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Winter February 17, 2016

POSSESSION-Factual Power or Law

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Question whether the possession is factual power or law in legal theory has its roots from the time of its occurrence.

So in Roman law regarding the legal nature of the possession were divided opinions.

According to one opinion, it is characteristic of classical Roman law, the possession is seen as a fact independent of the law to speak after sentence “Ownership has nothing to do with possession—Nihil commune habet proprietas cum possessionibus.”¹ Accordingly it was considered that possession does possess most of the actual item—Possessio plurimum facti habet. It was thought that possession is not law, but the fact—Possessio non iuris est, sed facti. As a result of this understanding, possession does not automatically revival after the return of the Roman citizen from captivity, so it all seems to purely twist of words that possession also not a law.²

¹ Ulpian, Edict, book 70, D.41.2.12.1.
² As is known, fall into slavery in Roman law has amounted capita deminutia maxima, etc., loss of legal capacity of the entities and their approach the level of things. In order to avoid that in case of capture Roman introduced fiction of death was seen as a die at the moment of falling into slavery. When it was released (or escaped and would get back to the territory of the Roman state), coming to the institute postiminium action, in which all his rights as alive and never stopped. Not only to life relationships that Roman law considered the foremost factual, not legal as marriage and property owners. If a Roman citizen wanted to continue to rule (as before falling into slavery), had again after (actual time) to gain possession. Romac, Roman law, by 80, Marjan Horvat, Roman law, sv. I Zagreb, 1952, by 99th.
According to the second opinion, which reflects the post classical Roman law, possession is a fact and law. –*Possessio non tantum corpori, sedet iuris est.*

In the Justinian Code (Collection of court decisions issued 529, completed 534 years in one of the 12 books) highlights: “no one can doubt the fact that possession has two bases, one of which is tied to the law, and the other consisting of a natural posture”.

Similar is the position of the Roman jurist Pipijan according to which: “People who are subordinate to others' power can hold the item that enters the pekulij, but can not be owners and rulers, because possession is not only actual power, but it also refers to the law”.

Later in the first civil codes enacted in the 19th century, it was adopted perceptions that the possession is the law.

So Austrian civil law, possession numbered itself the real rights. However, in more recent civil codes adopted later in the 20th century, possession is not understood as a right but as a fact.

According to tradition, and today the ruling conception, possession count as actual power of things. In support of this position is the opinion of a number of legal writers.

So, according to A. Đorđevic, possession is displayed first and the closest such a factual situation (factum). Possession is the only actual power and authority and nothing more, and not a right.

According to Č. Rajačić, possession factual situation protected by law. Possession enter into the legal field, but it is not right. Right in the subjective sense contains in itself the power of a person to seek, factual situation which does not correspond to his right to comply with law. In possession,

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3 D.41,2,49.
4 A. Đorđevic, Drzavina, by. 16,17.
the contrary factual situation must exist (because without it there is no possession) to the subjective right would occur.\(^5\)

According to M. Vuković, under possession means actual relationship between people and objects, along with boiled will stick as his or carried over it a right in their favour.\(^6\)

According to A. Gams, possession is the actual power of things. In contrast, ownership is legal authority. Owner rule has actual authority to boil, it aims to item factual and economic exploits. Therefore, it is generally a ruler. But ownership and possession do not always coincide.\(^7\)

For V. Spaić, possession is just a fact, facts that truth entails certain legal consequences and enjoys legal protection, but in itself is not any law and protection of tenure with the lawsuits protecting only the factual situation that existed before the disturbance. There are not going to deliver the legal powers that do not exist in possession, only to establish the factual power of the former estate.\(^8\)

According to M. Vedriš-P. Klarić, possession factual situation protected by law. Firstly possession without doubt an actual relationship between man and things. However, this relationship should be used for economic exploitation of the goods. Because he regards as a rule is not only a fact, but a set of facts, and that means facts which normally ends at a time, but time should not last long. The economic exploitation of the goods does not consist in the possession of a single act. The notion of actual power, it makes sense wider than that of fact.\(^9\)

According to A. Romac, possession is an actual power weight item, regardless of the law, or whether ruler or not there some law that gives authority to the factual power. Consequently,

\(^5\) Č. Rajačić, Stvarno parvo, Zagreb, 1956, by 8.
\(^6\) M. Vuković, Osnovi stvarnog prava, by 32.
\(^8\) V. Spaić, Stvarno parvo, by 97.
\(^9\) M. Vedriš-P. Klarić, Gragansko parvo, by 161-162.
possession is just a fact, facts that a certain expression in the law, therefore it is called legal, legal fact.\textsuperscript{10}

According to O. Stanković possession can be defined as the effective administration of things, whether carried out on the basis of a subjective right or extra-legal basis and whether the ruler believes is authorized to perform the actual power.\textsuperscript{11}

According to R. Živkovska, possession is really a subjective right, but the actual power of the things that exist independently of the subjective real right. The law regulates the actual power with legal norms, so possession is legal category that is one of the central institutions of civil law.\textsuperscript{12}

According Ehrencvajg, possession is itself regarded the government established the basis of the item, placing it under one's will, whereas not taken into account our authority for that setting.\textsuperscript{13}

According to R. Paund, from the angle of the legal concept of possession can be defined as actual physical power (or control) of an object with a will (or intent) that power (control) to be carried out in own purposes.\textsuperscript{14}

According Garajs, possession is an institute of individual rights or the right thing to do but a fact. But it can be a consequence of: a) Individual rights (eg. The property) and b) The reason for the creation of individual rights (eg. The maintenance, possession of the land without the right to property, which in English law leads after expiry of the specified period to extinguishing the right of ownership), so in some cases the mere fact of the rule of goods protected from harassment.\textsuperscript{15}

According to Randi, possession is an external act based opportunity for self-rule over the items.

\textsuperscript{10} A. Romac, Rimsko parvo, Zagreb 1981, by 138-139.
\textsuperscript{11} O.Stanković, Stvarno parvo, 1994, by 33.
\textsuperscript{12} R. Živkovska, Stvarno parvo, Skopje, 2005, by 224.
\textsuperscript{13} Ehrencweig Sistem des osterreichichen, by 484.
\textsuperscript{14} P. Raund, Jurisprudencia, Kniga 3, by 43.
\textsuperscript{15} Gareis, Encyklopadie der Rechtswissenschaft (1921), par.17.
Possession is the fact because:

a). The actual nature does not change by law binds him some legal consequences. And other facts right binds some consequences, so they do not become right just because (eg. The fact of human existence is getting legal ability, maturity is obtained legal capacity....).

b). Possession is not right because it protects against autocracy. To possession because a right, there must be a requirement of the ruler to all third parties for them to refrain from autocracy and if such a requirement does not exist possession.

c). Possession is not right just because the positive law modifies the terms of its acquisition and loss. Although the law often recognized as occupancy situations where there are all the elements of possession, and those situations where they are not recognized as possession, possession with it becomes legal power of entities in terms of some things (subjective right).

Randi also indicates that possession can be subject to legal transactions, because the fact of the rule of law bind various legal consequences that can then be legal operations, (meaning possession can sell, rent, etc.). But the legal cases can not be transferred possession (because it is a fact) but only with preparing the possibilities of acquiring possession of those who acquire. Possession means no any law in particular can be a real right. Yet nothing stands in the way, possession be called legal relationship, so in that sense the law is regulated and legally protected. But to establish that possession is a right is still far.16

According Holms, when we say that a person has possession, we immediately confirm that all the facts that fall within a certain set of facts related to it and thus directly or tacitly declare that the right of such person will recognize the advantage that in such a state is provided. Contract or property, and any other material legal concept can be analysed in the same way, and so should be released. The only difference is that the possession is appointed facts and suggest or assume any

legal consequences, while ownership always, and deal with more uncertainty and reluctance to appoint consequences and suggest facts.17

Ž. Perić says that the possession is such a tangible touch the face of a certain item, in which that person is the owner of that item and used in a way only an item proprietor has the right to do so.18

According to R. Legradić possession or ownership is not only the actual relationship of entities and goods, but it is also a social relationship to the exclusion of other subjects of authority over the items. In other words, possession or ownership is a basic part of the property, its economic content devoid of legal update.19

According to S. Krneta, possession of talk as to institute the law, because in any society do not recognize possession, neither ruler considered each individual item to have its own power, which uses and actually enjoyed, though the ruler is in a spatial relationship to the item. Though essentially a fact, not a right, any actual relationship is therefore our possession in a legal sense. Even one actual relationship in which a given society is recognized as a condominium to enjoy its advantages, especially legal protection.20

According to G. Geršić, possession is not only a legal right, but a behaviour or behaviour that animal rights were taken into account, which connects the certain legal consequences for which law prescribes rules. The legal protection of the possession as such is given, it becomes the subject of positive legislation and the objective of the law. By possession recorded in the area of law its natural term, which in its essence, naked fact becomes a legal concept and the very possession becomes

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17 Holms, Common Law (1881), by 214-215.
legal behaviour. But that possession is not right, not at all considered to denote possession as a legal behaviour, so much is rightly regulated and protected by legal means.21

Otto Girke out that possession is really powerful things, but the controversy over whether possession of Roman law is a naked fact, with legal action or just right: today's tenure as Gewere can be understood only as a legal relationship rooted in property law. It not only joined the legal actions, but he is himself legally qualified authority on things that no matter what material is legal situation, acquires an independent legal position of the formal kind, so is displayed as a personal subjective right.22

According to D. Arandelović, possession is not a right, it is a phenomenon that stands outside the law. But although possession is not right, however it is valid for the right. Consequently a person who is the ruler of an item in terms of item that keeps arising between him and others certain rights and obligations that are rightly protected.23

According Dernburg, ownership is not a right, it is a phenomenon that stands out for the right, although ownership is a base for many rights. When would abolish any legal order or it would not have disappeared possession. As a real power of humans on things, would last possession remains a condition for human survival.24

According Vinšajd, possession is not right and it stands so completely, that it actually cannot also be defined, as fact until such facts are not set against the law.25

According to M. Žuvela, possession is not really right, but a presumption of individual property rights.26

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21 G. Geršić, Priroda drzavine, 1885, by 25.
23 D. Arandelović, Predavanja iz rimskega prava, Beograd 1938, by 158.
24 Dernburg, Pandekte, Zagreb 1900, by 425.
25 Windscheid, Lehrb d. Pandenktenrechts.
According Karbonie, possession is real power which cannot be separated from the law. The consequence if so, seems a pure distortion, saying that possession is also not right.\textsuperscript{27}

Moil, says that without doubt, possession differs from ownership that is required for the existence of a de facto relationship between a person and an object (item) and wail that is a fact. There is no doubt that it entails legal consequences, so if it looks so that it is purely a rollover of the words that the possession is well and right.\textsuperscript{28}

According to N. Gavela, none of them is no ordinary social fact, but also the legal fact of the existence legal order binds specific legal actions. Possessed meet and factual and legal. The existence of any relation to the actual power, the actual object belonging to the entity is a fact, but a fact that possession only if the legal order so classify. Determining the essential properties of the holding gives the elements of the definition of possession. Obviously to help them genus proxium - relatively permanent social relationship with any entity or that most of them actually have authority in respect of a particular object-in other words the fact that the object belongs to a particular entity or entities. A differentia specifics of the facility are meeting the criteria, norms of a legal system set to distinguish the possession of other social relations.\textsuperscript{29}

According Tutundjev Đorđi, possession has its economic definition under which it is "economic power over the item, any actual power that provides an economic interest."\textsuperscript{30}

Contrary to the presented ideas that possession is just factual (real) power, a phenomenon that stands out from the right legal behaviour, though in reality it is a fact and there is an impression that in terms of its consequences is the same law, some authors believe that the possession is a fact and right and some go even further and advocate the view that the possession is right.

\textsuperscript{27} Jean Carbonnier, Droit civil, sv. III/Les Biens, Paris 1983-1985, by 173.
\textsuperscript{28} Moil, English Translation of the Institutes of Justinian (1912), by 334.
\textsuperscript{29} N. Gavela, Posed stvari prava, by 5.
\textsuperscript{30} Tutundjev Đordi, Osnovi na imotnoto parvo, II Poseben del stvarno parvo, Skopje maj 1960, by 55.
Thus, according to M. Jovanović, the possession by its occurrence is only the fact, but the duration is right.\(^{31}\)

According to L. Marković, the question of the legal character of possession is purely relative nature, so then it's best possession to be considered as a fact and as a right, therefore the view of what it is hearing. On the one hand the possession is pure fact, because denotes actual relationship to the power of a person with the item. But the other side of this fact is based the authority of the ruler to keep the item and to possibly seek protection from the authorities in case of harassment. By actually ruler enjoys protection in terms of its factual authority over the property and he appears as a title of a subjective right \textit{sui generis}. It is the right of a particular type and nature and intensity, it is temporary and must be removed before the hard right.\(^{32}\)

B. Vizner out that possession is the actual power which may cause the creation, modification and termination of the right. For example, if qualifying takes some possession by law specified time, it leads to maintenance, which means the actual power is transformed into legal power.\(^{33}\)

According to O. Kadriu, on the basis of the theories and legal standpoints in Roman law with special emphasis on the standpoint of the modern (contemporary) real right, we are of the opinion that possession or the possessor factual authority of goods or power. As such, it does not belong to a group of real rights. But it's still right and as such belongs to a group of so-called subjective civil rights in the broadest sense. And as a subjective right, possession contains a predefined round of legal powers. The powers belong to its title, actually belong to the ruler or the possessor of goods or rights. Taking into account the attributes of possession and its possible modalities, science and jurisprudence recognizes different situations of possession.\(^{34}\)

\(^{31}\) M. Jovanović, Drzavina, njena zastita I odrzaj, Beograd 1925, by 196.
\(^{32}\) L. Marković, Gragansko parvo, Beograd 1927, by 297.
\(^{33}\) B. Vizner, Gragansko parvo, Beograd 1962, by 174.
\(^{34}\) O. Kadriu, Sudrzavina I pravna zastita, Pravni zivot br. 11/09, by 705.
According Savinji, it is clear that the possession itself, in its original idea is a simple fact: also certain is that it is related to legal consequences. Accordingly, possession is both fact and law, in his being a fact, but their effects and this is right twice a significant relationship is necessary for important purposes. As the possession it is no legal relationship to the violation of our possession it is no legal injury and will be a violation even if disruption of possession violates at the same time and another right. Indeed, possession may appear as fact, but in certain situations may occur as a right also to practical legal nature is twofold.\textsuperscript{35}

The notion that the possession is right and it really rightly advocated Hajnrih Han\textsuperscript{36}, M. Bartoš\textsuperscript{37}, A. Rušnov\textsuperscript{38}, B. Blagojević\textsuperscript{39}, L. Urošević\textsuperscript{40} particularly interesting is the view of R. Jering\textsuperscript{41}. (Which possession is nothing but property on defence). He stressed that the possession is foreign owned.

A position that Puhti\textsuperscript{42} basis of tenure as a right is the right of personality. Thus the basis of protection of possession is the person of the ruler.

Standpoint that possession is a right acknowledged in the Austrian Civil Code (308) and Serbian Civil Code (197). Klang, the famous commentator of the Austrian Civil Code explains the attitude of the Austrian legislator, with this love to give possession of knowledge that can be inherited and passed, and it can only be recognized if he does.\textsuperscript{43}

\begin{itemize}
  \item \textsuperscript{35} Savigny Rudolf, Des Recht des, Besitzes edition VII, Wien 1865, by. 30, 43 and 147.
  \item \textsuperscript{36} Heinrich Hanh, De jure rerum ei iuris in re speciebus 1639.
  \item \textsuperscript{37} M. Bartoš, Tabaci……….., by. 44, 45 and 46.
  \item \textsuperscript{38} A. Rušnov, Tumac obcem austrijskom graganskom zakoniku, Zagreb, kniga prva, by 378.
  \item \textsuperscript{39} B. Blagojević, Nasledno parvo 1955, by. 24.
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  \item \textsuperscript{42} Puhta: Dursus des Institutionem II, by 224.
  \item \textsuperscript{43} Retrieved from Asen Grupce, Gragansko imotno pravo, stvarno pravo 2 del, by. 216.
\end{itemize}
According to D. Stojanović, when talking about the list of real rights, including among them the possession. This view probably stems from the fact that possession cannot exist as a legal authority to govern its own item.44

However, from all the above views about the dilemma of whether possession is actual power or the right, in most cases they insist on possession of such facts or factual power of things.

From what we can conclude, it appears that possession is the actual relationship that is followed by the actual power of things. The actual relationship is confirmed by the existence of forms of tenure such as (successor and indirect possession), who have not established effective administration of things. The actual power is essentially a topological feature of possession, no matter that it is not always required for possession exists, so to speak as the possession of actual power.

Possession is not right and therefore possession is not recorded in the public records. The existence and nature of tenure can best be seen with a personal observation, but also indirectly by inspecting the Agency for Real Estate Cadaster. There is a possibility of recording the possession in the services of the Real Estate Cadaster, when it comes to gift agreement that transfers the property right without handing over the subject of the contract SIPA possession receiver.45

Possession is a relatively lasting relationship and as such enjoys legal protection and persists until suppressed by the stronger right. If possession would be a subjective right, in which case review would be complete.

Accordingly possession is actual power and not a right. This is especially apparent in proceedings before a court when a person requires protection of tenure.

44 Retrieved from Asen Grupce, Gragansko imotno pravo, stvarno pravo 2 del, by. 216.
45 Article 42 of the Law on Notary, b) the legal matters for which it is mandatory notarial act.
In civil proceedings due to disturbance of possession shall not be allowed for stronger right. If the possession would be right, in which case the objection of this kind would be allowed. General rule is that the court litigation protection from disturbance of possession, the defendant cannot invoke his right, which it enjoys in relation to the disputed item. Only in Soviet and Anglo-American law in disputes of this nature allowed discussion on the issue of right to possession. Possession does not enjoy absolute protection, but as a factual situation objectively protected by law only in certain cases of obstruction.

So we conclude that possession is actually just the actual power of a person over a certain item or perform the content of a right. So, this determination of possession is accepted and the "Law on ownership and other real rights" applied in the country and in the relevant codes of other states and as such appropriate and undoubtedly expresses the legal nature of the possession as a factual power or the term "possession" and not a "right of possession".

Yet, although possession is actual power, flow time can through appropriate legal institutes such as maintenance, be a prerequisite for obtaining which we think its role is a great and important law in general.

From all above mentioned implies that what will be the nature of the possession in most cases mentioned as a possession, will depend on the existing legal regulation of existing ownership and legal relations that have yet to develop a possession as such will need to respond to them.

**Abstract**

Writing the article was motivated by the knowledge about the issue possession under its legal nature, whether it is factual power or right.
Analysing whether the possession is actual power or the right to contribute to a better understanding of the possession because people daily in some sort of possession of the goods or rights, so you should know what they represent.

The goal is to motivate people to gain possession of the property and rights and benefit from them.

Possession as factual authority has meaning from a theoretical point of view, but also in terms of people, because possession is an institute that is directly related to their goods and rights.

**Keywords**: possession, ownership, actual power, maintenance, fact, goods, institute.

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