, the main change was the introduction of the land contracting system (承包 - *chengbao*) which, drawing from the distinction between the right of ownership and management rights, allowed peasant families to be leaseholders of agricultural land, so to manage it in the light of market-oriented standards[22].

In urban areas, on the other hand, collectively-run enterprises were allowed increasing freedom for operating on the market, setting prices, determining production strategies and so on[23].

Experimental reforms concerning rural commune enterprises achieved diversified outcomes: in some cases (the so-called "Wenzhou model"), formerly brigade-run enterprises, whose ownership rested with the respective collective entity, were indeed leased out to households, which managed them mostly fol-

[19] M. Bonnin, *The Lost Generation: The Rustification of Chinese Youth, 1968-1980*, Chinese University Press, Hong Kong 2013.
[20] H. Kang, 50-51.
[21] Lin Rihua, Leng Tiexun, 乡村集体所有制企业的若干法律问题 (Some legal issues of the rural collective enterprises), *faxue pinglun*, 1/1991, 40.
[22] T. Vendryes.
[23] On the topic see, in general, B. Naughton, *Growing Out of the Plan. Chinese Economic Reform 1978-1993*, Cambridge University Press, Cambridge 1995.

lowing market-oriented practices[24]. In other cases, collective entities such as villages established partnerships with households and adopted a joint management approach[25]. Alternatively (in the so-called "South Jiangsu model"), the collective entity could decide to retain in its own hands the management of local enterprises, while allowing more entrepreneurial freedom to its managers and directors[26].

After 1984, when People's Communes were officially dismantled and replaced, in terms of administrative divisions, by Townships (乡 - *xiang*) and Villages (镇 - *zhen*), the commune enterprises all became Township and Village Enterprises (TVEs). In the 1980s and 1990s they experienced massive success, to the point of being viewed as the backbone of the Chinese economic miracle[27].

Which were the reasons of such success? At least three different peculiar traits of this type of enterprise are worth mentioning.

In the first place, their property regime allowed for both ideological and practical flexibility. TVEs were collectively owned by Townships and Villages, even if only a part of them, in those years, was actually managed by local governments[28]. As just seen, other solutions included government-household partnerships and leases to households or private subjects.

Collective property regimes allowed for a certain degree of control from local authorities, thus favoring the development of personal connections between enterprise managers and local political figures, while also, on the other hand, effectively placing private-run enterprises outside the purview of state economic plans and giving them greater management freedom[29].

In the second place, the peculiar connotation of TVEs, even when privately managed, implied, on the one hand, favourable treatment by local governments in terms, for instance, of taxation; however, on the other hand, it excluded them from the benefits usually accorded to State-Owned Enterprises, especially as far as access to credit from state-owned banks was concerned[30]. Therefore, TVEs were by all means forced to adopt profitable management and business strategies, so to sustain themselves in the absence of capital injections from local authorities[31].

In the third place, the transition from brigade-run enterprises to TVEs led several industrial establishments to be leased out to former Commune cadres or leaders, who gradually became a first "generation" of entrepreneurs in Chinese countryside, making use of their political connections to gain favourable political

[24] L. Zhou.
[25] *Ibid.*
[26] *Ibid.*; L. Sun, *Ownership reform in China's township and village enterprises*, in S. Green, G.S. Liu, *Exit the Dragon? Privatization and State Control in China*, Blackwell, Oxford, 2005, 90-110.
[27] H. Cheng, *Promoting Township and Village Enterprises as a Growth Strategy in China*, in M. Guitian, R.A. Mundell (eds), *Inflation and Growth in China*, International Monetary Fund 1996, 168-189; H. Kang.
[28] Lin Rihua, Leng Tiexun; Peng Maoqing, 集体所有制企业的若干法律问题 (Some legal issues of collective enterprises), *Yunnan daxue xuebao*, 2/2001, 54.
[29] Lan Cao, "Chinese Privatization: Between Plan and Market", *Law and Contemporary Problems*, 63/2000, 13-62; B. Naughton.
[30] L. Zhou.
[31] *Ibid.*

conditions for their new endeavours. In return for such support, they did not hesitate to align their business strategies to the priorities pursued by the authorities.

The aforementioned three elements all contributed to the success of TVEs starting from the 1980s, operating in a regulatory vacuum (as often happened in the early years of Chinese reforms) which allowed for bold experiments. The first regulatory interventions from the Chinese State Council had occurred already in the late 1970s, but they were, indeed, mainly promotional, simply clarifying the political will to support the growth of collective enterprises[32].

It was only in the 1990s that the situation changed. At that time, economic reforms had been deepened and the Chinese industrial landscape was more complex, especially due to several waves of proper privatizations, which had also involved several TVEs[33]. At the same time, urban collective enterprises now enjoyed a degree of business autonomy, which often put them in direct competition with private economic operators. As a consequence, some of those factors which had contributed to the success of TVEs and other collective enterprises were beginning to be viewed also as issues of the economic system as a whole[34].

So, for instance, preferential treatment sometimes accorded to TVEs and collective enterprises by the local government was perceived as discriminatory toward private enterprises[35]. Furthermore, the hybrid nature of collective ownership allowed some space for hazy practices: private entrepreneurs with good connections could be able to register their enterprise as a collective one, thus accessing the corresponding benefits, even without the prescribed characteristics[36].

In order to tackle these issues, starting from the 1990s the Chinese decision-makers began to take in serious account establishment of a coherent regulatory framework for TVEs and for collectively-owned enterprises in general. In 1990, the Regulation on Rural Collectively-Owned Enterprises (i.e., the TVEs) was passed[37]; in 1991 the same happened with the Regulation on Urban Collectively-Owned Enterprises[38] and, in 1996, with the Law on Township and Village Enterprises[39].

The regulatory effort proceeded in two main directions: on the one hand, the regulations about collective enterprises set clear rules pertaining to their reg-

[32] See, for instance the "Notice on the Rules on Several Issues Concerning the Development of Commune and Brigade Enterprises (Draft for Trial Implementation)" (关于发展社队企业若干问题的规定（试行草案）的通知) of 1979 and the "Several Rules on the Implementation of the National Economic Adjustment Policy by Commune and Brigade Enterprises" (关于社队企业贯彻国民经济调整方针的若干规定) of 1982. On the topic see Lin Rihua, Leng Tiexun.

[33] S. Liu.

[34] H. Cheng.

[35] Peng Maoqing; H. Cheng.

[36] Peng Maoqing.

[37] 乡村集体所有制企业条例. The Regulation is still in force and has been revised several times (the most recent being in 2011).

[38] 城镇集体所有制企业条例. The Regulation is still in force. Its latest revision was in 2016.

[39] 乡镇企业法. The law entered into force in 1997. Compared with the previous regulations, its nature reflects a mainly promotional approach instead of a regulatory one.

istration, their internal organization, as well as their entrepreneurial autonomy. On the other hand, the Chinese leadership displayed a clear intention to strengthen the connection between the collective enterprise as an economic operator and the State.

According to the regulations, the TVEs are «enterprises established collectively by farmers of township (...) and villages (...)»[40]. Distinguished from them are the urban collectively-owned enterprises (集体所有制企业 - *jiti suoyouzhi qiye*, hereinafter also "UCOEs"), established in non-rural areas.

The differentiation directly affects the connotation of the collective property rights involved: UCOEs are property of the "working masses" (劳动群众 - *laodong qunzhong*)[41], referring to either the working staff of the enterprise or the working masses of united economic organizations within the enterprise[42]. Moreover, an enterprise is listed as collectively-owned when its capital is owned for the majority (no less than 51%) by a collective entity (such as another collective enterprise), even when the remaining capital is owned by private investors[43].

On the other hand, TVEs are owned by the «farmers within the scope of the township or village where the enterprise is formed», and the right of ownership is exercised either by the general meeting of farmers or by a collective organization representing the farmers[44]. The law allows for TVEs to exist also under mixed ownership schemes, provided that the capital invested in them by rural economic collective entities exceeds 50% or, alternatively, is inferior to 50% but «enough to play a holding or dominating role»[45].

Differences in the theoretical property settings impact upon specific management of collective enterprises. Urban enterprises are subjected to democratic management stemming from a system of workers' assemblies, in charge of appointing the enterprise management figures[46]. Even if the law grants such enterprises wide margins of business autonomy, they remain subjected to state economic plans[47] and are bound to carry out ideological and educational tasks toward their own employees[48]. Grassroots organizations of the Communist Party of China (CPC) play a supervisory role within such enterprises, especially with regard to the implementation of Party and state policies[49].

With regard to TVEs, state control over business operations does exist, but is more nuanced. As the ownership is vested into the rural collective entity, the autonomy of the TVE reflects, at least in part, the governance autonomy granted

[40] Art. 1 of the Regulation on TVEs.
[41] Art. 4 of the Regulation on UCOEs.
[42] *Ibid.*
[43] *Ibid.*
[44] Art. 18 of the Regulation on TVEs.
[45] Art. 2 of the Law on TVEs.
[46] Art. 9 of the Regulation on UCOEs.
[47] Articles 7 and 22(1) of the Regulation on UCOEs.
[48] Art. 22(9) of the Regulation on UCOEs.
[49] Art. 10 of the Regulation on UCOEs.

to rural communities[50]. TVEs are not forced to establish CPC branches (though it may very well happen); they assume sole responsibility for profits and losses[51] and are only bound by local plans for rural development[52]. Nevertheless, they are, by law, subjected to preferential fiscal and financial treatments[53], in the light of their capital role in promoting the development of rural areas, especially the most backward ones[54].

More importantly, rural collectives may lease TVEs to private subjects without any change in the enterprise's form of ownership[55]. In case of leasing or contracting-out, however, the collective retains its supervisory and coordinating tasks[56].

4. Collective Property and the Rural Economy: Market and Planning Schemes

After the 1990s, the regulatory initiatives promoted by the State rationalized the landscape of collective enterprises and, though gradually, led them to become a more limited phenomenon, much less widespread than what had happened in the previous decades. As private economy gained momentum and the State (at all levels) sought to privatize unproductive and small enterprises[57], some collective enterprises (both in urban and rural areas) struggled to cope with increasing competition and to enhance the quality of their production so as to meet market demands[58].

Collective enterprises, especially TVEs, still play a significant role in the secondary sector of Chinese economy, but surely they cannot be considered, as they once were, the backbone of Chinese economic development[59]. The decrease in scientific contributions about them reflects such diminished relevance.

Notwithstanding such changes, the legal mechanisms which shaped the TVE as a vector of Chinese rural development set operational paradigms which

[50] On the topic see S. Li, *I rapporti fra i comitati di villaggio e i governi delle aree rurali*, in G. Rossi (ed), *Stato e società in Cina. Comitati di villaggio, organizzazioni governative, enti pubblici*, Giappichelli, Torino 2011, 13-24.
[51] Art. 6 of the Regulation on TVEs.
[52] Art. 13(6) of the Regulation on TVEs.
[53] Articles 17-22 of the Law on TVEs.
[54] Art. 6 of the Law on TVEs.
[55] Art. 18 of the Regulation on TVEs.
[56] Art. 19 of the Regulation on TVEs. The principle expresses in this article, namely the right of decision concerning the enterprise's operating direction, seems, indeed, to hold general value, even in situations where the enterprise is leased out to a third party who therefore becomes its manager.
[57] Lan Cao.
[58] B. H. McDonnell, "Lessons from the Rise and (Possible) Fall of Chinese Township Lessons from the Rise and (Possible) Fall of Chinese Township Village Enterprises", *William & Mary Law Review*, 45/2004, 953-1009.
[59] Zong Jinyao, Chen Jianguang, 历史不会忘记乡镇企业的重要贡献 (History will not forget the important contribution of Township and Village Enterprises), Agricultural Products Processing Bureau of the Ministry of Agriculture and Rural Affairs of the People's Republic of China, 31 July 2018, available at http://www.moa.gov.cn/xw/bmdt/201807/t20180731_6154959.htm (latest access: 4 June 2024).

are still today employed by local authorities and, especially, by rural collective entities when dealing with the management of either their own land or their industrial establishments.

In the Chinese countryside, the vast majority of land is owned by townships and villages. Agricultural enterprises operating on such land rely on a wide variety of lease/concession schemes, nowadays involving (potentially) several subjects[60]: collective land may be leased to members of the collective entity (typically, a household or a villager); alternatively, it may be leased to an enterprise, which may be either a TVE or a farmers' cooperative or even a private enterprise owned by a subject not belonging to the collective entity[61]. Furthermore, as the use and management rights derived from the aforementioned schemes may circulate[62], it often happens that the original titular of such rights (be it a household, an individual or a cooperative) decides to transfer them to other subjects, usually based outside the collective entity and strangers to it[63].

On the one hand, this phenomenon is meant to foster the advancement of market mechanisms in the management of collective land. On the other hand, however, the specific legal setting of collective property implies a certain degree of coordination between the owner of the land (i.e. the collective entity) and the titular of the use/management right.

It is such coordination which allows planning mechanisms to operate in the development of rural economy. The vertical, mandatory planning quotas which (at least in principle) still governed agricultural production in the 1980s were gradually rendered null and void by the variety of regulatory experiments that flourished in the early years of the reforms, including that of the TVEs. Therefore, vertical planning was replaced by interventionist policies which sought to achieve planning objectives by controlling the allocation of financial disbursements such as subsidies, tax reliefs and cheap credit from state-owned banks[64].

In the light of the political connection between the collective entity (owner of the land) and the local government (owner or main shareholder of rural banks), supervisory and coordinating powers of those entities toward the actual users of collective property are reinforced. In other words, a better coordination between the strategic priorities of the user of the land, of the owner of the land

[60] Li Jun.

[61] Information contained in this paragraph were collected during a series of interviews conducted in June 2018 in a village of the county of Pingjiang in Hunan Province. Interviewed people included members of a local farmers' cooperative holding a right to use agricultural land owned by the village.

[62] Cui Jianyuan, 物权：规范与学说 (*Real rights: norms and doctrines*), Vol. 2, Tsinghua University Press, Beijing 2011.

[63] See fn 57.

[64] On the transformation of Chinese economic and development planning see S. Heilmann, O. Melton, "The reinvention of Development planning in China, 1993-2012", *Modern China*, 39/2013, 580-628; Wang Shaoguang, Yan Yilong, *A Democratic Way of Decision-Making: Five Year Plan Process in China* (中国民主决策模式，以五年规划制定为例), Renmin University Press, Beijing 2016; G. Sabatino, *I paradigmi giuridici della pianificazione per lo sviluppo*, Editoriale Scientifica, Napoli 2022; Id., *Legal Features of Chinese Economic Planning*, in I. Castellucci (ed), *Saggi di diritto economico e commerciale cinese*, Editoriale Scientifica, Napoli 2019, 33-78.

(i.e. the collective entity) and of the local government implies higher chances of receiving financial benefits for one's economic activity[65].

Similar schemes are also applicable to TVEs which are leased out to households and other private subjects[66].

To sum up, Chinese collective property regimes, as far as enterprise activity is concerned, rely on a complex network of institutional relations involving economic operators, collective entities and local government authorities. On the one hand, it is such network which makes it possible to implement support policies for enterprises using collective land or for collective enterprises themselves; on the other hand, the existence of such network prevents a clear separation between the collective and the state in the management of economic activities[67]. Albeit to different extents in UCOEs and TVEs, moreover, phenomena of paternalistic management and political interference appear to be a typical trait of this typology of enterprise, hindering their economic efficiency and, thus, their strategic relevance[68].

5. Conclusion

The inherent ambivalence of Chinese property law, torn between the Soviet conceptual categories, socialist institutional frameworks and the new market-oriented rules, is sometimes criticized and, especially in times of codification, is deemed partially unfit to serve the purposes of a complex economy such as the Chinese one[69]. Similar considerations may be raised with specific regard to collective property regimes in enterprise law[70].

However, looking at the issue from a comprehensive perspective, one could also assume that such criticisms imply the idea that Chinese market socialism could progressively develop toward a purely capitalistic property law. This, indeed, is not the case, and thinking otherwise would mean doing a mere exercise in wishful thinking.

In the second place, it must be noted that collective enterprises, historically, have played a capital role in taking advantage of the regulatory voids opened at the beginning of the reforms, while maintaining their ideological allegiance to socialist categories and principles. In underdeveloped rural areas, the existence

[65] See fn 57. Benefits granted to users of collective land who align their business strategies to local development strategies include not only easy access to credit from local banks or subsidies, but also favorable loan schemes, discounted interests rates on loans, as well as organizational and financial backing for advertising campaigns promoting the products of the enterprise working on the collective land.

[66] With specific regard to TVEs, the coordinating powers of authorities also stems from the provision of Art. 19 of the Regulation on TVEs.

[67] Zhou Rui, 我国乡镇企业法律环境分析 (Analysis of the Legal Environment of Chinese Township and Village Enterprises), *jingji yu fa*, 2007, 342-343.

[68] *Ibid.*

[69] Xu Guodong.

[70] Zhou Rui.

of the TVEs, though not celebrated as before, still continues to provide local communities and authorities with flexible instruments to combine overall development planning and a certain degree of business freedom. Consequently, the debate about the improvement of management solutions for TVEs is ongoing in China[71].

TVEs and other collective enterprises may never regain the status they acquired in the 1980s and 1990s and their market share may gradually decrease, as urbanization increases and industrial landscapes rapidly change; notwithstanding, the regulatory paradigms they set and the operational models they established remain at the root of Chinese rural economy.

From such perspective, Chinese law interprets traditional socialist categories not only in the light of its own tradition (for instance, with regard to the role played by rural collectives and villages) but also in the light of both market mechanisms and the new instruments of development planning.

The institution of collective property in Chinese enterprise law, therefore, embodies a functional and non-ideological approach to the relation between plan and market, in the sense meant by Deng Xiaoping, the chief architect of Chinese economic reforms[72]. It is only through the filter of such approach that the current role played by collective property regimes in Chinese economic developments, as well as their future transformations, may be understood.

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[72] Deng Xiaoping, 文选 (*Selected Works*), Vol. 3, People's Press, Beijing 1993, 373.

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THE CONCEPT OF BENEFICIAL OWNERSHIP: THEORY AND PRACTICE OF APPLICATION

Abstract: *The author will conduct a comparative study of contemporary issues of development and application of the concept of "beneficial ownership" within legal systems of leading countries of Anglo-American law and "economic ownership" in legal orders of the countries of Roman-German legal traditions. The focus of the work will be on the issues of influence of restrictive measures of some countries and international entities on the legal relations and mechanisms in the sphere.*

Keywords: *beneficial ownership, economic ownership, legal system, legal order, Anglo-American legal family, Roman-German legal family, restrictive measures.*

The notion of "beneficial ownership" originated from the evolution of trusts in the equitable system, where ownership is divided into legal and beneficial aspects. This division is a result of the unique historical progression of Anglo-American law. Under a trust, the beneficial owner not only has a personal obligation right against the trustee but also holds a real right against third parties, as per equitable law provisions. In contrast to Anglo-American law jurisdictions, continental legal system countries emphasize the absolute nature of property rights and clearly delineate limited property rights through national civil legislation. In the civil law of these nations, the concept of "economic ownership" is utilized, involving the transfer of a specific right to use property along with the right to receive income from it[2]. The updated Civil Code of certain continental countries, such as the Hungarian Civil Code of 2013, includes the term "beneficial ownership," which refers to a restricted real right of usufruct and differs from common law beneficial ownership.

The term "beneficiary" is derived from the Latin word "beneficialis", which combines "bene" meaning "benefit" and "ficere" meaning "to do". It refers to the individual who receives the benefit or favor. The concept of "beneficial ownership" originated in Medieval England's civil law and evolved from trust law, initially known as "uses" granting the right to use land. The trust system was widely utilized during the twelfth-century Crusades, where knights entrusted their lands

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[2] P. Kozanecka, Chinese legal terminology in the field of property law, *Comparative Legilinguistics*, 25/2016, 7–25.

to caretakers while away, granting them legal ownership powers. However, the knights retained property rights upon their return, as land ownership belonged to the king of England.

The concept of "splitting" property rights emerged when courts of equity and common-law courts recognized different owners of lands. Crusader knights were acknowledged as land owners by courts of equity, while common-law courts identified those who managed the land in the absence of crusaders as owners of specified land plots. Knights allocated their land for the benefit of family members, which was considered factual rather than legal. Returning crusaders sought legal protection in the courts of equity of the Lord Chancellor, who applied principles of canon and Roman law, as their rights were not protected in common-law courts. With the adoption of the Statue of Uses in 1535, the beneficiary was acknowledged as the equitable owner of the trust property.

The Earl of Oxford's Case of 1615 acknowledged the precedence of equity over common law, emphasizing the principle of *res judicata*. The Lord Chancellor highlighted the Crown Office's role as the guardian of justice and virtue, contrasting it with other courts that strictly adhere to legal rules. Equity law recognizes the distinction between legal and beneficial ownership, allowing for the division of property rights among different individuals. Beneficial ownership refers to an economic or financial interest in a property, separate from legal ownership. This concept is closely related to trust law, which delineates the rights of trustees from those of beneficiaries with beneficial interests. In cases where the rigidity of common law may cause harm to individuals, the Crown Office considers principles of equality and justice. By balancing legal rules with equitable considerations, the Office aims to uphold fairness and justice in its decisions.

A trust is a legal construct under equity law where property is split into "legal property" owned by the trustee and "beneficial property" owned by the beneficiary[3]. The concept of "beneficial property" is evident in court decisions, such as in Ayerst v. C & K Ltd, where legal ownership does not grant the right to income or disposal of the property. The division of property in a trust involves two components: "legal property" held by the trustee and "beneficial property" held by the beneficiary (Bray, 2012)[4]. The idea of "beneficial property" is highlighted in court rulings, like in *Ayerst v. C & K Ltd*, where legal ownership does not entail the right to income or disposal of the property[5].

The fundamental concept discussed in the text is the archetype of equity property, known as the "split property," which is structured as a trust where legal ownership lies with the trustee for the benefit of the beneficiaries. The distinction between legal ownership and beneficial ownership is highlighted in the case of *J Sainsbury plc v O'Connor*[6], where it was emphasized that beneficial ownership en-

[3] J. Bray, *A student's guide to equity and trusts,* Cambridge University Press, 2012.
[4] *Ibid*.
[5] Ayerst (Inspector of Taxes) v C&K (Construction) Ltd [1976] AC 167.
[6] J Sainsbury Plc v O'Connor (Inspector of Taxes) [1991] 1 W.L.R. 963 (22 May 1991).

tails ownership for one's own benefit, either when legal and economic ownership align or when they are held by different parties[7].

Court discussed beneficial ownership in the trust in the case of *Prevost Car Inc. v. Her Majesty The Queen*[8]. It was highlighted that a trustee holds property for the benefit of another person, despite being the legal owner. The trustee does not have the rights of ownership, such as the right to use, bear risks, and control the property. In common law, there is no division of ownership of property, unlike civil law which distinguishes between the beneficial owner and the legal owner. The beneficial owner is the real economic owner of the property, while the legal owner holds the property for the benefit of the beneficiary. The Supreme Court of Canada defined the beneficial owner as the real and present owner of the trust property in the *Jodrey Estate case*[9]. It was noted that even if the property is registered in another person's name or held by a trustee, the beneficial owner is the one who ultimately exercises ownership over the property[10].

The case of *Montana Catholic Missions v. Missoula*[11] County Judge involved the concept of "beneficial use," "beneficial ownership," or "beneficial interest in property," where legal title and beneficial interest are held by different individuals. This right is legally recognized, protected, and enforced through court decisions. Consequently, under the Anglo-American common law system, the beneficial owner is not considered the legal owner of the trust property due to the absence of "split" ownership. The trustee, as the legal owner, manages the property for the beneficiary, who is recognized as the owner by equitable law.

Judicial precedent practice recognizes the beneficiary as the true economic owner of the trust property, with ownership powers, receipt of benefits, and full control. The beneficiary also bears the responsibility for maintenance and risk of the property, and has the right to demand fulfillment of the trustee's obligations[12]. The rights of the beneficial owner are categorized as personal (rights in personam) and rights in rem. If the trustee harms the trust property or transfers it without notice, the beneficiary can file a claim for compensation. The beneficiary's right to protect against trustee misconduct is a personal right and an equitable obligation under equity law (Watt, 2020)[13].

The concept of property (*in rem*) and personal (*in personam*) law in Anglo-American law is used to classify rights subject to protection and enforcement under common law and equity[14]. It also classifies claims into rem (*actios in rem*)

[7] M. Reinhard-DeRoo, *Beneficial Ownership in U.S. Supreme Court Decisions,* Springer, Cham, 2014.
[8] Prévost Car Inc. v. The Queen, 2008 T.C.C. 231.
[9] Covert *et al*. v. Minister of Finance of Nova Scotia, [1980] 2 S.C.R. 774.
[10] W. Barr, R. Pearce, *Pearce & Stevens' Trusts and Equitable Obligations*, Oxford University Press, 2018.
[11] Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906).
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and personal (*actios in personam*), court decisions into in rem and personal, and judicial proceedings into act in rem and act in personam for enforcing court decisions and orders. The concept of property (*in rem*) and personal (*in personam*) rights of the beneficial owner is different from property and obligations rights in Roman-German law[15]. Instead, it is a type of claim aimed at protecting "equitable interests" beneficiary within the trust from third parties (*actio in rem*) or from the trustee (*actio in personam*).

The beneficial owner, as the equitable owner of the trust property, can seek protection through a personal action (*actio in personam*) in case of trustee failure. This action aims to safeguard the obligatory rights of the beneficial owner by holding the trustee accountable for their duties. The right of obligation in trust agreements involves the trustee's performance of duties according to the trust agreement and the law of equity. Protection through a personal claim is relative, with the beneficial owner having rights similar to ownership but not identical to it.

The obligee, also known as the beneficiary, possesses a personal entitlement to safeguard from the trustee, referred to as a right *in personam*, alongside a real entitlement, known as a right *in rem*, against deliberate and unwarranted infringements which require universal protection. The inception of a personal entitlement to safeguard, known as a right *in personam*, inevitably gives rise to real entitlements, namely rights *in rem*. The presence of an equitable obligation right, akin to a common law obligation right, is contingent upon the ownership right of property. This property belongs to the beneficiary. In the event that a third party deliberately and unreasonably harms this property, they are entitled to seek compensation for the resultant damage. It is evident that the property right in equity is solely enforceable in compliance with the regulations stipulated in the equity law. Third parties who infringe upon this right are held liable for their violations in equity rather than for torts at common law. It follows that the beneficial owner not only has personal rights to protection from the trustee, but also real rights subject to protection from the whole world.

The beneficial owner, considering the above, has the right to file a claim in rem (*actio in rem*), essentially a claim "against the thing," asserting ownership of the trust property in equity against third parties. This claim seeks to eliminate any violation of their rights to the property. Its purpose is to safeguard the beneficial owner's rights from unlawful interference or violation by any third party. The claim targets the beneficial owner's proprietary interest in the trust property, the object of their real right.

Protection through this claim is absolute, extending against any party that infringes upon or violates the beneficial owner's property rights. However, this absoluteness applies only as long as the violation of the beneficial owner's property right persists. Once a specific person or entity is identified as responsible for violating these rights, the claim for redress is directed specifically towards them.

[15] See e.g.: D. Rydlichowska, Actio in rem in Polish Civil Law, *Studia Iuridica Lublinensia,* 25(4)/2016, 205-220.

The question of whether a beneficial owner holds a true "right in rem" in relation to trust property has been the subject of extensive debate. Some scholars argue against the notion of a "cestui que trust" as an equitable owner, citing the trustee's legal ownership and the impossibility of two parties with opposing interests holding ownership of the same property.

However, the courts have recognized a beneficiary's right to protection against those who receive trust property from the trustee (transferees) with knowledge that it is held in trust. This protection arises from the principle that such transferees act in bad faith or collude with the trustee in a breach of trust. Equity mandates that these transferees compensate for any damages caused, while the trustee must pay special compensation for violating the trust if restoration of the property is possible.

This equitable protection grants the beneficiary, the true equitable owner of the property, a right to "equitable interests" in the encumbered property, similar to a legal easement. This "equitable property interest" is linked to the property itself and can be extinguished through a sale of the trust property to a bona fide purchaser, one who had no knowledge of the property's trust status. A trustee who sells trust property to a person with notice of the trust and later regrets the sale may, in equity, file an action to rescind the sale and restore the property. This right, however, is not absolute. If the trustee is barred by the Statute of Limitations or unreasonable delay, the beneficiary may be unable to recover the trust property through the trustee.

This situation creates an unfair predicament for the beneficiary, as they hold an equitable interest in the trust property. It seems unjust to deprive them of this interest due to the trustee's inaction or collusion with the transferee. The beneficiary, as an equitable owner, should not be bound by the Statute of Limitations or their own laches. While the beneficiary's right might be considered personal, they can still compel the transferee to compensate for the damage caused by the breach of trust. This aligns with the principle that the transferee holds the property under a constructive trust for the beneficiary's benefit, obligating them to return the property or face a claim for compensation.

The beneficiary, under equitable principles, possesses the right to directly pursue a claim against the transferee, potentially involving the trustee as a party to the action. This direct claim reinforces the beneficiary's equitable ownership and allows for the restoration of the trust property or its equivalent value.

The presence of two owners with different interests in a trust does not negate the real rights of the beneficial owner. The trustee, as the legal owner of the trust property, must manage it diligently for the benefit of the equitable owner[16]. In Anglo-American law, the equitable interests of the beneficial owner do not conflict with the rights of the trustee. The beneficiary can enforce duties outlined in the trust agreement by taking legal action against the trustee[17]. If a third party

[16] W. Barr, R. Pearce, *Pearce & Stevens' Trusts and Equitable Obligations*, Oxford University Press, 2018.
[17] J.E. Penner, The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust, *Canadian Journal of Law & Jurisprudence,* 27(2)/2014, 473-500.

violates the trust, the beneficial owner can file a claim against the dishonest acquirer of the trust property to protect their ownership rights. This includes cases where the acquirer was aware of the trust property and unlawfully possesses it. In this case, a constructive trust arises — a trust under which the unscrupulous acquirer, as a trustee, wrongfully retains the trust property illegally transferred to him, but manages it in favor of the beneficiary - the previous owner of the trust property by equitable law.

The confirmation of a beneficial owner of proprietary rights in trust property is established by common law's case law. In the *DKLR Holding Co (No. 2) Pty Ltd case*[18], the High Court recognized an interest within a land trust as more than just an equitable chose in action[19]. Although there has been a long-standing debate on whether there are interests within the trust in rem, the interest of the beneficiary is considered a real interest in property. The decision in the *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* case states that the beneficial owner has a proprietary interest in equity in the trust property from the creation of the trust[20]. This interest is enforceable in equity by any subsequent owner of the trust, except for a bona fide purchaser who acquired the property for a fee[21].

The House of Lords ruling in Tinsley v. Milligan highlights that ownership of property through equity grants a real right of ownership, rather than just an obligatory one. Equity allows the beneficiary to protect their interest in the trust property by taking legal action against third parties, except for bona fide purchasers who bought the property for value. The distinction between "beneficial property" in Anglo-American law and "economic property" in civil law arises from the differing legal nature of property rights in the two legal systems. In Anglo-American law, property rights are ultimately held by the sovereign, limiting the rights that private individuals can acquire in relation to any object.

The sovereign's full right of ownership is divided into separate property rights of different owners, known as "bundles of powers," which can be held by different persons in various combinations. Anglo-American case law recognizes 10 to 12 different powers of the owner, which can be simultaneously held by different persons, contrasting with the continental legal system. In the continental legal system, property law is defined as a set of comprehensively regulated rights to a thing, including the right of ownership as the most complete, absolute right of property dominion. Limited real rights, such as usufructs, easements, rights of use and habitation, superficies, and pledge, are also recognized as part of property law based on Roman law.

[18] D.K.L.R. Holding Co. (No. 2) Pty. Limited v. Commissioner of Stamp Duties (N.S.W.)., High Court of Australia (Full Court), 21 April 1982.
[19] B. McFarlane, N. Hopkins, S Nield, *Land Law*, Oxford University Press, 2020.
[20] Westdeutsche Landesbank Girozentrale v Islington LBC [1996] UKHL 12, [1996] AC 669.
[21] J.E. Penner, The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust, *Canadian Journal of Law & Jurisprudence,* 27(2)/2014, 473-500.

Under Roman-Germanic law, the absoluteness of property rights is characterized by its completeness (plenum ius) and the impossibility of a person establishing ownership of a thing already owned by another person[22]. That is, there is a ban on establishing multiple ownership rights of different owners for the same thing.

Within the Roman-Germanic legal framework, the concept of "economic property" is similar to "beneficial ownership", involving the transfer of economic rights from the property owner to another person[23]. It was highlighted this concept in the *Prevost Car Inc. v. Her Majesty The Queen case*, comparing property rights under common and continental law in the Canadian Civil Code of Quebec. In civil law, one person can be a "naked" owner while another, the usufructuary, can use and own the property as the owner of the usufruct, subject to property preservation. This distinction is outlined in Article 1120 of the Civil Code, where the owner has the right to use, possess, and dispose of the property freely and completely, similar to the rights of a beneficial owner in common law.

The usufructuary is the recipient of property income, similar to the beneficial owner in common law. When property is held by a nominee, agent, or trustee, the person must acknowledge that they are not the true owner. Thus, the judges determined that the concept of "usufruct" is most similar to the common law concept of "beneficial ownership". Usufruct is a Roman concept that divides property into three rights: the right to use (*usus*), the right to receive income and collect fruits (*fructus*), and the right to dispose of the property (*abusus*). Often, one person has the right to use and receive income, while another has the right to dispose of the property[24]. The Civil Codes of many foreign countries maintain the traditional interpretation of usufruct as an inalienable and limited property right, allowing the usufructuary to own, use, and benefit from the property while preserving its substance. That is, usufruct is understood as a limited real right to use someone else's thing (*jura in re aliena*) with the right to receive income (*fruits*) from it without changing its substance.

The definitions of usufruct in the Civil Codes of Poland, Germany, and Hungary are quite similar. By analyzing these legal provisions, we find that the concepts of "beneficial owner" and usufruct share common and distinct characteristics[25]. Within the trust and usufruct structures, ownership is divided into separate powers. In the trust, the trustee holds legal ownership while the beneficiary has the right to income, recognized by equitable law. In usufruct, the "naked" or "nominal" owner retains ownership rights while the usufructary gains rights to use and receive income from the property. Unlike the beneficial owner in a trust, the usufructary manages the property encumbered by usufruct. Civil legislation

[22] L. Katz, Exclusion and Exclusivity in Property Law, *University of Toronto Law Journal*, 2008, 58.
[23] See e.g.: D. D. Popov, The Ownership in The Draft of Civil Code in Serbia, *Zbornik radova Pravnog fakulteta*, Novi Sad, 53(1)/2019, 1-16.
[24] J. Varkemaa, *Conrad Summenhart's Theory of Individual Rights,* Leiden, The Netherlands, Brill, 2011.
[25] M. Ashurova, Characteristics of the real legal basis for the ownership and use of housing. *Journal of Law Research,* 6(6)/2021.

in these countries sets requirements for property management, including rational use, preserving economic purpose, and fair economic practice compliance.

The usufructary is required to manage the property similarly to the owner before the establishment of the usufruct, which is not a feature of the trust design or the concept of beneficial ownership. The authority to manage usufruct property requires full civil capacity, while trusts can be created for incapacitated or partially capable beneficial owners who cannot manage their powers over the trust property. In contrast to Anglo-American law, where beneficial owners can alienate their interests, continental legal systems like Poland, Hungary, and Germany have inalienability principles for usufruct rights, preventing transfer by the usufructuary through universal succession[26].

At the same time, the legislation of these countries provides for the possibility of transferring the right to exercise a usufruct, in particular the possibility of a usufructuary ceding to a third party their right to exercise a usufruct on a paid or free basis, for a certain period or for the entire period of existence of the right of usufruct.

The practical significance of the impossibility of alienating the right to usufruct with the possibility of alienating the right to exercise it is that the right of usufruct remains closely connected with the usufruct, making it personal. Legislative provisions confirm this, such as the responsibility of the usufructary to inform the owner about any actions of third parties that may damage the owner's rights. Additionally, there are provisions on the obligation of the nominal owner to leave in force rental agreements and the termination of usufruct with the death of an individual or a legal entity usufructary. The usufructary not only has the right to own and use a thing burdened with the right of usufruct in accordance with its purpose, but also to demand the exclusion of all other persons from possessing and using the thing[27].

A crucial safeguard for usufruct rights lies in the ability to file a claim for recognition. This claim allows the usufructuary to formally establish their ownership of the usufruct over a disputed immovable property, ensuring its recognition by third parties. Crucially, this claim is distinct from seeking the return of the property or removal of obstacles to its use. The claim's primary purpose is to resolve any legal ambiguity regarding the usufructuary's ownership of this right, thereby providing clear legal certainty.

In modern conditions, the legal regulation of beneficial ownership may be influenced by the introduction of unilateral restrictive measures in relation to a number of states. In particular, the EU Council Regulations 2022/576[28] and

[26] P. Wysocki, Transformation of the Perpetual Usufruct Right Into the Ownership of a Real Property Estate. *2016 Baltic Geodetic Congress (BGC Geomatics)*, 276-281.

[27] Z. Służewska, 7,4,29 A IN IURE CESSIO USUSFRUCTUS DOMINO PROPRIETATIS. *Zeszyty Prawnicze*, 6(2)/2017, 57-71.

[28] Council Regulation (EU) 2022/576 of 8 April 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 111, 8.4.2022, 1–66.

2022/879[29] amended Regulation (EU) No 833/2014[30] to include measures targeting the Russian economy. These measures are considered international restrictive measures and focus on economic actions against Russia. Article 5m of Regulation No. 833/2014 specifically prohibits the creation and management of trusts and similar structures with ties to Russia, such as citizenship, residency, ownership, or control connections.

Prior to Regulation 2022/576, the concept of trust and beneficial ownership was not explicitly addressed in the sanctions package of Regulation No. 833/2014. Instead, the notion of control was utilized. Article 2 of Council Regulation (EU) No 269/2014[31] introduced restrictions in the form of freezing all funds and economic resources under the control of listed natural persons or related entities (Johansen, 2016). Neither Regulation No. 833/2014 nor Regulation 2022/576 provides a clear definition of a trust or similar structures. The issue of defining trusts was raised in connection with EU Directive 2015/849[32], which addresses money laundering prevention. The Official Journal of the European Union published a list of trusts and similar legal mechanisms regulated by Member States, based on notifications sent by each EU Member State to the Commission[33]. Thus, the list of trusts in Ireland includes an express trust, a trust by operation of law, and a constructive trust imposed by a court or created by operation of law. The latter type of trust is created without the intention of a party and is imposed by a court of equity to prevent unfair use of fiduciary benefits. Countries like France and Romania have fiducia in their legal frameworks, which some authors see as similar to a trust concept[34]. The definition of "other legal entities" similar to trusts is a contentious issue in law enforcement. The European Commission's FAQs were issued on July 8, 2022, regarding the application of Article 5m of the Regulations, providing guidance but not legally binding interpretations[35]. These clarifications can help in understanding the general approach, despite lacking legal force.

[29] Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 153, 3.6.2022, 53-74.

[30] Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229, 31.7.2014, 1-11.

[31] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, 6-15.

[32] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, 73-117.

[33] List of trusts and similar legal arrangements governed under the law of the Member States as notified to the Commission (2019/C 360/05). URL: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019XC1024(01)&from=FR

[34] T. Karlović, Transfer of Ownership in fiducia and Trust – Preliminary Considerations on the Possibility of Application of the Hague Convention on the Law Applicable to Trusts and on their Recognition, *Zbornik radova Pravnog fakulteta u Splitu,* 55 (3)/2018, 579-605.

[35] See generally: https://finance.ec.europa.eu/system/files/2024-01/faqs-sanctions-russia-consolidated_en.pdf

The explanations of July 8, 2022 suggest that determining whether an entity falls under the category of "other legal entities" akin to a trust should be done on a case-by-case basis by examining its structure and functions in comparison to a trust. This involves assessing the establishment of fiduciary relations and the division of legal and beneficial ownership of the entity's assets. The Clarifications of July 8, 2022 advise consulting EU Directive 2015/849 to ascertain if member states have identified entities similar to a trust. The European Commission updated its clarifications on August 30, 2022 regarding the application of restrictive measures[36]. It was clarified that imposing restrictive measures on a person does not alter their status as a beneficial owner of a legal entity. Freezing property does not change the ownership structure, so the status of beneficial owners should remain unaffected despite the restrictions. EU Regulation No. 833 permits European investors to withdraw securities from the National Settlement Depository (NSD) issued after April 12, 2022. European depositories must ensure that NSD only performs depositary functions for such securities and that they do not come under the control of a Russian entity as a result. The main consequence of the restrictions introduced by Regulation 2022/576 is the termination of trusts established by Russian citizens and legal entities or who are their beneficiaries.

In conclusion, it should be admitted that the concept of "beneficial property" in Anglo-American law refers to a set of property rights known as "equitable interests" in trust property, granted to the beneficiary as the true economic owner through personal and in rem claims. Different interpretations of property law lead to variations in property rights between legal systems, with countries following the continental system adopting a concept of "economic property" akin to "beneficial ownership", such as usufruct, which involves the transfer of specific ownership powers to the usufructuary while maintaining the economic essence and purpose of the property. Disputes over usufruct rights allow the usufructuary to make in rem claims against both the owner and third parties for recognition of the right of use, without the need to return the property or remove usage obstacles. Apart from the division of property rights, both "beneficial ownership" and usufruct exhibit unique characteristics related to property management, the legal personality of the managing individual, and the transferability of the granted powers. At the same time, due to some external factors, first of all international restrictive measures, this legal institute finds its development and modernisation in the form of harmonisation and unification in different jurisdictions. In particular, the absence of a unified concept of a trust, as well as other similar legal entities, in practice causes problems in the application of established rules and limitation of the rights of beneficiaries.

[36] *Ibid.*

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COLLECTIVE PROPERTY THROUGH THE LENS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This paper aims to explore to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, as well as to systematize different collective dimensions of the right to property as addressed in the ECtHR case law. The underlying hypothesis of the paper, which was confirmed by research, is that the ECtHR failed to sufficiently elaborate on the collective dimensions of the right to property due to the causes that are not linked to cultural relativist arguments but to the ECtHR general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property under Article 1 of Protocol No. 1 to the ECHR.*

Firstly, the key standards for protecting the right to property as developed through the ECtHR caselaw will be briefly presented. After that, selected ECtHR case-law on the collective dimension of the propriety rights of indigenous peoples and the caselaw on the restitution afforded in cases of denationalization will be examined to assess whether they diverge from the general protection of the right to property afforded by the ECtHR. The normative-legal method to analyze the case law of the ECtHR in terms of the protection it afforded to collective dimensions of the property right will be predominantly utilized.

Keywords: *right to property, collective dimension of the right to property, collective property, European Court of Human Rights, nationalized property, indigenous people*.

1. Protection of the right to property and the right to collective property in international instruments

The right to property is not recognized in either the United Nations International Covenant on Civil and Political Rights[1] or the United Nations International

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[1] International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171.

Covenant on Economic, Social and Cultural Rights[2]. On the universal level, the right to property is enshrined in Article 17 of the Universal Declaration of Human Rights (hereinafter: Declaration).[3] Although the Declaration does not have a legally binding character, many of its provisions, including those governing the right to property, enjoy such undisputed recognition as to be considered part of customary international law and therefore universally obligatory.[4]

On the other hand, the right to property is expressly envisaged in regional instruments for the protection of human rights to which two-thirds of all UN member states are parties.[5] This includes the American Convention on Human Rights (hereinafter: ACHR)[6], the African Charter of Human and Peoples' Rights (hereinafter: the African Charter)[7], and the Protocol No. 1 to the European Convention on Human Rights (hereinafter: P 1 ECHR).[8] The provisions of the three regional human rights conventions are not identically formulated but have a lot in common. They all guarantee the individual right to property and allow for its limitations in the public interest.

It has been argued in the literature that the regional human rights instruments recognize the right to property primarily as an individual right.[9] Conversely, the wording of the Declaration goes in the direction of a more extensive scope of the right to property considering that it specifies that the holder of the right to property can be either an individual on his/her own or an individual "in association with others".[10]

There are also specialized human rights instruments that are specifically tailored to protect certain collective aspects of the right to property. This is, primarily, the Indigenous and Tribal Peoples Convention (Convention No 169) of the International Labour Organization (ILO)[11], which remains the only binding international law instrument specifically applicable to indigenous peoples.[12] Its Article 14 recognizes, *inter alia,* the notion of indigenous peoples' collective ownership over land which they have traditionally occupied.[13] This was further reinforced in

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3.

[3] Universal Declaration of Human Rights (10 December 1948) UN doc A/RES/217(III).

[4] European Parliament, At a Glance, The Universal Declaration of Human Rights and its relevance for the European Union, 1; J. G. Sprankling, "Toward the Global Right to Property", in: *The International Law of Property*, Oxford University Press: Oxford, 2014, 203.

[5] J. G. Sprankling, 203.

[6] American Convention on Human Rights 1144 UNTS 123, Article 21.

[7] The African Charter on Human and Peoples' Rights 21 ILM 58, Article 14.

[8] Article 1(1) of P 1 ECHR. See E. De Wet, "The Collective Right to Indigenous Property in the Jurisprudence of Regional Human Rights Bodies", *SA Yearbook of International Law*, 2015, 2.

[9] E. De Wett, 4-25.

[10] UNDHR, Article 17: Everyone has the right to own property alone as well as in association with others.

[11] International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No. 169).

[12] M. Barelli, "The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime", *Human Rights Quarterly* 32(4)/2010, 954-955.

[13] The ILO Convention No. 169 was negotiated with the intent of replacing the ILO Convention No. 107 (International Labour Organisation Indigenous and Tribal Populations Convention, 1957 (No. 107)), which had also recognized the communal land rights of the members of indigenous population including natural resource

2007 by the U.N. Declaration on the Rights of Indigenous Peoples. Even though this Declaration does not have a binding character, it contains relevant provisions about indigenous peoples' collective property rights over land, territories, and resources as well as their cultural, intellectual, religious, and spiritual property.[14]

The United Nations Committee on the Elimination of Racial Discrimination has also called on states to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and take steps to return such lands and territories if the indigenous people were deprived of them. This means that the Committee has acknowledged the land-related property rights of the indigenous peoples under the International Convention on Elimination of All Forms of Racial Discrimination.[15] It is important to note, in the context of the present paper, that the said Convention was ratified by nearly all members of the Council of Europe.

In a vein similar to the ILO Convention No. 169, the American Declaration on the Rights of Indigenous Peoples gives due regard to the cultural, intellectual, religious, and spiritual property of this group.[16] In that respect, it unambiguously classifies indigenous peoples' property rights to their lands, territories and resources as collective rights.[17] However, it also constitutes a non-binding instrument and only a limited number of rights guaranteed therein constitute customary international law.

While the regional human rights adjudicatory bodies primarily apply the provisions of the ECHR, the ACHR, and the African Charter, which enshrine the individual right to property, those bodies, to a different extent, also protect the collective dimensions of the property right through their caselaw. Such an evolution of the right to property from an individual right to the right to property with a collective dimension is attributable to the fact that the regional bodies can interpret the respective treaty rights progressively and autonomously.[18] This approach can be explained through the notions of autonomous concepts and evolutive interpretation of the ECHR.

Namely, ever since the 1970s, the ECtHR developed the doctrine of autonomous concepts, characterizing as autonomous a significant number of concepts that figure in the ECHR, including "possessions" and "property".[19] The Inter-American

rights. The ILO Convention No. 107 is no longer open for ratification, but it remains in force in 18 countries that ratified it but have not ratified Convention 169. A total of 27 nations had ratified ILO Convention 107. See M. Barelli, 954-955; D. Shelton, "The Inter-American Human Rights Law of Indigenous Peoples", *University of Hawai'i Law Review* 35/2013, 938-941.

[14] See Articles 11 and 26 of this Declaration.

[15] International Convention on the Elimination of All Forms of Racial Discrimination, resolution 2106 (XX)2 of 21 December 1965.

[16] See Article 13 para. 2 of the American Declaration on the Rights of Indigenous Peoples: AG/RES.2888, XLVI-O/16, Adopted at the third plenary session, held on June 15, 2016.

[17] See Article 6 in conjunction with Article 25 of the American Declaration on the Rights of Indigenous Peoples: AG/RES.2888, XLVI-O/16, Adopted at the third plenary session, held on June 15, 2016.

[18] E. De Wett, 2015, 4; D. Shelton, 937-968.

[19] G. Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR" *EJIL*, 15(2)/2004, 283-291.

bodies followed a similar approach, having insisted that terms in their respective regional human rights instruments have autonomous meaning.[20] Autonomous concepts should be interpreted as having an autonomous meaning in international law, regardless of their meaning in national legislation.[21] The second key feature of autonomous concepts relates to their flexibility, considering that they are subject to constant evolution. In academic literature, such flexibility was explained as a consequence of the evolutive interpretation by the ECHR which came to be known as a "living instrument" approach.[22] The principle of autonomous interpretation is deemed to have allowed European and Inter-American adjudicating bodies to define "property" in ways specific to indigenous peoples and to add a collective dimension to the right to property. The African Charter offers different kinds of protection than its European and American counterparts, considering that it envisages group rights.[23] Namely, when it comes to property, the African Court on Human and Peoples' Rights brought a relevant clarification by specifying that the right to property, in effect, can be individual or collective under the African Charter since "although addressed in the part of the Charter which enshrines the rights recognized for individuals, the right to property as guaranteed by Article 14 may also apply to groups or Communities" when interpreted in conjunction with Article 21, which regulates the collective rights of people.[24]

The available literature shows[25] that the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, along with the African Commission on Human and Peoples' Rights, "have done ground-breaking work" in expanding the scope of the right to property by being sensitive to group identity, while the European Court of Human Rights (hereinafter: ECtHR) is lagging behind such a development. Instead, the ECtHR has taken a more conservative position in its interpretation of the right to property when it comes to recognizing the collective dimension of the indigenous peoples' right to property, even though in principle it acknowledges their distinct way of life.[26]

This difference in approach towards the protection of collective dimensions of the right to property has been explained in scholarly literature as attributable to the cultural relativism introduced into the interpretation of human rights guarantees.[27]

[20] D. Shelton, 947.

[21] *R.L. v. The Netherlands*, Application No. 22942/93 European Commission on Human Rights, Decision of 18 May 1995; V. Ćorić, A. Knežević Bojović, "Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights before European Supranational Courts", *Strani pravni život* 4/2020, 31.

[22] G. Letsas, 298.

[23] J. M. Lundmar, "European Court of Human Rights for the Protection of Arctic Indigenous Peoples' land rights", doctoral dissertation, Faculty of Law School of Humanities and Social Sciences University of Akureyri Akureyri, November 2017, 68.

[24] The collective rights of peoples, when it comes to property, are envisaged by in Article 21, African Charter, and reads as follows: All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. See J. M. Lundmar, 69.

[25] G. Pentassuglia, "Towards a jurisprudential articulation of indigenous land rights" *European Journal of International Law*, 22(1)/2011, 165-167; E. De Wet, 3.

[26] J. M. Lundmar, 1; E. De Wet, 27.

[27] E. De Wet, 27.

In contrast to the Americas and Africa, Europe constitutes a region where indigenous peoples are much fewer in number and, in most Council of Europe (CoE) member states, the issue of recognition of the collective property of indigenous peoples is not likely to arise.[28] In parallel, in the post-communist era, the ECtHR has developed fruitful jurisprudence pertaining to the transition from collective property to private property regimes. It has been argued by the ECtHR that such transition had been viewed as a necessary condition for transition to liberal democracy and alignment with the rule of law.[29] Although a similar transition from collective property to private property regimes was not limited to the European continent, the ECtHR is the only regional court that developed rich case-law in that regard.

Against this background, the authors of this paper aim to explore to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, as well as to identify and systematize different collective dimensions of the right to property as addressed in the ECtHR case law. The underlying hypothesis of the paper is that the ECtHR's jurisprudence failed to sufficiently elaborate on the collective dimensions of the right to property due to the causes that are not linked to cultural relativist arguments but are attributable to the ECtHR general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property in the sense of P1-1. The authors will predominantly utilize the normative-legal method to analyze the case law of the ECtHR in terms of the protection it afforded to collective dimensions of the right to property.

The authors will first briefly present the key standards governing protection awarded under P1-1 which were developed through the ECtHR caselaw. Subsequent to that, the authors will examine the selected ECtHR case-law on the collective dimension of the right to persons pertaining to indigenous peoples as right holders and the caselaw revealing the ECtHR approach towards the restitution afforded in cases of denationalization. This will be done so as to assess whether they diverge from the previously identified general standards governing the protection of the right to property afforded by the ECtHR. In both sections, the authors will try to look for arguments brought by the ECtHR in cases when it diverges from the general standards of affording protection to different types of the right to property applied by the ECtHR.

Given an overwhelming number of property cases before the ECtHR dealing with the transition from collective to private property regimes and related implications,[30] the authors will not be able to analyse the entire body of the ECtHR caselaw cases. Instead, cases will be selected and a search will be done based on

[28] *Ibidem.*

[29] L. Dehaibi, "Liberal Property and Lived Property: A Critique of Abstract Universalism in the Human Right to Property", doctoral dissertation, McGill University, 2020, 162.

[30] For example, the ECtHR has heard over 1000 cases from Romania and Russia respectively. See. L. Dehaibi, 162.

the filters available on the Hudoc webpage. The preliminary search based on the given notion did not give a sufficient body of ECtHR jurisprudence as a result. More precisely, a search based on the term "collective property" gave only five results.[31] Therefore, the upgraded search was predominantly conducted utilizing the term "socially owned assets" and "nationalized property". The search concerning the land rights of indigenous people was conducted using the term "indigenous", which provided 48 results. However, this search did not include some relevant cases cited in literature, while insight into some of the cases revealed that the term "indigenous" was indeed included in the ECtHR judgment or decision but was not of particular relevance in deciding the case. The cases analysed were therefore selected by triangulation of results obtained on Hudoc, the cases cited in relevant caselaw and cases analysed in relevant literature.

In the research, the authors acknowledge Waldron's[32] distinction between the ideas of common and collective property to that of collective property. For him, in both cases, there is no individual to stand in a specially privileged situation with regard to any resource. Waldron[33] views the difference between the two notions in the following manner: in common property the rules governing access to and control of material resources are organized on the basis that each resource is in principle available for the use of every member alike, while in collective property, access to and the use of material resources in particular cases are to be determined by reference to the collective interests of society as a whole. For the purpose of this paper, the authors will only refer to the notion of the collective property and will try to predominantly focus on the types of above determined collective property since both the ECHR and the ECtHR through its case law give due regard to the notion of the public interest.[34]

2. Standards developed by the ECtHR under Article 1 of the Protocol No. 1 to the European Convention on Human Rights

Before delving into the ECtHR jurisprudence regarding collective property, it is worth briefly recalling the protection awarded under P1-1 and related tests applied by the ECtHR through its caselaw. This brief elaboration on the standards that the ECtHR applies to all property-related cases will further allow the authors to examine whether the ECtHR case law dealing with collective aspects of the right to property diverges from the general strand of the jurisprudence of the ECtHR in terms of providing the protection to the right to property, and if so, how is such departure justified.

[31] Out of these five cases, only one recognizes that there was a violation of the right to property.
[32] J. Waldron, "What is Private Property?", *Oxford Journal of Legal Studies*, 5(3)/1985, 313-349.
[33] *Ibidem.*
[34] The authors use the terms "general interest" and "common interest" interchangeably as synonyms.

Even though the wording of Article 1 of P 1 ECHR guarantees only the peaceful enjoyment of possessions, the ECtHR has stated as early as 1979 that it, in substance, guarantees the right to property.[35] The concept of "possessions" under P1-1 has an autonomous meaning and is therefore independent from its formal classification in domestic law. In ECtHR jurisprudence, "possessions" can be either "existing possessions" or claims which are „sufficiently established to be enforceable".[36] The concept of the so-called "existing possessions" is not limited only to the right of ownership but also includes a whole range of pecuniary rights such as rights arising from patents, shares, arbitration awards, established entitlement to a pension, and even rights arising from running a business.[37]

Claims which are "sufficiently established to be enforceable" are those claims in respect of which an applicant can argue that he or she has at least a "legitimate expectation" of obtaining a property right. [38] Such an expectation must be of a nature more concrete than a mere hope that they will be realized. An expectation is deemed legitimate if it is based on a legal provision or a legal act such as a judicial decision.[39] However, the ECtHR will not deem that a legitimate expectation exists if there is a dispute concerning the correct interpretation and application of domestic law.[40] When it comes to the collective dimension of property rights, the issue of whether a given collective property-related right is deemed an existing possession or a claim which is sufficiently established to be enforceable is one of the key issues in ECtHR jurisprudence.

P1-1 allows for interference with the peaceful enjoyment of possessions, if such interference, which may amount to deprivation of possession or control of the use of property, is in the public interest. Further, any such interference must be lawful and must strike a "fair balance" between the demands of the general interest and of the individuals fundamental rights (i.e. be proportionate).[41] It seems that the above balancing exercise which should be undertaken by the ECtHR is of particular importance in collective property related cases, as it gives due regard to collective dimensions of the right to property through underlining the relevance of public interest.

[35] Case of *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, paras. 63-64; See more on the relevance of *Marckx v. Belgium* at: V. Ćorić, A. Knežević Bojović, "Indirect Approach to Accountability of Corporate Entities Through the Lens of the Case-Law of the European Court of Human Rights", *Strani pravni život,* 62(4)/2018, 30.

[36] A. Grgić *et al*, *The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks No. 10, 2007, Council of Europe, 7, https://rm.coe.int/168007ff55

[37] *Ibidem.*

[38] Registry of the European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights Protection of Property*, 2024, para.11. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_1_protocol_1_eng, last visited July 15, 2024.

[39] See Case of *Kopecký v. Slovakia,* Application No. 44912/98, Judgment of 28 September 2004, paras. 49-50.

[40] See Case of *Kopecký v. Slovakia,* Application No. 44912/98, Judgment of 28 September 2004, para. 50.

[41] See Case of *Beyeler v. Italy*, Application no. 33202/96, Judgment of 5 January 2000, paras. 108-114.

One other important element in examining whether a measure interfering with the peaceful enjoyment of possession is fairly balanced is the existence of compensation for such interference. In this regard, the ECtHR noted that Article 1 of P 1 ECHR (hereinafter: P1-1) does not explicitly encompass the right to compensation.[42] More specifically, the ECtHR in its previous case law held that P1-1 does not guarantee a right to compensation in full in all circumstances and consequently the legitimate objectives of public interest, such as those pursued by economic reforms or by measures improving social justice, could necessitate reimbursement being less than the real value of the property concerned. It is therefore noteworthy that the ECtHR opened doors for the possibility of awarding partial compensation under specific circumstances which may be particularly relevant for the caselaw pertaining to collective dimensions of the right to property. It remains to be seen whether the ECtHR applied this exemption in its case law pertaining to the protection of some forms of collective property.

3. Indigenous Peoples' Land Rights in European Court of Human Rights Jurisprudence

As it has been indicated before, the rights guaranteed by the ECHR and its protocols are primarily set to protect individual, rather than collective rights.[43] More specifically, it has been pointed out in doctrine that P1-1 requires states to refrain from interfering with individual rights. The evolution of human rights resulted in the ECHR being interpreted in line with the "theory of positive obligations", requiring states to take positive actions in order to ensure the effective realization of rights guaranteed by the ECHR.[44] However, when it comes to the collective rights of indigenous peoples, the existing ECtHR jurisprudence is yet to fully follow the approach employed by American and African human rights' protection bodies.

First of all, it should be noted that some European states do recognize the existence of land-related rights of indigenous peoples – for example, in 2005, Norway passed a law on communal lands as held by Sami in Finnmark Province in 2005,[45]

[42] It further reminded that it appears from the *travaux préparatoires* that the express reference to a right to compensation contained in earlier drafts of P1-1 was later excluded. See Case of *James and Others v. the United Kingdom*, Application no. 8793/79, Judgement of 21 February 1986, para. 64.

[43] G. Otis and A. Laurent „Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property" *Arctic Review on Law and Politics*, 4(2)/2013, 174.

[44] E. Ruozzi, "Indigenous Rights and International Human Rights Courts: Between Specificity and Circulation of Principles" APSA 2011 Annual Meeting Paper, Available at SSRN: https://ssrn.com/abstract=1902900

[45] Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark (Fin-nmarksloven) https://lovdata.no/dokument/NL/lov/2005-06-17-8. The English translation of the Law is available at: https://lovdata.no/dokument/NLE/lov/2005-06-17-85 (Act relating to legal relations and management of land and natural resources in Finnmark). For more on this issue see, for instance: Z. Akhtar, Z. Sami Peoples Land Claims in Norway, Finmark Act and Providing Legal Title. *The Indigenous Peoples' Journal of Law, Culture & Resistance*, 7(1)/2022 115-138.

while in Sweden[46] the Reindeer Husbandry Act[47] recognizes the right to use land and water for the sustenance of Samis and their reindeer. The existence of such legislation facilitates property-related claims of indigenous people under P1-1, as it provides a clear legal basis for the claim, and may be utilized in the examination of whether there is a legitimate expectation related to the claim. So far, the ECtHR has made decisions that touched upon the issue of indigenous land rights but has not had the opportunity to directly protect collective property rights of indigenous communities invoking on whether the autonomous understanding of the right to property in P1-1 covers. Nevertheless, the existing jurisprudence is worth examining so as to see whether the approach of the ECtHR is in line with the global developments related to the said right. In this paper, several pivotal cases will be examined in this context.

The first relevant case is *Könkämä and 38 other Saami villages against Sweden*[48]. In it, the European Commission on Human Rights confirmed that the exclusive hunting and fishing rights provided under the Reindeer Husbandry Act and claimed by the applicant Saami villages in the given case can be regarded as possession within the meaning of P1-1. [49] While this broad understanding of possession on the part of the ECtHR was very important, the application in question was dismissed due to domestic remedies not being exhausted, and therefore no substantive decision was made.

In *From v Sweden*[50] the special way of the Saami was not only reaffirmed, but the Commission found that the national legislation that permitted a Saami village access to privately owned land for purposes of elk hunting was a decision made in general interest, and therefore constituted a proportionate limitation of property rights.[51] In other words, the special land-related rights of the Sami i.e. their collective rights to land were considered to be a general interest that justified interference with private property.

In *HINGITAQ 53 against Denmark*[52], ECtHR examined the applicants that they had, on a continuing basis, been deprived of their homeland and hunting

[46] Other European countries recognise other forms of community property. According to L. Alden Wily, 2018. "Collective Land Ownership in the 21st Century: Overview of Global Trends" Land 7, no. 2, 4. https://doi.org/10.3390/land7020068, Austria, Bulgaria, Germany, Italy, Norway, Czech Republic, Hungary, Iceland, Ireland, Latvia, Russia, Sweden, Turkey, Portugal, Romania, Spain, Ukraine recognize some form of community property in their national laws.

[47] Rennäringslag (1971:437), available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/rennaringslag-1971437_sfs-1971-437/

[48] Application No. 27033/95, European Commission on Human Rights Decision of 25 November 1996.

[49] This decision was a step forward from the position taken by the Commission in Case G. and E. v. Norway, Application No. 9278/81 and 9415/81 (joined), decision of 3 October 1983, when the Commission found the request of two applicants, Norwegian Sami, manifestly unfounded, as have not provided sufficient proof of their specific property rights or claims vis-a-vis the land that was the subject-matter of the dispute, even though it had previously accepted that interference with the land in question (building of a dam and flooding) will affect their way of life, thus triggering the application of Article 8 of the ECHR.

[50] Application No. 34776/97, European Commission on Human Rights Decision of 4 March 1998.

[51] E. de Wet, 11.

[52] Application no. 18584/04, Decision of 12 January 2006.

territories and denied the opportunity to use, peacefully enjoy, develop, and control their land under both Article 8 of the ECHR and P1-1. In examining the admissibility of the application in question, the ECtHR did acknowledge that Denmark had interfered with the applicant's rights *in rem*. However, ECtHR deemed these interferences as instantaneous acts that did not produce a continuing situation. As the acts of interference occurred prior to the ECHR entering into force in Denmark, the ECtHR found it had no jurisdiction over the claim made by the applicant *ratione temporis*. The avoidance on the part of the ECtHR to delve deeper into the consequences of the interference was criticized in doctrine, with some authors pointing out that such an examination could have moved the European jurisprudence closer to the developments in international and regional human rights' law.[53]

Finally, in the case *Handölsdalen Sami Village v. Sweden*[54] the ECtHR had the opportunity to decide whether the Sammi applicants' winter grazing rights on land belonging to private parties was protected as "possession" within the meaning of P1-1, given their right to use land for such purposes was recognized under Swedish law. The ECtHR employed a rather narrow approach in this case and declared the application inadmissible in the part relating to the said claim.[55] In doing so, ECtHR asserted that the applicants' claim of having grazing rights did not constitute "existing possession" in the meaning of ECtHR jurisprudence, as it was on the Swedish courts to determine whether grazing rights applied to the disputed land.[56]

ECtHR then went on to examine whether the invoked Sami rights constituted a "legitimate expectation" i.e. whether they could legitimately expect to obtain effective enjoyment of the said asset. Invoking its previous reasoning whereby a proprietary interest in the nature of a claim may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. In this particular case, the ECtHR was not satisfied, given the decisions of Swedish courts that preceded the case before the ECtHR, that "the applicants claim to a right to winter grazing on the disputed property was sufficiently established to qualify as an "asset".[57] ECtHR consequently found that the claim in question was not protected under P1-1. According to some scholars, this decision confirmed that the ECtHR was not willing to go beyond the findings of national courts in the absence of evidence that the decision passed by those courts was arbitrary.[58]

[53] E. de Wet, 16; G. Gismondi, "Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1", *Yale Human Rights and Development Journal*, 18/2016, 26-27.
[54] Application no. 39013/04, Decision of 17 February 2009.
[55] Paras. 49-51.
[56] Para. 51.
[57] Para. 55.
[58] N. Bankes, "The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments", *The Yearbook of Polar Law Online* 3, 1 (2011), 80.

The position taken by the ECtHR can be seen as not aligned with the practices of other regional human rights protection bodies. More specifically, it does not seem to acknowledge the emerging standards set in the flagship *Endorois* case decided on by the African Commission on Human and People's Rights[59] whereby "traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title and traditional possession entitles indigenous people to demand official recognition and registration of property title".[60]

In other words, full and substantive cross-fertilization of jurisprudential concepts[61] seems to be lacking in this ECtHR case. As Koiruvova pointed out, the concept of property rights in Europe does not yet correspond "with the community-based understanding of what "property" means for indigenous people".[62]

One key criticism of the ECtHR's approach came in the form of a partly dissenting opinion of Judge Ziemele to the judgment on the merits in *the Handölsdalen Sami village and Others v. Sweden* case. In it, judge Ziemele first invoked the developments in international indigenous law[63] and in particular the recognition of their rights to own the land they traditionally used. She then criticized the ECtHR for accepting the Swedish rules on the burden of proof which was, in this case, on the Sami, in proving that they had winter grazing rights on the land "from time immemorial". Judge Ziemele found that "this approach excluded considerations relating to the specific context of the situation and rights of indigenous peoples".[64] Further, she reminded of the criticism expressed by the UN Committee on the Elimination of Racial Discrimination (CERD) vis-à-vis this particular rule of Swedish law, assessing it as constituting de facto discrimination against the Sami in legal disputes.[65] ECtHR decision in this case also received backlash in doctrine.[66]

[59] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya Comm No 276/2003, Decision of 25 November 2009.

[60] Para. 209 of the decision in *Endorois* case.

[61] For more on this issue see: G. Pentassuglia, 2011. As to previous instances of cross-fertilization, and, more specifically, on instances when the ECtHR invoked the practices of the American and African human rights' protection bodies, a useful overview is provided in M. Papaioannou, "Harmonization of International Human Rights Law Through Judicial Dialogue: the Indigenous Rights' Paradigm", *Cambridge International Law Journal*, 3(4) /2014, 1037-1059.

[62] T. Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects", *International Journal on Minority and Group Rights*, Vol. 18, Koivurova, Timo, Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects (2011). International Journal on Minority and Group Rights, 18/2011, 36.

[63] Including the ILO Convention No. 169, the existence of mechanism such as the UN Working Group on Indigenous Populations, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples, and concluding observations on State reports, general comments and case-law from existing UN human rights treaty bodies (including General Comment No. 23 and several cases examined by the Human Rights Committee under the International Covenant on Civil and Political Rights. See paragraph 2 of Judge Ziemele Partly Dissenting Opinion.

[64] Para. 5.

[65] Para. 7. Judge Ziemele quoted Concluding observations of the Committee on the Elimination of Racial Discrimination CERD/C/SWE/CO/18, paragraphs 19-20.

[66] G. Gismondi, 2016 and E. De Wet, 2015.

The situation, at least when it comes to Sweden, has since changed. Namely, in 2020 landmark in the *Girjas* case[67] the Swedish Supreme Court found that, in applying national property law, the protection afforded to Indigenous peoples and minorities by binding public international law has to be taken into account. In practical terms, in the *Girjas* case the court resorted to „evidentiary relaxation" and relieved the Sami of the onerous burden of proof previously imposed by Swedish courts.[68] In the context of the jurisprudence of the ECtHR, this decision can have two implications. First, it could change its position towards the protection awarded to indigenous people's rights under Swedish law as domestic law. Second, it could prove to be an additional impetus for the ECtHR to duly consider the international law developments and the practices of other regional human rights' protection bodies in its case-by-case analysis and consequently influence its position as to whether a given claim of indigenous people's representatives in Sweden constitutes possession that would trigger the application of P1-1.

4. ECtHR jurisprudence in the context of (de)nationalization of property

Contrary to the limited case-law of the ECtHR dealing with indigenous peoples' related rights to property, there is a vast number of property cases before the ECtHR pertaining to the transition from collective property regimes to private ones and *vice versa* under the communist and post-communist rule in Central and Eastern Europe (hereinafter: CEE). The widespread taking of private property into public ownership and control was one of the notable features of those communist regimes.[69]

The above category of cases includes cases dealing with the compensation, restitution or rights of the protected tenants. After the fall of communism, expectations rose for the nationalized property to be returned *in natura* or for compensation to be awarded, either to their former owners or to their descendants.[70] Many of the cases that implicate property restitution in the context of the de-nationalization of land property are still heard to this day. They also pertain to different legal situations created following the return of property to the previous owner. The large number of cases belonging to this group can be illustrated by statistics showing that there were over 1000 cases before the ECtHR falling within the given group from Romania and Russia.[71]

When it comes to the caselaw dealing with the rights of the protected tenants, it will not be examined within this paper, as it pertains to state management

[67] Swedish Supreme Court Case No. T 853-18, decided 23 January 2020.
[68] C. Allard, "Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case", *Arctic Review on Law and Politics*, 12/2021, 56–79.
[69] A. Grgic *et al.* 32.
[70] *Ibidem.*
[71] L. Dehaibi, 162.

of housing and special lease schemes, which concerns both privately owned and socially owned property. Consequently, it is only of limited relevance for the examination of the treatment of collective property under the ECHR. The extensive caselaw of the ECtHR dealing with the effects of property transition on tenancy protection arise out of the widespread communist practice of imposing state control over private property.

One of ECtHR leading cases dealing with balancing the rights of owners against those of tenants in (at that time ongoing) process of gradually relaxing restrictive rules concerning the lease of privately owned dwellings is illustrative of the difficulties related to the issue at hand. The ECtHR in *Schirmer against Poland* rightly pointed out to legal and social issues that may arise in the light of conducting such a balancing exercise, which comes as a part of the process of transition from a socialist legal order and its property regime to one compatible with the rule of law and the market economy.[72] The ECtHR duly admits the difficulties and complexity of such a transition, as well that it cannot serve as a pretext for exempting the Member States from the obligations stemming from the ECHR or its Protocols. However, the ECtHR ideological stand according to which only market economy is compatible with the rule of law seems dangerous from the standpoint of providing full protection of collective dimension of the right to property through its case law.[73] Although perceived as problematic, it seems that the given value statement did not influence the ECHR adjudication in the given case pertaining to measures to control the eviction of tenants. This is because the ECtHR found the violation of Article 1 of P 1 ECHR of the owner of the rented apartment in that case, based on a comprehensive balancing exercise between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions. Similar value statements were contained in the ECtHR cases of restitution of nationalized property where the inseparable link has been created between democracy and market economy.[74]

For the purpose of this analysis, the extensive ECtHR caselaw dealing with the transition from collective property regimes to private ones and *vice versa* will be classified chronologically into cases dealing with claims concerning the state's non-fulfilment of compensation commitments to the owners of the nationalized property which were made before the fall of the communist regime and to the transition-related cases that arose subsequently to its fall. The first group of cases is significantly smaller in volume compared to the other, since the number of applications against CEE states rapidly increased after the end of the Communist reign.

[72] *Ibidem.*

[73] See more on the principle of the rule of law in the European context at: A. Knežević Bojović, V. Ćorić," Challenges of Rule of Law Conditionality in EU Accession", *Bratislava Law Review*, 7(1)/2023, 41-62.

[74] See *inter alia* case of *Maria Atanasiu and Others v. Romania*, Applications nos. 30767/05 and 33800/06, Judgement of 12 October 2010, para.169.

4.1. ECtHR caselaw triggered by complaints for the protection of property initiated before the fall of communist rule

The first group of cases involving collective dimensions of the right to property deals with claims concerning the state's non-fulfilment of compensation commitments to the owners of the nationalized property made before the fall of the communist regime. Similar legal issues also arose outside communist regimes as a result of expropriation or other modes of confiscation of the property, which will not be covered by this assessment.

This group of cases is to be examined in the context of standards developed by the ECtHR presented in the section 2 of this paper. A particular emphasis will be placed on the assessment of whether the ECtHR undertook an adequate balancing exercise in the given cases and awarded the compensation giving due regard to the collective aspects of the right to property.

Since this group of compensation cases is not large in number, the analysis will be focused on the ECtHR reasoning in the case *Czajkowska and Others v. Poland*[75] which deals with the nationalization of property under the communist rule. The given case constitutes an example of the ECtHR's recognition of a violation of property rights which is attributable to the failure of Poland to fulfil compensation obligations towards the former owner and his/her legal successors, whose property was nationalized under the communist rule. Instead, national authorities issued decisions granting only partial compensation to the owner and later her legal successors while promising that further sums of money would be granted in subsequent periods. However, over the course of the next 16 years, the applicants had not obtained all their damages.[76]

In the given case, the ECtHR recognized the need to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. However, it appears from the judgment that such a balancing exercise was not comprehensively undertaken by the ECtHR, even though the applicants submitted that the property in question had mostly been sold to private entities for commercial rather than public purposes.[77] The ECtHR also failed to elaborate on the issue of whether the partial compensation can be considered fair in the given case, or, in other words, whether the requirements for awarding partial compensation set forth in *James and Others v. the United Kingdom*[78] are met in terms of the above-mentioned social justice concerns. Instead, the elaboration of the ECtHR was very superficial and limited in scope, considering that it held that the applicants were entitled to full compensa-

[75] Case of *Czajkowska and Others v. Poland*, Application no. 16651/05, Judgment of 13 July 2010.
[76] A. Mrziykowska, "Legal Obligations of Poland Regarding the Restitution of Private Property Taken During World War II and by the Communist Regime in Light of the Jurisprudence of the European Court of Human Rights", *Polish Yearbook of International Law,* 39/2019, 122.
[77] Case of *Czajkowska and Others v. Poland*, para. 55.
[78] Case of *James and Others v. the United Kingdom* Application no. 8793/79, judgment of 21 February 1986

tion under the relevant domestic legislation, since the right to such compensation has been confirmed by domestic authorities.[79] In other words, the ECtHR failed to delve into the question of whether the nationalized land in the given case serves the public interest. Therefore, the ECtHR missed the opportunity to elaborate its approach with regard to the question of why nationalized property (as a form of collective property) should be fully reimbursed. Nevertheless, the ECtHR's further reasoning is useful, as it reaffirms some important guidelines from its previous jurisprudence, according to which the adequacy of the compensation would be diminished if there is an unreasonable delay over 15 years, as is the case in the given judgment.[80] In undertaking its limited balancing exercise, the ECtHR concluded that the fair balance was upset by the fact that applicants continue to be faced with uncertainty as regards the amount and the date of payment of the remainder of the compensation along with the manifestly excessive period which the authorities have required to calculate and pay the compensation.[81]

When it comes to assessing whether the partially unpaid compensation can be qualified as "possessions" in terms of P1-1, the ECtHR observed that pecuniary assets, such as debts and the above partially unpaid compensation fall within the scope of P1-1 as it constitutes a "legitimate expectation" that a current, enforceable claim will be determined in the applicant's favour.[82] Such a conclusion was driven by the fact that there has been a combination of the indicated legislative acts and the administrative decision determining the amount of compensation to be paid in place and as such is in line with the general strand of the ECtHR case law dealing with the protection of property. It is noteworthy that the ECtHR in this case applied reasoning that is also present in other ECtHR caselaw dealing with the restitution of nationalized property. According to that approach, the ECtHR holds that legitimate expectations are met only if the relevant legislative acts governing compensation are adopted after P 1 ECHR entered into force in respondent countries.

4.2. ECtHR caselaw concerning (de)nationalization of property-related complaints initiated after the fall of communism rule

This group comprises the cases in which the applicants questioned the legality of communist nationalization decisions in light of the domestic provisions binding at the time of the issuance of such decisions and cases where deprivation

[79] Case of *Czajkowska and Others v. Poland*, para. 60.

[80] In a similar vein, the ECtHR also found the violation of Article 1 of P 1 ECHR in the case of *Kirilova and others v. Bulgaria*, Applications nos. 42908/98, 44038/98, 44816/98 and 7319/02, Judgment of 9 June 2005 and in the case of *Igarienė and Petrauskienė v. Lithuania*, Application no. 26892/05, Judgment of 21 July 2009, as significant delays occurred in delivering flats offered as compensation for the expropriation of their properties to the applicants. However, the given case is not related to the communist rule. See Registry of the European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of property*, 2024, 81.

[81] Case of *Czajkowska and Others v. Poland*, para. 62.

[82] *Ibid.,* para. 50.

of property after World War II was carried out in accordance with nationalization laws. It appears from the cases of the ECHR organs which were brought after the fall of the communist regime that they did not always extensively elaborate on substantive issues arising out of the character and limits of nationalized ownership, nor that the balancing exercise between the protection of property and the requirements of the general interest was carefully undertaken. Such a deferential approach is attributable to various factors.

Firstly, the ECtHR did not delve into substantive issues in a number of cases where confiscations of nationalized property occurred before the respondent state ratified P 1 ECHR. Instead, the ECtHR rejected those applications for the lack of temporal jurisdiction. Such an approach was followed, among others, in the case *Jan Malhous against the Czech Republic*.[83] The case of *Brežny & Brežny v. Slovakia*[84] is also relevant for the rejection of the part of the application due to the lack of temporal jurisdiction. Although Slovakia at that time was one of the post-communist states, the given confiscation did not come as a result of the widespread nationalization of private property but as a consequence of the conviction made by the national municipal court.

In respect to the cases of the confiscation of private property and its transfer to collective property which took place before the respondent state ratified P 1 ECHR, the ECHR organs have consistently held that such deprivation of ownership or another right in *rem* constitutes "an instantaneous act" which does not produce a continuing situation of "deprivation of a right".[85] Due to the lack of continuing effects of such deprivation, the ECtHR held that Article 1 of P 1 ECHR cannot be interpreted as imposing a general obligation on the state to return nationalized property which was taken before the respective state ratified the ECHR. In that light, it underlined that the given Article does not guarantee the right to acquire property.[86] This position of the Commission and the ECtHR is not applicable only to the right to property and in particular to its collective dimension. In fact, it is in line with the general principles of international law regarding the non-retroactivity of treaties.[87] While there are exceptions concerning "continuing violations" in some areas of human rights law, this principle is rather strictly applied in cases concerning property rights. Therefore, the caselaw pertaining to the restitution of nationalized property, which became known as socially owned property, does not diverge in this respect from the general strand of the ECtHR jurisprudence on the right to property.

[83] The application was declared incompatible with the provisions of the ECHR insofar as the applicant challenged the measures under the 1948 Act in respect of his father's property which were taken prior to the entry into force of the ECHR in respect of the Czech Republic. Case of *Jan Malhous against the Czech Republic*, Application no. 33071/96, Grand Chamber decision of 13 December 2000, 16.

[84] Case of *Brežny & Brežny v. Slovakia*, Application no. 23131/93, Commission decision of 4 March 1996, 66-79.

[85] Case of *Jan Malhous v. the Czech Republic*, 16; Case of *Preußische Treuhand GmbH & Co. KG a.A. v. Poland*, Application no. 47550/06, Decision of 7 October 2008, para. 57.

[86] Case of *Maria Atanasiu and Others v. Romania*, paras. 135-164.

[87] A. Mrziykowska, 114.

However, once a State, which ratified P1 ECHR, enacts legislation providing for the restoration of property previously nationalized under a communist regime, such legislation is considered as a basis for the protection of the so-called "new" property right under Article 1 of P 1 ECHR, as long as one satisfies the requirements for entitlement. The judgment in the case *Maria Atanasiu and Others v. Romania* may serve as an example of such case law pertaining to the (de)nationalization context.[88] The same approach was followed by the ECHR's organs in respect of arrangements for restitution or compensation established under pre-ratification legislation, in case such legislation remained in force after the respondent state ratified P1 ECHR, as evidenced in the case *Von Maltzan and Others v. Germany*.[89] In *Maria Atanasiu and Others v. Romania*, the undertaken balancing exercise led to the finding of the violation of the right to property, considering that national authorities failed to adopt sufficient legislative and administrative measures that would be capable of providing all parties concerned with the restitution process with a coherent and foreseeable solution proportionate to the public interest aims pursued.[90] Contrary to that, the violation was not established in the case of *Von Maltzan and Others v. Germany* since the ECtHR found that applicants' belief that the laws then in force would be changed to their advantage cannot be regarded as a form of legitimate expectation for the purposes of P1-1.[91] In both cases, the balancing tests were carefully applied although without paying special attention to the nature of the collective property and its implications.

Secondly, the scope of ECtHR review is limited by the fact that a property claim that is not grounded in national law will not be protected under P1-1, as the ECtHR is not entitled to create property rights. The ECtHR in its caselaw pertaining to the transition from a communist to a market-economy system in CEE countries expressly stated that under the ECHR, it is not possible to derive an obligation on the part of a respondent state to enforce restitution and compensation claims if such claims do not have a clear basis in national law.[92] However, it appears that the identical requirement is set forth for the protection of all types of property under P1-1. Consequently it cannot be deemed that divergencies exist between the caselaw on the collective dimension of the right to property and the general strand of ECtHR jurisprudence dealing with the property right.

In a nutshell, none of the applications that alleged violations of any dimension of property rights have prompted the ECtHR to extend the scope of state responsibility.[93] Such a approach on the part of the ECtHR of giving extensive

[88] Case of *Maria Atanasiu and Others v. Romania*, para. 136.

[89] Case of *Von Maltzan and Others v. Germany,* Applications nos. 71916/01, 71917/01 and 10260/02, Grand Chamber Decision of 2 March 2005, para. 74.

[90] Case of *Maria Atanasiu and Others v. Romania*, para. 189.

[91] Case of *Von Maltzan and Others v. Germany,* paras. 112-113.

[92] A. Mrziykowska, 115-132.

[93] Please note that the opposite has been true in the case of (alleged) violations of some other rights protected, inter alia, under Articles 2 and 3 of the ECHR. See A. Mrziykowska, 133; E. De Wet, 13.

deference to national law in determining whether a property interest exists and refusing to go beyond the determinations of national authorities in protecting the right to property can be explained by the fact that the ECtHR cannot completely isolate itself from the financial arguments that were brought up in the discussions in CEE countries about the potential scope and costs of denationalization. Moreover, such ECtHR's approach comes as a consequence of the lack of specific regulations on the protection of the property rights of individuals at the international level.[94]

Naturally, the subsidiary character of the ECtHR jurisdiction also brings some limitations as to the extent to which the ECtHR develops its approach in terms of violations linked to the transition of nationalized property. Such limitations have been particularly apparent in one specific group of cases brought in the nationalization context, where applicants questioned the legality of the communist nationalization decisions in light of the domestic provisions binding at the time of the issuance of a nationalization decision. The case *Jan Pelka and Others v. Poland,* where the Commission rejected the application as *ratione materiae* incompatible with the ECHR provisions considering that it was lodged with the ECHR organs while domestic nationalization-related proceedings were still in progress may serve as an illustrative example of that group of cases. Namely, the applicants had requested from domestic organs to declare the nationalization decisions null and void; however, the administrative proceedings before national authorities, as per the relevant law, could not result in recognition of the applicant's property rights – this had to be done in separate proceedings. ECtHR consequently held that national remedies had not been exhausted.[95] Such a stance taken by the ECHR organs in *Jan Pelka and Others v. Poland* with regard to the requirement of the exhaustion of domestic remedies in the nationalized property context is aligned with the general lines of reasoning in the overall jurisprudence of the ECHR organs on the given requirement.

As regards the extent of the ECHR organs' authority to develop standards governing the confiscation of nationalized property, it is noteworthy that states have a wide margin of appreciation when introducing restitution solutions and determining the conditions under which they agree to restore property rights of former owners.[96] Such a margin should be also applied with regard to the amount of determined compensation. Thus, this margin allows national authorities to take into account the state's financial capabilities and even exclude restitution in relation to specific categories of former owners.[97] In a similar vein, the determination of the notion of "public interest" is also left to the discretion of contracting states. The ECtHR regularly held that the notion of "public interest" is necessarily extensive and should be interpreted accordingly.[98] More specifically, the ECtHR

[94] *Ibidem.*

[95] Case of *Jan Pelka and Others v. Poland*, Application No. 33230/96, Commission Decision of 17 January 1997, 4.

[96] Case of *Jantner v. Slovakia*, Application No. 39050/97, Judgement of 4 March 2003, para. 34.

[97] Registry of the European Court of Human Rights, 78.

[98] See more on the interpretation of the notion of public interest in property related cases at: M. V. Matijević, "Acquisition of Property Through Prescription and Illegal Occupation of Immovable Property of IDPs from Kosovo* after the 1999 Conflict", *Strani pravni život*, 57(3)/2013, 181-182.

stated that it is natural to leave a wide margin of appreciation to national authorities when it comes to their decisions to enact laws on the expropriating property or affording publicly funded compensation (though sometimes partial) for the expropriated property, since that involves implementation of social and economic policies. However, the ECtHR stated in its jurisprudence that it does not accept the interpretation of the notion of "public interest" offered by national authorities unless it is not "manifestly without reasonable foundation".[99]

Although the wide margin of appreciation is a common feature of the ECtHR caselaw when it comes to determining violations of the right to property, it is clear from the examined case law that it is additionally extended in cases dealing with radical property transformation in the (post)communist regime. In order to justify such an extended margin of appreciation, the ECtHR particularly pointed to its benefits for contracting states when they regulate complex property issues during the transition from a communist regime to a democratic public order protecting private property.[100] In that context, the ECtHR identified difficulties it faces in striking a fair balance between property rights and public interest when the transformation of the State's economy and legal system affects a wide population. Those difficulties justify a considerable margin of appreciation in the cases linked to property transformation.[101]

The extended margin of appreciation is coupled with a more lenient review on the part of the ECtHR regarding the striking of a fair balance between the right to property and public interest concerns in (de)nationalization context. In the (de)nationalization context, the ECtHR undertook various balancing exercises which were not limited only to striking a fair balance between the right to property and public interest as occasionally such a review was meant to strike a fair balance between different rights such as the right to property and the right to respect for private and family life in the sense of Article 8.

When it comes to undertaking a balancing exercise of whether the confiscation of private property under communist rule was proportionate to the public interest, it seems that a loose proportionality test was regularly applied in a way that mostly leaves the interpretation of key standards to national authorities while not giving due regard to the collective dimension of nationalized property. However, the proportionality tests undertaken by the ECtHR in some isolated cases depart from the above. Instead of delving into the separate analysis of a large number of proportionality tests conducted by the ECtHR on this issue, we will briefly present one of the most striking judgments in the case of *Jahn and Others v. Germany* to illustrate how the ECtHR in the "unique context

[99] Case of *James and Others v. the United Kingdom*, Application no. 8793/79, Judgment of 21 February 1986, para. 46.; The ECtHR statement that the margin of appreciation is left to national authorities concerning the scope of property restitution and the notion of public interest should be taken with caveats since the final word on their interpretation will be taken by the ECtHR in its balancing exercise.

[100] Registry of the European Court of Human Rights, 81.

[101] Case of *Maria Atanasiu and Others v. Romania*, paras. 171-172.

of German reunification" fully recognized the distinctive features of the collective dimension of the right to property.[102]

In the case of *Jahn and Others v. Germany*, the ECtHR found that the lack of any compensation for the deprivation conducted based on land reform during the communist regime did not upset the "fair balance" that has to be struck between the protection of property and the requirements of the general interest.[103] Although the general standard applicable to the right to property goes in the direction of allowing for partial compensation for interference with the right to property, under specific circumstances, in *Jahn and Others v. Germany* the ECtHR went a step further, accepting that exceptional circumstances like the unique context of German reunification may justify even the absence of any compensation for the confiscated property.

Interestingly, the ECtHR in the given case recognized the distinctive nature of the rights of the new farmers and partly grounded the judgment on the specifics of collective property over agricultural land, a form of property introduced by land reform during the communist regime in Germany. More concretely, the ECtHR stated that established farmers' rights over land cannot be classified as property rights such as those that existed at the time under democratic, market economy regimes. Instead, it referred to them as a mere reflection of the "collectivist system of property rights that characterized the former communist countries".[104] The distinctive limitation of those collective rights is attributable to the fact that heirs to such land under applicable national legislation were not in a position to keep it lawfully unless they themselves were farming the land or were members of an agricultural cooperative. The ECtHR in the given case gave due regard to such a limitation by finding that the applicants were not entitled to inherit the land lawfully and that any compensation to the initial owners of confiscated property is not necessary for striking a fair balance between the right to property and public interest.

It is important to keep in mind that along with the specific nature of collective property the unique circumstances of the German unification also strongly contributed to this exceptional ECtHR finding considering that the given judgement was partially based on a series of uncertainties regarding the legal position of heirs. Conversely, the ECtHR in a similar subsequent case (*Vistiņš and Perepjolkins v. Latvia*) which arose out of the context of German reunification, found a violation of the right to property where at least partial compensation was paid to applicants.[105] However, the value of *Jahn and Others v. Germany* seems undisputed since the ECtHR in that judgment gave due regard to the specific of collec-

[102] Case of *Jahn and Others v. Germany,* Applications nos. 46720/99, 72203/01 and 72552/01, Grand Chamber Judgment of 30 June 2005.
[103] Case of *Jahn and Others v. Germany,* para. 117.
[104] *Ibid*., para. 101.
[105] Case of *Vistiņš and Perepjolkins v. Latvia*, Application No. 71243/01, Grand Chamber Judgment of 25 October 2012, paras. 127-130.

tivist system of property rights that characterized former communist countries and gave them considerable weight in its balancing exercise. Such a finding of the ECtHR therefore demonstrates its ambiguous approach towards the resolution of cases pertaining to confiscated property under communist rule. On the one hand, the ECtHR comes up with value statements encouraging the transition from a totalitarian regime to a democratic form of government and favors private over collective property. On the other hand, in isolated cases, the ECtHR grants full recognition to the collective dimension of the nationalized property which results in non-sanctioned interference with the "right to private property" of former owners.

5. Conclusion

The right to property is not recognized in either the United Nations International Covenant on Civil and Political Rights or the United Nations International Covenant on Economic, Social and Cultural Rights. Conversely, it is recognized in regional instruments for the protection of human rights. This includes Article 21 of the ACHR, Article 14 of the African Charter and P1-1. The provisions of these three regional human rights instruments, while not being identical, all guarantee the individual right to property and allow for its limitations in the public interest. There are also specialized human rights instruments that are specifically tailored to protect certain collective aspects of the right to property – these mainly concern the notion of indigenous peoples' collective ownership over land which they have traditionally occupied. While regional human rights adjudicatory bodies primarily apply the provisions of the ECHR, the ACHR, and the African Charter, which enshrine the individual right to property, they also protect the collective dimensions of the property right through their caselaw, albeit to a different extent. This approach can be explained through the notions of autonomous concepts and evolutive interpretation of the ECHR and the ACHR, whereas the African Charter itself also recognizes the collective dimensions of the right to property.In examining to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, the authors looked into two specific strands of ECtHR case-law: the cases concerning the collective dimension of the property rights of indigenous peoples and the caselaw on the restitution afforded in cases of denationalization.

An examination of ECtHR jurisprudence on land-related rights of indigenous peoples has shown that the ECtHR did in fact rely on the autonomous concept of the right to property to recognize, in general, that indigenous peoples in Europe have rights over the lands they have traditionally used. Further, the ECtHR acknowledged that limitations, envisaged in national law, to properitary rights of individuals that benefit indigineous peoples are in the public interest. This recognition, however, was conditional on the requirements applicable in

the general strands of ECtHR jurisprudence related to the right to property. This was particularly visible through the ECtHR examination of whether the rights of indigenous peoples constituted existing property or claims that are reasonably substantiated. Namely, in assessing these issues, the ECtHR gave deference to the legislations and judicial and administrative practices of the respondent states. This means there was very little cross-fertilization between the ECtHR caselaw and the practices of two other regional bodies *vis-a-vis* the rights of indigenous peoples over the land they traditionally occupied or utilized. In other words, the ECtHR seems reluctant to delve into the issue more deeply and diverge from its general jurisprudence and thus to fully acknowledge the specificities of indigenous's people's rights.

The examination of the ECtHR jurisprudence concerning (de)nationalisation of property, i.e. transition from collective property regimes to private ones and *vice versa* under the communist and post-communist rule in CEE shows that the ECtHR was and is aware of the difficulties and complexity of such a transition (which was welcomed), but finds that it cannot serve as a pretext for exempting the Member States from the obligations stemming from the ECHR or its Protocols. More specifically, the analysed cases pertain to the outcome of the claims for the restitution of the property which was nationalized after World War II. Through the given strand of caselaw, the extent of the ECtHR recognition of the specific collective features of the nationalized property was acknowledged.

Firstly, the analysis of the selected caselaw reveals that the ECtHR has mostly circumvented dealing with substantive issues and in particular with the examination of whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in the cases of nationalized property. Instead, a large number of applications were rejected on procedural grounds as incompatible with P1-1 *ratione materiae* and/or *ratione temporis*.

When it comes to the applications which were not rejected, the ECtHR approach of giving extensive deference to national law in determining whether a property interest exists and of refusing to go beyond the determinations of national authorities is again apparent. More specifically, the ECtHR has affirmed that the states have a wide margin of appreciation in determining the public interest and introducing restitution solutions as a part of the process of transforming the State's economy and legal system, as this affects a wide population and may have considerable pecuniary implications. Although the wide margin of appreciation is a common feature of the ECtHR caselaw when it comes to determining violations of the right to property, it is clear from the examined case law that the given margin is additionally extended in cases dealing with radical property transformation in the (post)communist regime. This is coupled with a more lenient review on the part of the ECtHR regarding the striking of a fair balance between the right to property and public interest concerns. Such a loose propor-

tionality test was regularly applied in a way that does not give due regard to the collective dimension of nationalized property. However, the proportionality tests undertaken by the ECtHR in isolated cases depart from the above.

An illustrative example of such divergence can be found in *Jahn and Others v. Germany,* which is distinctive in several aspects. While the general standard applicable to the right to property goes in the direction of allowing for partial compensation for interference with the right to property to comply with the principle of proportionality under specific circumstances, in *Jahn and Others v. Germany* the ECtHR went a step further, accepting that exceptional circumstances like the unique context of German reunification may justify even the absence of any compensation for the confiscated property. It is interesting that the ECtHR further in the given case give due regard to the distinctive collective nature of the rights of the new farmers, according to which heirs could keep the land lawfully validly as long as they were farming it or were members of an agricultural cooperative. This case therefore demonstrates the ambiguous approach of the ECtHR towards the resolution of cases pertaining to confiscated property under communist rule. On the one hand, the ECtHR comes up with value statements encouraging the transition from a totalitarian regime to a democratic form of government and favors private property over the collective property. On the other hand, in isolated cases, the ECtHR grants full recognition to the collective dimension of the nationalized property which results non-sanctioned interference with the "right to private property" of former owners. Considering that the ECtHR cases on the restitution of property nationalized during the communist rule were mostly resolved and came under the category of the well-established case law, no turning points in jurisprudence are anticipated in the future.

Overall, it can be concluded that, while the ECtHR has to an extent carved out a place for collective dimensions of the autonomous concept of the right to property, it remains cautious when it comes to awarding protection to these collective property rights i.e. deferential towards the legislation and judicial and administrative practices of national states. This further implies that in some respects, such as the property rights of indigenous people, the ECtHR keeps lagging behind the protection awarded to collective property rights under two regional human rights' protection systems – namely the Inter-American and the African one. Given the current developments in international law and even in some national legal systems, it is reasonable to expect that ECtHR will be under additional pressure to align its jurisprudence with that of the other two regional adjudicatory bodies when adjudicating cases involving indigenous people rights. The property rights of indigenous peoples lend themselves particularly well to such a development.

On the other hand, the ECtHR is the only regional court that developed extensive case-law concerning the transition from collective property to private property regimes. Therefore it would be worth to analyse whether the ECtHR

influenced the case law of the Inter-American and African adjudicatory bodies in that respect. It seems that the ECtHR's general approach of employing a more relaxed approach towards the applicants should be modified *vis-à-vis* (de)nationalisation cases. It could be done by extending the scope of responsibility of contracting states by relying on a less deferential approach in examining domestic law pertaining to the right to property.

Finally, it seems that the identified differential approach of the ECtHR in (de)nationalization cases cannot be attributable to cultural relativist arguments, as has been argued in the scholarly literature, since the fall of communism is not a phenomenon restricted to the European continent. Moreover, it was explained in the paper that the ECtHR approach towards the collective property established during the communist rule is rather ambiguous since labelling of the communist regime as totalitarian does not go hand in hand with the identified practice of favoring the holders of collective property rights over the private property holders. Moreover, the examined body of ECtHR case law further shows that cultural relativism also cannot serve as an explanation for the ECtHR approach towards the recognition of the property rights of indigenous people. Although Europe (in contrast to the Americas and Africa) constitutes a region where indigenous peoples are much fewer in number and where the issue of recognition of the collective property of indigenous peoples is less likely to arise, it does not necessarily mean that such a cultural context shaped the ECtHR approach in that regard. Therefore, the ECtHR failure to elaborate more systematically on the collective dimensions of the right to property is rather attributable to its general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property in the sense of Article 1 of P 1 ECHR. Such an approach comes as a logical consequence of the lack of specific regulations on the protection of the property rights of individuals at international level. It seems therefore that without further development and strengthening of the international legal instruments governing the right to property, the ECtHR will not be willing to extend the scope of state responsibility and to give up its differential approach in examining violations of the right to property.

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