e-journal of
Social and Legal Studies

The Origin and the First Stages of the Common Property Relations Development

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Abstract

Purpose This article discusses issues related to the protection of common property and ownership of property, as well as the transition from common ownership to ownership and the consolidation of personal property and the reverse process of transition from personal property to common property, disclosure of the relationship of Roman and modern Russian law in the regulation of relations of common property.

Design / Methodology / Approach The methodological foundations of the study are theoretical, general scientific and special methods. Theoretical methods such as historical, classification and systematization, dialectic and others were utilized. General scientific: generalizations, inductions and deductions, as well as others..

Results All civil law institute was laid at the beginning of ancient Rome. Indicators of communication of community property, common ownership, common property, as well as community, legal entity, partnership and others. The authors came to the conclusion that in the oldest forms of universal ownership of property, the ancient Romans

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had a communal right of ownership, and its production - land and means of production. Smaller social units - family - land ownership - only ownership of the means of production. Now each member of the family is considered to be her co-owner. Following this, personal property is formed. Moreover, legal institutions based on a common property are being developed: “legal entity”, “partnership”, etc. At the same time, the Romans were supposed to exist. They also introduced for the first time the term “share” in relation to common property relations.

Practical implications Research results may be useful for further theoretical research; about using easement when sharing a common thing. The research results may be useful for improving the current legislative framework for determining property rights.

Originality / value The significance of this study is in the highlighted and grounded necessity to create an institution of common ownership and projection of experience. Existing in Roman law, since it is, firstly, continues to be worked out; secondly, most accurately they contain vital processes characteristic of the vast majority of social formations in world history.

Keywords: Ownership; ownership right; joint ownership; common ownership; share in the common ownership right; legal entity; partnership.

Received: December 2, 2019 ***Accepted:*** December 10, 2019

Introduction

The property right is the central institution of private law and, because of this, it has been studied in sufficient detail. A type of the property right is the common ownership right. It would be logical to assume that it has been studied very well, but it was not. There are many controversial and unclear questions. Answers to them the history of the common property institution formation can give. The most detailed information about this the Roman law gives, because it is, first, investigated in details; second, it demonstrates the life processes characteristic of the vast majority of social formations that world history knows very well.

1. The Emergence of community ownership and ownership

The writings of the most authoritative researchers in the field of law of Ancient Rome began with the description of those times when the Roman tribes began to occupy some lands and look at them as their own, protecting and separating from the lands of other communities and clans. For example, I.A. Pokrovsky (1917) wrote that the settled way of life leads the members of the community and the clan to the idea that the lands they occupied belonged to them. Neighboring lands, on which other communities and clans settled, were already not common, they were alien. Thus, a sense of belonging to the community and the genus of certain territories appeared, which became the right of communal and ancestral land ownership.

Similar processes occur in the smaller cells of the community – families. They also seek to separate their ownership of land, but such ownership is still far from the right of ownership. According to I.A. Pokrovsky (1917) the law of Ancient Rome for a long time considered the family not as the rightful owner of the land occupied by them, but as a subject with delegated ownership: "the original" quiritic property "(*dominium exjure Quiritium*) meant only the right to a certain "lot" in the communal land, to some "quota" of it, that the word *fundus* meant more "*allotment*" than the real area of land". Thus we see the beginnings of what we now call ownership shares. It is interesting to note that the share has been perfect since its inception.

2. The protection of community property and tenure

The possession of public land must be protected and for this Roman lawyers developed ownership interdicts. Most likely, the very

first kind of possession, which was protected by such interdicts, was *posessio agripublici*. That is, the owner's protection, which is now associated with the right of ownership, is actually older than this right and has come out of the protection of its possession by the participant of communal property. A similar conclusion can be found in N. Bogolepov, who also found a connection between the power of ownership and ownership of the public land (Bogolepov, 1895).

Initially, we assumed that the term "*agripublici*" could mean the public land in the sense that it was owned by the state, and then our conclusion about the origin of ownership protection could be questioned, but in S.A. Muromtsev's investigations we found out the mention about the fact that the term " *agerpublicus* "meant land belonging to the community, which after the fall of the communal system passed into the possession of individual families, giving rise to private ownership (Muromtsev, 1883). The conclusion that modern ownership came from *posessio agripublici* is confirmed in modern foreign literature (Ando et al., 2016). In such circumstances, there is no doubt that ownership protection is not just older than the right of personal property, it is also genetically related to common (communal) property.

One more interesting rule, which dates back to the communal ownership of land, it is in front of witnesses in transactions with it. N. Bogolepov (1895) suggests that in ancient times, witnesses were drawn from among the residents of the community and had to express the consent to the transaction. The later requirement of publicity in such transactions is the evolved rule of the presence of witnesses (members of the community).

3. Transfer of community property to family property and the personal property strengthening

At the next stage of the development of the studied relations, the land becomes the property of the family and each of its members was considered to be a co-owner: "... all the family members were like co-owners of that land even during the life of *paterfamilias* ("*quodammododomini*" – in Gay)" (Pokrovsky, 1917). In this regard, the mechanism of inheritance is quite surprising for us. Today it is considered that inheritance is one of the forms of the universal succession, when one person loses his/her rights and another takes his

place. In ancient Rome, if we are talking about the stage when the family was the property owner, the departure of the family head meant the transfer of actual power to another person, but not the transfer of rights. N. Bogolepov wrote about this, stressing that the death of the householder did not entail the property division, since it both was and remained in the common possession and use (Bogolepov, 1895).

I.A. Pokrovsky (1917) gives the similar description of inheritance: "... inheritance *suiheredes*, from the point of view of the old law, is not even inheritance, but simply the entry into independent management of the property, which during the life of paterfamilias belonged to them on the rights of family common property". I.A. Pokrovsky associates the final strengthening of the private property with the strengthening of the role of paterfamilias, who played the role of the sole proprietor, which happened by the time of the Law of XII tables.

Thus historically the public property preceded the personal one. I.B. Novitsky (2002) wrote: "The Individual property of an individual citizen was historically preceded by the public property of a tribe, a clan, a family". It is a very common view that the personal property has grown out of the common ownership of the real estate, primarily land. It is refuted by T. Mommsen, believing that slaves and cattle were appropriated earlier, and the land was still in communal ownership for a long time. In support of this, T. Mommsen gives the ancient name of the property "the possession of cattle" (pecunia) or "possession of slaves and cattle" (familia pecuniaque) (Mommsen, 1997). A. Berger similarly understands the term "*familiapecuniaque*" and translates it as the property in general (AdolfBerger, 2002). Something similar can be found in the work by I.B. Novitsky. He believed that the oldest property was the property of the genus -extended to the means and products of production. Clarification by I.B. Novitsky and T. Mommsen is very informative, but not fundamentally. For the purposes of this work, that sole ownership arose from the possession of part of the common property.

4. Transition from personal to shared ownership.

The final formation of the personal property does not mean that the Romans refused the joint possession of things and property community at all. At that time there was a very interesting phenomenon: getting rid of communal property (at least ceasing to consider it as the

main), the Romans began to put private property in the common property. That is, if previously private property was considered as a derivative of communal property, now common property, as a rule, is formed by the addition of private property of two or more persons. Of course, Roman law knew the common property and property community, formed by accidental confluence with it, as, for example, in the inheritance (*consortium*), but the will of the participants was at its basis, otherwise there would have been made the division. Perhaps the only incident of the common property formation in spite of the participants will was the "accidental community" (*communioincidens*), for example, in mixing ancestral things of different persons. The addition of private property into common property was so well-known that Roman lawyers even developed a broader concept of "common ownership", from which legal entities, partnership agreements and others originate. It should also be clarified here that the Romans seem to have differentiated the property community and the common property. The first concept was broader and included the second one. In addition to the common property, the common superficius and emphyteusis could be attributed to the property community. That is, not only the right of ownership was divisible, but also other property rights (Grimm, 1924).

As in our days, in Ancient Rome, the law did not always keep up with the facts and economic realities, and they were as follows: for the economic activity implementation, the Romans began to combine their efforts, capital, property, forming collectives, which, however, were not recognized as a subject of law and were not a subject to protection. Thus, S.A. Muromtsev (1883) noted that things not in private ownership were not recognized as being in civil circulation, and therefore they were not protected by civil law means. In this regard, lawyers have developed the concept of a legal entity. "A legal person comprised the legal recognition of the common possession as a form distinct from personal possession, but equal with it".

Initially, the property did not belong to the collective and was the common property of the participants (Novitsky, 2002). I.A. Pokrovsky, agreeing that the property of the Corporation was considered as the property of individual members (according to the rules of the partnership, *societas*), made an important addition that the degree of participation was determined by the shares. The right of

ownership when creating a legal entity could be delegated to the Treasurer (Pokrovsky, 1917). To ensure the stability of corporate relations, rules leading to the separation of property are gradually introduced. Thus, the law came to the fact that the legal entity was recognized as the owner of the property.

Partnerships were another form of joint ownership. The peculiarity of this form is that its basis is a contract. As D.D. Grimm (1924) accurately noted, "...a partnership is a contractual property community". The agreement regulates all the relations connected with the partnership activity. There is no formation of a new face. The property invested in a common business is a common property (*condominium*) or comes into the common use (Muromtsev, 1883). The parties by their agreement could determine the share of each other in the common property, as well as establish the procedure for its use (Sukhanov, 2017). Such non-legal associations had the different degree of the commonality and were created for common household on the basis of the hereditary property (*consortium*), trade (*societasuniusnegotiationis*), making one-time transactions (*societasuniusrei*), etc. (Pokrovsky, 1917).

If during the communal property (patrimonial, family property) the inheritance led to the replacement of the person ruling such a property, now the inheritance consists in the transfer of rights, and this may entail the transfer of one thing in several hands. So for the first time arose a common property by virtue of the law – *communio*. It is noteworthy that the law provides for the shares of participants. Then, according to E.A. Sukhanov (2017), this form, along with the contractual community of members, develops into a *condominium*, and that, in turn, into a common shared property, which is known to the modern law and order. This assumption is quite logical, since the "corporate" community evolves into the property of a legal entity.

5. General rules of the regulation of the common property relations in Roman law

Having developed the concept of the common property (*condominium*), the Roman lawyers began to develop rules that would most generally regulate the relations associated with it. They are described in the most detail by I.B. Novitsky (Novitsky, 2002) and D.D. Grimm (Grimm, 1924). They pointed out that it was Romans who developed the concept of "share in the right", believing that not a part

of the thing belongs to the accomplice, but a certain share in the right to the whole property. There were other opinions among Roman lawyers described by W.W. Buckland and A.D. McNair (1965), such as that there is a single possession shared by all.

But the Roman lawyer used a concept that implied the division of law, but not the possession. This was connected with a special understanding of the ownership. "Several persons cannot simultaneously own the same thing so that each of them was considered the owner of the whole thing (*composessiopluriuminsolidumessenonpotest*). But several persons can own inseparably a common thing so that each of them was considered the owner of the ideal part of the thing (so-called *composessiopluriumpropartibusindivisis*)" (Grimm, 1924).

Hence the rule that if one of the participants dropped out, the participation share of other participants increased proportionally. Romans also came to the conclusion that the community of law implies a community in making decisions regarding the implementation of law, so all the acts aimed at common things were agreed by the accomplices. Moreover, according to D.V. Dozhdev (1996) the size of the participation did not matter, and therefore one of the co-owners could paralyze any decision. At the same time, each of the accomplices had the right to dispose of his ideal share, for example, leaving it as collateral. One of the co-owners, who took emergency measures to ensure the safety of the common property, could claim compensation from others. Each of them could unilaterally demand the division of things (to separate its share), for which he resorted to *actiocommuoidividundo*.

If the division was impossible, the judge could award the thing to one, obliging him to pay compensation to the companions. The decision on the case was law-forming, that is, it gave rise to a new right – the right of personal property. Simultaneously with the decision on the division (separation), the judge could establish an easement so that the new owner could freely use his thing. Dividing the thing, primarily land, can not be infinite, so as not to form excessively small areas. "The customs and common sense of the population were left to put a limit to the excessive fragmentation of the land ownership..." (Mommsen, 1997). Another achievenment of the Roman jurists is the creation of "neighborhood law". They believed that real estate by virtue of its

natural properties implies joint ownership by neighbors, hence the whole complex of rights - rights in the neighborhood (Muromtsev, 1883). To protect their rights from the encroachments of third parties co-owner could resort to vindication or negatory claim.

6. The achievements of the Medieval law.

The next stage of the legal thought development is associated with the fall of the Western Roman Empire in 476, as well as with a new round of study of Roman law by Western European lawyers. This period lasted quite a long time, until the end of the XIX-early XX century., while in Europe acted " new " Roman law. From the point of view of the development of views on the common property, this time gives little new information, despite the fact that under the influence of the European lawyers works, primarily – glossators and commentators – Roman law was significantly revised, or rather – interpreted. The relations of common property were not left aside.

In the works of G. Dernburg (1905), K.F. Chilarge (1906) and other authors, we find sections devoted to common property, but they are not a breakthrough in the field under study. Only the development of such a variety as "collective property" (*Gesammteigenthum*) can be attributed to the merits of medieval jurisprudence (Dernburg, 1905), as well as the formation of the pre-emptive right of purchase (Filatova, 2012). Serious progress has been made in the regulation of the marital property relations.

7. Connection of Roman and modern Russian law in the regulation of common property relations.

The Foundation, created by Roman law, was so strong that many of its parts are used to this day – the modern right of common property is based on it. Nowadays, the law looks at the relations of shared ownership through the prism of the concept of "share in the right". So, according to item 2 of Art. 244 of the Civil code of the Russian Federation the property can be in the common property with definition of a share of everyone in the property right (share property) or without definition of such shares (joint property). There is still a rule on the joint exercise of rights (article 246, article 247 of the Civil code), the unconditional right to demand to allot shares (item 2 of article 252 of the civil code), etc. In case of impossibility to allot shares and in our

days compensation is paid (paragraph 2, item 3, item 4, article 252 of the Civil code).

Now, as in Ancient Rome, there are limits to the division of things, but if earlier they concerned only the land, today they also apply to living quarters. There remained "neighborhood law" with the understanding that the specifics of real estate is the inability to possess it in isolation from others. Unfortunately, some achievements were undeservedly forgotten. For example, in modern literature there is a discussion about the nature of the court decision on the section (allocation). It is proposed to consider it as transformative or conferring. However, even the ancient Romans considered such a decision to be law-forming, and this position seems to us to be the most balanced.

We think useful the experience of Roman lawyers, who in the division of common property at the same time imposed an easement. Now the courts do not practice it. It is also regrettable that modern practice has abandoned the use of vindication claim in violation of the rights of one of the co-owners in favor of the claim "for the restoration of the right to share". Some of the provisions of Roman law the modern legislator did not accept, such as the fact that one of the participants could block any decision regarding a common thing. In modern law, the will of one or more owners can be overcome (p. 1 art. 247 of the Civil code).

Conclusions and recommendations

The most ancient form of the property joint ownership among Romans was the communal ownership, and its object-land and means of production. Smaller social units – families – owned land only by virtue of belonging to the community, then there was the ownership of families to the means of production. The ownership of public land developed into the ownership of it: now every member of the family is considered to be its co-owner. At the next stage, the personal property is formed, along with this remains the joint possession of things. Moreover, legal institutions based on the property community are developed: "legal entity", "partnership", etc. At the same time, Romans derive the concept of "common property" and define the rules by which it should exist. They were the first to introduce the term "share" in relation to the relationship of common property. The modern law of common share property partly preserved the experience of Roman law,

partly introduced new provisions. Today, as many years ago, the right of shared ownership is viewed through the prism of the concept of "share in the right". The rules on the joint exercise of powers, the unconditional right to allocate a share, and if this is not possible – the right of monetary compensation, the limits of the division of things and others have been preserved. However, unfairly forgotten, but must be claimed conceptions: on the role of law-making decisions about dividing the common property; on the use of the easement in the general section and other things.

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