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Common ownership model in the Roman private law

The features of development and implementation of ownership mechanism of legal regulation in the Roman private law, the principles of which were fully accepted by modern Kazakh law, and almost all modern European codifications are considered in the article. Originating as an exception, admitted by the Roman lawyers for regulation situations that cannot be ignored, over time, this Institute acquires all the features of the mechanism of legal regulation of common property, the classic form of which was share ownership. The author shows that the Roman lawyers in the relationship of common ownership put the emphasis on external relations exactly, emphasizing the material nature of this relationship, while the essence of corporate relations between owners themselves was ignored. The author considers that the lack of clear regulation of internal relations between co-owners and justify their relationship and determination the advantages with absolute external relations of the property was the main lacuna of legal regulation of common ownership in the Roman period, which gave rise a significant number of disputes between participants of common ownership. At the same time, the Roman lawyers developed system of protection of participant's rights through actions aimed at ending of common property and compensation of expenses for the total thing and loss expenses incurred by the participants, which made it possible to resolve these disputes effectively. At the end of the work the author formulates the features of common ownership model in the Roman private law.

Keywords: common ownership, participatory share ownership, limited interest, owner, common thing, agreement, the Roman private law, possession, use, disposal, property right.

The institution of property right has always occupied a central place in the civil law. Property right permeates most of all existing relationships, one way or another in contact with the concept of «property»: contractual, family, housing, hereditary, and many others. This circumstance explains the interest of scientists to model of property right, features of its formation, development, implementation and protection. This institution was in the sphere of scientific interest and the Roman lawyers, as evidenced by numerous treatises and opinions on this subject. It is natural that their statements were the product of scientific thinking about the relationship of that time; however, many of the provisions on the property right of the Roman period are reflected in the modern law of many states. The same applies to the total of property relations. The common property construction, developed in the period of Ancient Rome, perceived by almost all member states of the Romano-Germanic legal system. In this regard, we consider that at the analysis of this institution in the legislation of any European jurisdiction, it is necessary to start from the Roman model of common ownership.

«Roman law was the law of brilliant civilization that stretched from the Mediterranean to the North, from Byzantium to Britain, summoned in the soul of contemporaries like the nostalgic feeling of unity, lost by Christian world» [1; 35]. As S.S. Alekseev rightly said, at one time it produced «a strong, perhaps even «explosive» intellectual enrichment of law, when the mind is «broken» in the area of social regulation, and in connection with the needs of business life and law practice and has shown its force in the creation of legal mechanisms, constructions and categories of high intellectual order. ... Therefore, it is almost ready-entered the human culture. And it is not entered as a system of effective legal regulations ... , but as intelligent legal values - a complete system of legal constructions, structures, categories, conceptual and lexical system, summarized in VI century in Justinian Digest compilations (Code)» [2; 139].

Analysis of sources allows suggesting that the law of property in Roman private law was the most developed law. Such feature as an individual was characteristic for whole Roman private law in general, and the right of ownership, in particular, and consistently traced in everything that is connected with it [3]. Just the fact that ownership is the exclusive right encouraged the Roman lawyers to think about the impossibility of the existence of several persons ownership right in the same thing [4; 180]. However, law enforcement and treaty practice of friendly connections, as well as events that do not depend on the will of future participants, created a situations in which it was necessary to regulate the relations of persons, both have the same claim on the same object. This situation, for example, was often encountered in the succession of one indivisible

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thing by several entities, either as a result of an indissoluble mixture of materials of several persons in the case of a new thing creation, and so on.

Because these situations demonstrated a gap in the legal regulation of private relations, the Roman lawyers have tried to find a way to resolve it. The literature states that one of the first who suggested idea of many individuals ownership on the one thing in ideal proportions - pars pro indiviso (D.50.16.25) put forward the ancient classic Kv. Mucius Scaevola. According to this structure, pars pro indiviso each participant was the subject of legal share in the right to a thing (pars quota).

This issue was developed in detail in Tselza works. He considered that there can be no ownership or possession of two parties as a whole: and no one is the owner of the part of object, but has ownership to the part of entire undivided whole [4; 181].

From this thesis it implies that one object can be owned by two or more persons without dividing it into determined material parts. Otherwise there would be the need to study the new right of two or more persons on one subject did not arise, because each would be considered the sole owner of the part of object. Tselza emphasized that common parts are comprehended more consciousness than physically, on the basis of that, he has put forward the idea of simultaneous existence of ownership of the entire thing in inseparability and its property to a certain percentage of ownership of each of the joint owners [4; 181]. He argued that «there can be no ownership or possession of the same thing, which are carried out by two persons in full» [5; 466]. The right of each of the two owners on the one subject has been limited, in this case, by the right of others on the same subject. In fact, it turned out that this construction did not fit into the scheme of absolute property right, in which each owner is entitled subject, and he opposed all other subjects, except himself, thus ensuring the common property «bad substantial sphere» [6; 17].

But even with all the existing contradictions common property could not be prohibited, because such situations arised, and in some cases for certain things it was a necessity. In this regard, it can be argued that the Roman private law permitted, exactly — permitted situation where a thing and ownership of it could belong to more than one person at a time.

Thus, a ban or exclusion of cases of formation of joint ownership relations have been impossible, but such cases have been kept to a minimum, and also rules governing the rapid elimination of community were developed. This trend has been pronounced in the classical Roman law, which equates the legal status of co-owner and sole proprietor, if the relationship of common ownership was inevitable.

It should be noted that the only form of joint ownership in Roman law of the classical period was a common share ownership Previous periods of Roman law was characterized by also jointly owned institution.

However, during the period of young republic joint ownership more and more being pushed back in the period of classical law completely disappeared. The common share ownership, considered then the classic form of common property, more in line with its concept [7].

While serving existence of common ownership in the Roman private law the property divided by some common parts, indivisible things in which shared «... more intellect than in reality was understood» [4; 102]. Tselza wrote that each of the co-owners «totius corporis pro indiviso pro parte dominium habet», has a share ownership of the whole thing in general [8; 100]. From what we can conclude that in the ownership of indivisible object in the Roman private law, each participant had some mental (ideal) share, remaining the owner of all things in general. This approach enables to justify the claim of each participant of common ownership of the object as a whole, in terms of realization of proprietary rights, as one general right to object to determine the extent of forcing the capacity of each co-owner to an object as a whole.

Despite the fact that the Roman lawyers have left the exact definition of property right, mentions of the right of ownership of their works are there.

And if under the sole private ownership these powers were implemented individually by the owner, in the case of subjects plurality of participants of joint ownership realized these powers in a different order.

Such proprietary rights as ius utendi (usage right thing), ius fruendi (right fruit extract, revenue), ius abutendi (right order) have been known in Roman private law [8; 92].

Individual authors add possidendi (right to possess the thing), ius vindicandi (the right to demand a thing from the hands of each its actual owner, no matter - the owner or holder) to these pieces of content ownership rights [8; 92].

According to I.B.Novitsky, the list of individual proprietary rights of owner in the Roman private law is not exhaustive and could not be such, because the fundamental view of the Roman lawyers to private ownership is that the owner has the right to do with his thing all that it is not forbidden [8; 93]. From what we can

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conclude that, despite the fact that ownership was the most extensive of the existing rules on the thing, even it cannot be unlimited. These limits are concerned, first of all, ownership of the property.

All these powers included in the content of the common property. Common property was carried out jointly by all the participants. Guiding principle of the organization of joint property right was the principle according to which the possession of the whole thing was seen as a possession of the totality of all shares.

Here you can trace the duality in question of the essence of the share, because, according to Tselza theory, share in the common property - a share in the right to the property, rather than the share in the property. Possession of the thing and the right possession (cumulative share) are not equivalent concepts.

General co-owners had the right to possess and use the thing together. All equity owners, their community, acted as sole owner. The order of the powers of possession, use and disposal of a thing in general, and the proportion, in particular, was constructed similarly to sole proprietorships, that is, for the powers of ownership in relation to things in general, it was necessary to express the general will, and for the disposition of its shares was sufficient of will of one co-owner. That is, in the Roman private law, there was a classic set of competences in relation to whole thing, and additional entitlement orders with respect to the share of each co-owners. Authority in respect of all thing implemented by agreement of the parties, while the authority in the proportion sold at the discretion of the holder. Each co-owner can independently of other alienate his share burden her usufruct or pledge, appropriated (in the appropriate proportion) the fruits from it, and the acquisition of a common slave (servus communis), as well as participated pro quota in responsibility for damages arising from a common thing [9].

The fruits acquired by them, too, with the definition of ideal parts in the right. Shares of each participant a common property can be either equal or unequal (at doubt equal parts were assumed) [8; 100].

If the use of an ordinary thing coming out of order frames that the consent of all was required (D.2.22.7.1). Express consent of other owners, in some relations was required for the validity of the act of one of the co-owners. For example, to establish servitude (which basically defies division) and for the remission on will of public servant.

In the cases, if that who wish to set free a slave owner is not received, for example, the express consent of the other owners, the slave remained in the power of the other owners, then releasing the owner the property right to his has lost, that leading to a redistribution of shares of the other participants in common ownership.

Consent of the other participants was required and to take the necessary measures to preserve the things that are in common ownership. In the classical period, each of the co-owners could control the thing as a whole and make changes to it, being limited by the right of prohibition (ius prohibendi) from other participants. Most had no advantages over the minority, and prohibiting of one could stop any innovation, conceived by the others (D.8,5,11) [9].

If there was no objection the act of one of the co-owners had full effect. In this sense, the classical thought that silence - this consent (or at any rate - the lack of prohibition, which in this case is sufficient) [9].

The relationship of common ownership could arise either at the request of the participants, motivated by the presence of general interest in the common use of the property, and accident. As R.Zom notes, in the first case a contractual relationship were established, the right to association acted between the co-owners, in the second case there was quasi contractual relationship, then there is a commonality acted like a partnership [10; 298].

Analysis of sources suggests confirming that relations of common property participants were considered as a relationship of persons linked together by an agreement, even in those cases where co-owners fell accidentally into these relations, such as at inheritance of one indivisible thing. Such a community called communion in quam incidimus - the community in which we fall, that is, random; hence the name communio incidens [4; 102].

If there is the possibility of accidental contact with the community, called as common property, it is logical that every person should have the opportunity, or a mechanism to get out of it.

This mechanism has existed in the form of a co-owner right at any time request under common ownership. For this he was given action communi dividundo [8; 100]. It could be applied only in the case where the common property occurred not as a result of the conclusion of the partnership agreement.

This suit, in contrast to other claims decided by check, ascertain and protect right already existed before, served as a way to establish new rights. Thus, for example as described in I.B. Novitsky, Lucius and Titsy have inherited from his father the land; not wanting to save the state of community right, they cannot be together to achieve mutual agreement on the section; so they seek the assistance of the court (the claim for

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section). In this case the court established for each of them the right of ownership to a specific part of their land, or (if you cannot partition) provided one of its joint owners, assigning a different obligation to pay the appropriate amount of money, etc. [8; 100]. As can be seen from this example, such a solution has established a new right because, for example, Lucius before section partition was owner of share, after such parts become the owner of the land. At the same time, the newly established right based on preexisting common ownership, so this way of acquiring property right on existing even in Roman law classification considered as a derivative. Similarly, acting and action for the inheritance section (actio familiae erciscundae) to co-heirs [9].

In the case of mutual claims of the co-owners claim formula includes not only demonstratio and adiudicatio, but the intentio «quidquid ob earn rem alterum alteri praestare oportet» («all that is in this case should ensure to one another») with the appropriate condemnatio, that is all four possible portion of the formula [9]. In the division the judge was guided by its own discretion, but to assess the divisible thing was a fair price - iusto pretio aestimare [9]. Therefore, in the same process could be resolved not only a question of termination of common ownership, but also the reimbursement of expenses for a total thing, or for damages caused by the participants to each other.

As it is clear from the actions mentioned above, in the Roman private law, there was a whole system of protection of participant's rights of joint ownership, which suggests talking about common ownership model with all its attendant trappings presence.

Thus, the analysis of legal literature shows that in the era of the classical Roman law certain rules were developed and fairly actively apply, which are held in case of common ownership. Based on them, we can highlight the specifics of the model of joint ownership in the Roman private law, which are as follows:

– firstly, in the Roman private law common property existed and was originally considered as an exception to regulate the cases in the ownership of the subjects of the multiplicity which cannot be settled within the framework of existing rules;

– Secondly, the existence of situations in which the owners of indivisible things became subjects under the agreement and in random order, required the presence of Roman law adequate rules of regulation, rather, in the second case, since the voluntary union of the situation could be settled by the contract;

– thirdly, the model of joint ownership in the era of the classical Roman law was built according to the type of absolute law, in which all participants of joint ownership were considered as one authorized person;

– fourthly, the Roman lawyers noted the fact of existence of two groups of relations in the common property, as powers with respect to all things and in respect of the share allocated, , while the corporate nature of the internal relations of the co-owners was ignored in favor of the material nature of external relations;

– fifthly, legal regulation of relations of joint ownership in the Roman private law was built on the type of sole proprietorships, which proves the fact of an individualistic approach which, apparently, to maintain the viability of construction in which the thing did not belong to individuals but to the society at that everyone can enjoy the whole thing to an equal degree;

– Sixthly, each participant of common ownership had interests in certain mental right to the common property;

– Seventhly, that the participants of common ownership regarded as one entity, the decision on the object was to be one, too, that there was unanimity present in the content, management and disposition of a common object;

– Eighthly, there is a need to reach an agreement on issues related to the objects generated much controversy. Presence of deliberate mechanism to protect the rights of participants of joint ownership by the whole complaints system was caused by these circumstances;

– Absence of an agreement on the management and maintenance of common property entailed an opportunity for participants of joint ownership to terminate the relationship.

Thus, as it is evident from the above features, the mechanism of legal regulation of property relations was developed in the Roman private law with a multiplicity of subjects. If there are a number of gaps related to the justification of the legal nature of the internal relations of participants of joint ownership to each other and the relationship of these relationships with external absolute ones, analysis of individual rules suggests that the Roman individualistic approach to community of co-owners was at one time used as a basis to develop their own regulation of relations community, with all the modern European codifications. However, the civil legislation of Germany, Switzerland, Austria and France almost immediately eliminated or significantly limited the application of the principle of unanimity, as «as for community it is necessary in the first

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place not account of the views of each co-owner, but the ability to find a compromise and implement effective management and use of a common thing» [3].

That is an individualistic approach was replaced by a collective one. At the same time, the principles of community regulation formulated by the classical Roman law, were fully accepted by the pre-revolutionary, Soviet and modern Kazakh legislation.

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Рим жеке құқығындағы жалпы меншік үлгісі

Мақалада қазіргі заманғы қазақстандық құқық және іс жүзінде барлық заманауи еуропалық кодификациялармен толығымен ұстанған рим жеке құқығындағы ортақ меншікті құқықтық реттеу механизмін әзірлеу және енгізу ерекшеліктері қарастырылды. Рим заңгерлері жол берген ескермеу мүмкін емес жағдайларды реттеу үшін айрықша жағдай ретінде пайда болып, уақыт өте келе бұл институт жалпы меншікті құқықтық реттеу тетігінің барлық сипаттамалық ерекшеліктерін иеленеді, оның классикалық нысаны болып үлестік меншік танылды. Авторлар ортақ меншік қатынастарына қатысты рим заңгерлері сыртқы қатынастарға ерекше назар аударып, осы қатынастардың заттық табиғатының сипатын атап көрсеткендігін, бірақ меншік иелерінің өзара қарым-қатынастарының корпоративтік мәнін елемей қалдырғанын көрсетті. Сонымен қатар ортақ меншікке қатысушылардың арасындағы ішкі қатынастардың нақты реттелмеуі және олардың арақатынасын негіздеу мен меншіктің сыртқы абсолюттік қатынасындағы басымдылықты айқындаудың болмауы рим кезеңінде жалпы меншікті құқықтық реттеудегі басты ақау болып табылды, соның салдарынан жалпы меншікке қатысушылардың арасында даудың ұласуына әкеліп соқтырды деп санайды. Сонымен бірге рим заңгерлерімен жалпы меншікті тоқтатуға және жалпы затқа келтірілген залал мен қатысушыларға келтірілген шығынды өтеуге бағытталған талап қою арқылы қатысушылардың құқықтарын қорғау жүйесі әзірленді, ол осындай дауларды тиімді шешуге мүмкіндік берді. Жұмыстың қорытындысында рим жеке құқығындағы жалпы меншік үлгісінің сипаттаушы белгілері ұсынылған.

Кілт сөздер: жалпы меншік, үлестік меншік, құқықтағы үлес, меншік иесі, ортақ зат, келісім, рим жеке құқығы, иелену, пайдалану, билік ету, меншік құқығы.

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Модель общей собственности в римском частном праве

В статье рассмотрены особенности разработки и внедрения механизма правового регулирования общей собственности в римском частном праве, принципы которого были полностью восприняты современным казахстанским правом и практически всеми современными европейскими кодификациями. Возникнув как исключение, допущенное римскими юристами для регулирования ситуаций, кото-

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рые невозможно игнорировать, со временем данный институт приобретает все характерные черты механизма правового регулирования общей собственности, классической формой которой была долевая собственность. Авторы показывают, что римские юристы в отношениях общей собственности ставили акцент именно на внешних отношениях, подчеркивая их вещную природу, при этом игнорировалась корпоративная сущность отношений собственников между собой. Авторы считают, что отсутствие четкого регулирования внутренних отношений между сособственниками и обоснования их соотношения и определения преимущества с абсолютным внешним отношением собственности являлось главным пробелом правового регулирования общей собственности в римский период, что порождало значительное количество споров между участниками общей собственности. Вместе с тем римскими юристами была разработана система защиты прав участников посредством исков, направленных на прекращение общей собственности и возмещение расходов на общую вещь и убытков, понесенных участниками, которая позволяла эти споры эффективно разрешать. В заключение авторами сформулированы характерные черты модели общей собственности в римском частном праве.

Ключевые слова: общая собственность, долевая собственность, доля в праве, собственник, общая вещь, соглашение, римское частное право, владение, пользование, распоряжение, право собственности.

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