

LEGAL SIGNIFICANCE AND PROTECTION OF POSSESSION IN THE REPUBLIC OF MACEDONIA

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Abstract: In this paper it will be discussed the legal significance and protection of possession in the Republic of Macedonia. Below it will be listed the kinds of possession, and finally the rules for possession termination will be explained. The possession is an indicator that the person who rules one item is also a right holder of that item. The possession itself occurs in two types specially authorized by a law and pure factual power behind which stands no right. The possession enjoys legal protection. Below in the paper it is processed the judicial protection of the possession which is given based on complaint for disturbance of possession and action to recover the possession. The important thing at the judicial protection is that the rulers' protection is given to the last actual possession of the item, but it is not disputed the right of possession. Further in this paper it is included the protection of indirect possession where a complaint can be made by the indirect holder of the item, the judicial protection of possessory, possession protection of the heirs and permitted self – help for unauthorized harassment and revoking of the possession. With respect to the termination of the actual power of the item, listed and processed are the ways when the item failed, when the item was lost, when it is obvious that it won't be returned, when the ruler had freely left it and when the item is not taken from him and the ruler hasn't realized the right to possession.

Key words: property, ruler, complaint, item, object.

1. Introduction

One of the assumptions for achieving real right sector, especially the right to property is the bearer of the right to govern the item which is subject of the right. In principle, the contents of the right cannot be realized if the carrier does not possess the item in his hands, if he does not have the physical power over it. Specifically said, the item can neither be

used nor be available unless the carrier possesses it. Namely, for the item to be used, it should be the property of the carrier. For the item to be available i. e. to transfer the right to someone else, it should be given to the licensor. Because of this circumstance sometimes the property itself is shown as a right with three authorizations, of keeping, using and having the item. I do not exclude the possibility that the possession can be a partial authorization of one right.

According to this, the possession is an indicator that the person who possesses an item. There are cases when the rulers of the item are not the carriers of the right over them. In that case the possession is an individual actual power of the holders without legal cover. Such situations are common. For example the thief of an item has a power over it although he hasn't got the right to it. The buyer of the stolen item is not her owner too. There are situations which are not in accordance with the legal order in which the person who holds the item does not have the right to it. It is called detention of foreign goods in which the holder neither claims the right over the item nor uses it although he holds it. For example the worker holds the means of work of his employer and he is the ruler of them, the finder of another item too, the same applies to the keeper of another item or to a person who simply escorts another item on request of the right holder. According to the classic Roman understanding even a person who has the right to use another item (foreign item) after a contractual relationship is not a

ruler but detainer of the item (tenant). There are also cases when a person holds an item unaware of that. For example, by mistake someone put somebody's book in his bag and has full absence of will to hold that item i. e. mechanical holding of another item.

That way the possession appears in two types as a special authorization of a right (*ius possidendi*) and pure factual power behind which there isn't any right (*ius possessionis*).

The possession in its distinct type as pure factual power throughout the history of the right is legally relevant category although a lot of elements from this legal institution have recently been shown.

The possession enjoys legal protection. In principle, every possession and even the illegal possession as a defined actual condition of a relationship between a subject and a thing is legally protected.

Here it is asked the question: Why the possession is given protection when it is clear that there shouldn't be any right behind it? There are a few theories about this. According to an opinion, the violation of possession, and when behind it there isn't a right, it is a violation act, a kind of unjust. Protecting the possession it is protected the social peace. In my opinion, there is the ruler's interest the item to be in his possession. Until the court decides if the ruler has the right to keep the item in his possession, he has the right to keep it. That is the so called theory of continuity. The possession is protected because normally there is the property behind it. The possession protection is addition to the property protection because the property lawsuits are associated with difficulties.

According to me, as a basic explanation for the possessor's protection it should be taken into consideration the preservation of the social peace. If it is allowed the people to decide by them in whose possession should the items be left, chaos will be made, illegal condition, which is contrary to the purpose of the right. Of

course to this explanation builds other reasons like the one that behind the possession it is often hidden the right itself, so through possession it is protected the possession itself. Also it is undisputed that behind the possession as well as the rights in general, are always hidden persons' economic interests. From the stand point of law, it is only respected those interests which get legal qualities at the same time. Each legal protection must be explained with legal reasons although it is beyond any doubt that the economic interests ultimately are the basis for the law itself.

The possession has legal meaning and in that sense that it can be a basis for gaining or loss of the rights. Thus, based on multi-occupancy of an item, the actual power over that item for the ruler grows into right but for the former owner of that item it is loss of the right. It can be concluded that the legal meaning of possession is multiple. That's why it is normal to regulate it with the right and its theoretic procession in science. About this it can be said that in modern conditions the possession causes numerous dilemmas about its meaning, nature, essence, types and effect.

2. Types of possession

In general, every type of possession enjoys protection and has its legal meaning. Thus it shouldn't be concluded that different types of possession do not have different legal meaning and effect. It is necessary to determine the types of possession. There are more types of possession modeled according to different criteria.¹

According to the physical relationship between the possessor and the item, the possession is differed as:

- Immediate possession
- Indirect ownership

¹ Prof. Dr. Grupce A. Kultura – Skopje, (1985) Real Right – part two, p 219

Immediate possession is what it means direct relationship between the possessor and the item. In that sense the tenant is immediate ruler whereas the lessor is indirect ruler because he shows his actual power over the item through the tenant. According to the origin criterion, the possession can be:

- Independent possession and
- Performed possession

The first possession exists when the possessor thinks that he has one independent right to possess the item. This possession suits the owner's possession from the German and the individual possession from the Swiss law. It is performed the possession which is performed by the possession of another person. For example, it is performed the tenant's possession, servant employer and so on. This possession is similar to the previous one.

In the legal systems of the modern conception it is important that possession classification which is done according to the nature of the purpose i. e. according to the contents of the possessor's will. As it was highlighted, according to this criterion it is differed:

- Owner's possession
- Useable possession

The significance of this division is that only the first can cause transformation of the possession into law.

The above divisions of types of possession in the literature are usually linked with so called modern conception of possession, but not what emerges from the positive law. Considering what I said above, referring to real and imaginative difference between the classical and modern conception of possession, I think that about the mentioned conclusion there is no place which means that the above classifications are real given our right.

An important division of possession is according to the circumstance if behind it there is a legally valid basis for possession

or not. According to this criterion the possession appears as follows:

- Legal possession
- Illegal possession.

Legal possession is a possession which is based on a legally valid basis. It is usually legal proceedings but it can be inheritance, administrative or court act. Thus, if the possessor despite legality of possession hasn't become the owner of the item, the reason for that is something else. If for example, a founder of a foreign item or a thief sells the item to someone else. The licensor's possession is legal. Distinguishing possession as legal and illegal has a meaning when gaining the right to property i.e. the proper right on things in public property based on maintenance. On this basis the right can be gained if there is a legal possession.

According to the criterion if the possessor knows about the weaknesses of his possession relative to the existence of legal basis for it, the possession is differed as follows:

- Conscious possession
- Reckless possession

Conscious possession is a possession at which the possessor believes that his possession is not contrary to the law. In other words, if the holder is confused about the right whose contents he does, he is conscious. Reckless is the one who knows or given the circumstances could have known that his possession has no legal basis i. e. the right belongs to someone else. If for example an item is bought under suspicious circumstances i.e. from a thief, the buyer knew or could have known that he buys from a non owner, stolen item. That's why his possession although it is legal (because of buying it) is reckless. Conscientiousness is inner psychological and ethic moment of the relationship among the subjects. In modern law unlike Roman law, conscience should know about the whole time of possession. If conscientiousness later accounts, it is considered that the possession is reckless. Conscientiousness is supposed. That

means the recklessness should be proved by the opposite side.

Conscientiousness and lawfulness of possession are not identical terms. It is possible that the possession is legal and reckless and vice versa. In the last case it is discussed the so called putative basis. The conscious possessor is always treated more favorably than the reckless holder of a foreign item.

According to the way the possession is added, it can be differed as:

- Right possession and
- Improper possession.

It comes for improper possession when it is got by force, craftiness and breach of trust. Also the legal possession can be improper. So if somebody who has bought an item takes the item by force from the possession of the previous, before it is handed over according to the contractual terms his possession is improper. Also if somebody abuses trust and the item which has been entrusted to him keeps it for him, acquires improper possession.

3. Gaining and losing possession

To be realized as an actual power over the items, the possession should be obtained. The obtaining can happen in two basic ways:

- Primitive acquisition and
- Derivative acquisition.

The primitive acquisition becomes with primitive unilateral acts of the possessor. In any case it is necessary to occupy the item. There is no actual power without it.

The ways of obtaining possession are very different and depend on the item nature that is obtained. However, it is always necessary to make such a physical relationship between the item and the possessor which will enable actual disposition of the item, precisely realizing the economic benefits of its use. Despite that it is highlighted that it is necessary to exclude possession of third parties over the

items.² So obtaining possession is an actual question and it is important that the obtaining act is of such intensity which will make an opportunity for actual disposition of the item.

While obtaining the possession it is not enough that the item is occupied by one person i.e. to be kept by that person. It is necessary that the person to manifest a will to keep the item for him or in his favor. In fact, in this way the possession differs from detention.

Science is not unique about the question whether for the possession it is necessary the business capacity of the possessor. In my opinion the partial legal capacity can be accepted as not enough for acquiring possession, but the full legal capacity is an obstacle for that acquisition.

The derivative acquisition is gained by giving the item which is subject to legal proceedings. Therefore derivative is the acquisition which is based on set of legal facts between which as import figures the one that the legal predecessor of the acquirer is a bearer of the gained right whereas the primitive is the acquisition which is based on set of legal facts between which as important does not figure the one that the predecessor of the acquirer is a bearer of the gained right.

The possession stops losing the actual power over the item. However, the temporary loss of the item from the possession does not mean definite loss. Otherwise for the loss is not enough to stop any of the two essential elements, power and will. The possession is lost because of destruction of the item, taking over by another, loss of will to govern the item and so on. It is not loss of possession if the item is given to another person to keep it on behalf of the possessor. Thus the loss can be enough and contrary to the possessor's will. Handing over the item to a new possessor is a typical way of voluntary termination of tenure. One lost

2 Prof. Dr. Grupce A. Kultura – Skopje, (1985) Real Right – part two, p. 221

possession can be regained with new acquisition.

1. Possession protection in the Republic of Macedonia

The possession protection in the Republic of Macedonia is provided in the Law on ownership and other property rights. The possessor of those items and rights has the right to possession protection from disturbance and deprivation.³ The possessor who obtained the possession with unauthorized taking over from another person by force, threat, confusion, fraud or breach of trust, has the right to protect his possession. He has no right to protect the possession from the person he has taken it over without authorization but after the possession has become calm, it can be protected from him too.

The right to protection from destruction and deprivation has the possessor of the item against each person who disturbs him or has taken the possession by filing suit.⁴ Protection can be asked by the indirect and direct possessor. The direct possessor must ask for protection unless the indirect possessor hasn't asked for it.

Subject for possession protection are all persons no matter how they have got the possession. The law explicitly estimated that the possession is protected which the possessor has reached by force, threat, confusion or breach of trust. Only such a protection the possessor cannot ask for against the person from whom he has taken the possession illegally. If the possession has been taken illegally, such taken possession is illegal, it is flawed and the way it is illegal even when there is valid legal basis (for example: a contract for buying has been made and the buyer

has taken the item by force of that contract from the seller and because of that his possession is flawed and as such illegal regardless that the buying contract as a legal basis is valid. Exception from the rule is that the item which has been taken illegally from the previous holder can be protected by the possession and against the item owner when this possession becomes calm i. e. when with time, maintenance, and illegal possessor will become a legal holder of the item.

The possession protection right is realized within 30 days from the day of knowledge for disturbance of deduction and for the doer and latest within one year from the happened disturbance or deduction. The possession protection right is realized with special procedure before the court (procedure because of disturbance or deduction of possession) or by self – help. The possession which was taken by the possessor, hasn't stopped nor was interrupted if the possessor using his possession protection right has re-established or forced its establishment. Therefore, the possession protection right is realized with short preclusive deadlines with which flow a concrete possessor's protection cannot be realized because after this deadline the right disappears. The law provides two such preclusive deadlines i. e. relative subjective preclusive deadline which cannot be longer than 30 days from the day of finding out about the disturbance and the doer and absolute objective preclusive deadline which cannot be longer than a year from the happened disturbance or deduction regardless the time of the subjective finding out about the disturbance or deduction of the possession and the doer with which flow the subject dispute about disturbance of possession cannot be raised since the law has been extinguished. In order not to exceed these strictly preclusive limits by the plaintiff, it is necessary to take into consideration the regulations from the litigation which refer to these limits and the procedure urgency for possession disturbance.

³ Prof. Dr. Grupce A. Kultura – Skopje, (1985) *Real Right – part two*, p. 223

⁴ M-r Gelevski S. (2002), *The Property Law and Other Real Rights with comment and jurisprudence*, p. 412

Judicial protection of possession is given based on:

- 1) Lawsuit for possession disturbance and
- 2) Lawsuit for possession returning.

The important thing at judicial protection is that the possessor's protection is given to the last actual possession of the item and the right to possession is not discussed. Further, the disturbance of that last peaceful possession because of it subject of the lawsuit is only proving the facts while each highlighting eventually the right to the item i. e. that the item does not belong to the holder but to the defendant as a title to certain real right of that item is excluded. As an active legitimate plaintiff of the possessor's lawsuit is considered every possession holder regardless of the quality of his possession because in the litigation for possession disturbance is excluded the legal search of the legal basis of possession and the holder's conscientiousness. In the procedure after such lawsuits it is discussed only the facts referring to the last actual condition of the possession but not about its legal basis or conscientiousness and unscrupulousness or compensation of damage. A person authorized for lawsuit for possession protection is the indirect holder of the item and the person against whom the lawsuit for possession protection has been filed is the person whose possession is not enough (that means that the possession over the item has been gained by force, threat, fraud, or breach of trust) and who at the moment of filing the lawsuit holds the item and against the successor of that person (when the possession is asked to be returned), i.e. the person who differently disturbs the item holder.⁵ The defendant in the lawsuits for possession disturbance can defend by making certain objections. He can object the possession imperfection

(that the plaintiff got the item by force, secretly, or by breach of trust), then objection for late file of lawsuit for possession protection because of which extinguished his right to judicial possession protection. However, the defendant in the dispute because of possession disturbance cannot object that the item is his since such objections are made in a procedure after petition lawsuits but not in a procedure after possessor's lawsuits.

Possession protection lawsuit beside the indirect holder can be filed by the direct holder. Such a lawsuit can be filed by the direct item holder but only when the indirect item holder has lost the possession contrary to his will. The direct holder can file lawsuit against the indirect holder because of possession disturbance (for example lesser against the tenant) and v. v. the indirect holder against the direct item holder (for example the tenant against the lesser). In the first case, the tenant during the lease, does such activities for which according to the contract he was not authorized or after the expiry of the lease contract does not want to return the purchased item to the lesser and thus he disturbs or takes the possession from the tenant. In the second case, for example the lesser with certain actual actions interfere with the lessee in terms of the contract (agreement), to use the purchased item, to pick up the fruits from it or he took the item at the lease time in that way disturbing i.e. taking the indirect possession of the tenant. In such disputes for direct possession protection can be highlighted objections for possession protection based on lease agreement. So, the tenant will object that the actual power of the item is done based on the lease agreement and the lesser on his right to property.

Regarding the judicial protection of possessory is provided that every possessor is authorized to protect the possessory before the court from unauthorized disturbance or taking by a

⁵ Gelevski S. (2002), *The Property Law and Other Real Rights with comment and jurisprudence*, p. 416

third party and from the other possessors only if they totally excluded it from the previous possession or significantly limited former way of actual power performance. The actual power of an item can be divided among a few persons in two ways. According to the first, when the actual power doing is divided that way each possessor possesses a certain part from the common item therefore the real part from the common item is considered as a complete entity and each of the existing co owners does the actual power independently of their real part. In such case, the real existing co owner's part indicates that only towards third parties it is shown as an entity. According to the second way, when the actual power of one physically undivided item is divided among more persons in ideal parts (pieces) (for example 1/3, 2/3 or 1/5) and if parts are not explicitly identified it is assumed that there is possessory in equal parts. Here there are no real parts so separate possessor has no exclusive actual power on a material part from the common item but all the existing possessors do actual power on all parts of the common item and have to adhere to these two rules: a) the existing possession of each possessor to refer to the whole common item and b) in doing such actual power of the common item towards the existing ideal parts each of the possessors is obliged to refrain from those actions with which he will interfere or disable doing the actual power of the other multiples.

The property law and other real rights estimate the possession protection of the heirs. The testator possession passes to the heirs at the time of the testator's death regardless of when the heir gained the actual power of the inherited item.⁶ Omission in the old Law on the basic ownership – legal relationships is that possession protection was not provided

and this is explicit with the Property Law and other real rights. That protection the heirs enjoy from moment of the testator's death under conditions they are accepted as heirs. The time from the testator's death to the actual giving of the inherited item to the heir is called 'spiritualized' type of possession because without heir's actual power occurs actual power without his will at the time of the testator's death and regardless of when the heir accepted the actual power of the item i. e. possession.

The law provides self – help as exceptional, allowed and conditioned possibility of self protection of the existing possession by own powers and means, without the state authorities. Self – help as a legal instrument of possession self protection can be used i. e. allowed if these assumptions are met:

- A) Danger to be indirect I. e. immediately started and to last, if it is about disturbance, and in case of possession taking to be about taken possession or while it is happening, seeks immediate return;
- B) The way it is done to meet the circumstances in which there is danger i.e. the need the specific way of doing self – help is indicated as appropriate proportion relative to the way and intensity of unauthorized taken disturbance danger i.e. item taking. Whether the way of doing self – help really meets the circumstances in which there was a danger is a factual issue which the court will solve from case to case according to specific existing circumstances.
- C) The right to self – help has to be done very restrictively and while realizing the attack on possession to insist neither to harm the attacker's items nor to inflict injuries. That should never be done more than what is necessary to remove the immediate danger from attack on the possession because otherwise self – help becomes

⁶ Gelevski S. (2002), *The Property Law and Other Real Rights with comment and jurisprudence*, p 419

opposite. Then the attack on possession is defended with allowed means. The Law does not contain regulations for types of self – help but it can be supposed that it knows self – help as defensive and offensive self – help. The first consists of the right to self defense of its possession from illicit injury and the second from the right to return the taken item.

- D) The right to self – help is a logic consequence of admitting the factual power over the item and the certain economic interest of the holder his possession to be defended. Actions that the holder has chosen for his possession defense against the unlawful attack of a third party have to move within defense and that means that actions have to be applied which are excused regarding the circumstances of a case. Although the law does not have such regulations, the right to self – help by exception must also contain authorization for establishing the previous possession condition and that means the holder to be recognized the right to return the item when it has been taken and not to overstep assumptions which should be fulfilled to do the right to self – help contained in this article. The right to return the item taken from possession should be done immediately, if the taken item is mobile whereas at the stationary item, immediately after its taking the holder should take the necessary steps though self – help to return that property.

5. Termination of Possession

The rules for termination of item possession i.e. the holder to stop doing actual power over items, are regulated in the Property Law and other real rights. Those ways of termination of the item

actual power are the following: when the item has failed, when the item has been lost, when it is obvious that it won't be returned, when the possessor with his own will has abandoned it and when the item has not been taken from him and he hasn't protected the possession.

For possession to be lost by termination of doing actual power, it is necessary that the actual power previously existed on the side of the holder as his time permanent event of immediate spacious exercise of the actual power of the possessed item, which is shown as third parties would objectively meet the particular existing actual relationship of the holder towards the possessed item.

The holder can lose possession by his will and contrary to his will. According to his will the holder will lose the item when the holder will simply reject it (for example he will throw the newspaper in the bin) expressing in that way that his will not to keep the item further. However that will is 'natural' will and it can be possessed by a person with limited legal capacity. By his will the holder will stop doing the actual power of the item and then based on legal proceedings (for example with purchase contract) the item will be given to another person. Contrary to the holder's will, he can lose the actual power over the item when a third party will take the item from him or when he will lose the item. Regardless of the holder's will, the actual power over the item is lost when it objectively failed.⁷

Concerning the temporary disturbance for doing the actual power over the item, its existence or non existence is done depending on specific circumstances of the case.

In any case, it is appreciated that previously done actual power over the item is of temporary or permanent character. Despite that, this temporary

⁷ Gelevski S. (2002), *The Property Law and Other Real Rights with comment and jurisprudence*, p 424

disturbance should be understood in a broader sense and not only in the narrower sense. To temporary disturbance comes for example in case of disease or temporary holder's absence in case of temporary misplacement of car keys, without intention to be abandoned the actual power over it.

Concerning the immediate possession, it is lost when the direct holder has abandoned the item over which he had such possession. It is lost when the immediate holder with his will but contrary to the direct holder's will, has abandoned the immediate possession over the item.

6. Conclusion

From the above said, we can conclude that one of the most important assumptions for realizing each real right and especially the right to property is the bearer of the right to govern the item which is subject to the law i. e. the contents of the law cannot be realized if the bearer does not have the item in his hands, if he doesn't have the actual power over it. It can be concluded that the legal meaning of possession is multiple. That's why it is normal its regulation with the right and its theoretical processing in science. Relative to that it can be concluded that in modern conditions possession causes numerous dilemmas about its significance, nature, essence, types and effect.

The important thing in this paper is to underline that the possession enjoys legal (judicial) protection. In principle, each even illegal possession as a certain actual condition of relationship between the subject and the item is legally protected. Any type of possession enjoys protection and has its own legal meaning. Thus, it should not be concluded that different types of possession have no different legal meaning and effect.

Further, realizing the actual power over the items depends on obtaining the possession. The obtaining can be done in two basic ways as primitive and derivative acquisition. Derivative acquisition is the

one which is based on set of legal facts among which as important is that the legal predecessor of the acquirer is a bearer of the gained right whereas the primitive acquisition is the one based on set of legal facts among which as important is not that the legal predecessor of the acquirer is a bearer of the gained right.

The right and item possessor has the right to possession protection from disturbance and taking. Thus, the judicial protection of possession is given based on the lawsuit for possession disturbance and the lawsuit for possession returning. Here it should be underlined that the active legitimate plaintiff of the possessor's lawsuit is considered as an item holder regardless of the quality of his possession because in the litigation for possession disturbance is excluded the legal search on the legal basis of possession and the consciousness of the holder. In the procedure after these lawsuits it is discussed only facts which refer to the last actual condition of possession and not to its legal basis or consciousness or unscrupulousness but compensation for damage. A person authorized for lawsuits for possession protection is the direct holder of the item and the person against whom the lawsuit is filed for possession protection is the person whose possession is not enough and that means that the possession over the item has been gained by force, fraud or breach of trust and which at the moment of filing the lawsuit holds the item and against the successor of that person i. e. the person who differently disturbs the item holder.

It is interesting to mention that the Law provides the self – help as an exceptional, allowed and conditioned possibility of self protection of the existing possession by own powers and means, without the state authorities when danger is direct, self – help is necessary and the way it is done to be suitable for the circumstances in which there is danger.

The possession stops losing the actual power over the item. However, the

temporary loss of item possession does not mean definite loss. Once the possession is lost, it can be returned with a new acquisition.

Each research can lead the researcher in a situation to ask him what his contribution will be particularly when as subject of research is an extremely complex and many times processed topic. If from this 'sea' of problems and dilemmas we resolved some, then the purpose of the paper will probably be fulfilled. But if with this paper we have succeeded in getting closer to possibility to give one real, relief image of possession, then we will be pleased because with it a way will open for further studying of this issue.

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