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DIVIDED OWNERSHIP – DEVELOPMENT AND PERSPECTIVES

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Abstract

Divided ownership gives rise to a number of problems. The reintroduction of the *superficies solo cedit* principle and the superficiary right of building into the Czech law does not, of course, mean the return of feudal relationships. However, it should be reminded that it disrupts indivisibility (exclusivity, completeness, limitlessness) of ownership, which is traditionally seen as the foundation of ownership right. The authors use primarily comparative and historical methods in their research on this topic. In its today form, we understand divided ownership as a simplification that serves as ideological abstraction for a situation where the owner is subject to a long-term limitation by a very broad in rem right of another, which is hereditary and alienable. In this context we talk about three approaches to divided ownership in jurisprudence: (a) it does not exist at all; (b) it is limited solely to the feudal era; (c) it is a general term without relation to any specific social situation.

Keywords

Divided Ownership, Superficiary Right to Build, Roman Law, Ownership

I. Introduction

Ownership issues have traditionally attracted increased attention by philosophers, lawyers and politicians. It has played a pivotal role in considerations about the emergence of the State, fundamental rights and the development of society. Evaluations and arguments have varied (once ownership was claimed to be inviolable and sacred, at other times it was considered theft), which indirectly illustrates the importance and controversy of this issue, and the discussion on a number of questions remains open.[4]

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[4] See, e.g. Brandt (1974), Lehmann (2004), Venědiktov (1948).

Basically, we can distinguish two basic approaches to ownership: (1) "power" approach: ownership as a legal power, as an exclusive and integral right, which probably best corresponds to the classical (Roman-law) understanding of ownership and liberal thinking; (2) "user" approach: ownership as a set of rights, as a divisible right, which is characteristic of feudal and communist understanding of ownership, and also reflects the social dimension of the issue.

Theoretical understanding of these two approaches in the European legal thinking dates back to the 14th century to the leading postglossators: Bartolus de Saxoferrato and his most important pupil Baldus de Ubaldis. Although both relied on Roman-law texts, they came to different definitions of the right of ownership: Bartolus placed emphasis on the power aspect, while Baldus accentuated the user aspect.[5]

These concepts still oppose each other in a sense, whether it be in the field of legislation, application or theory. Although at present, the "power" approach prevails, traditionally it is modified by the "user" approach, which is becoming increasingly important.

A characteristic manifestation of user approach is a category called "divided ownership". This category is common in situations where there is an objective interest in disrupting or, contrarily, strengthening certain legal relations, notably for reform and social reasons – typically in relation to land ownership and also in the field of residential ownership.

Divided ownership involves a number of contentious aspects, whether it is the term itself, its historical meaning, or modern connotations. It was a relatively frequent consideration in the history of European legal thinking – from the age of glossarists to the German Historical School of Jurisprudence. Although the range of the theoretical concepts of divided ownership was limited (at least in the Middle Ages) in practice, it played a more important role in the development of contemporary thinking and, symbolically, for the characterization of the whole feudal epoch.[6]

There are three views of divided ownership in jurisprudence: (1) it does not exist; (2) it is limited to the feudal era; (3) it is a general category (where the owner is significantly and permanently restricted by a right which is hereditary and alienable). Each of these approaches is acceptable and justifiable: in essence, it is only a terminological issue, which, however, is closely related to the whole issue of ownership and has considerable ideological and actual consequences in the 18th century and particularly in the 19th century.

In terms of the classical (originally Roman-law) definition of ownership as the exclusive disposition, no category of divided ownership exists, these are only very wide-ranging rights to things of another. However, the emergence of the divided ownership theory is paradoxically connected with the beginnings of the development of Roman-law erudition in the Middle Ages and the "Roman law reception". Glossarists arrived at the idea of shared ownership when analysing Justinian texts concerning the difference in the acquisitive prescription of movables (*usucapio*) and immovables (*longi temporis praescriptio*). While in the case of movables the entitled person was acquiring actual ownership, in the case of immovables he was acquiring only protection analogous to that of the owner with *actio utilis*. Accordingly, some glossarists also distinguished "dual ownership" – *dominium*

[5] For more information, see Urfus (2001).

[6] Cf. Wagner (1938), Lehmann (2004), Krauss (1999), Busz (1966).

directum (direct, superior, related to substance) and *dominium utile* (related to utility). This was rather due to a misunderstanding of the Roman-law approach to ownership, which, by nature, could not tolerate any analogous dominion next to each other. Representatives of the postglossarists then tried to adapt the Roman-law legacy to the reality of medieval Europe, for which the common legal relations to a single thing were characteristic – whether concerning relations between elders and vassals or nobility and subjects. While in the minds of the glossarists the rights were still opposed to one another, in the commentators' approach they were intertwined and arranged hierarchically.[7]

"Superior" ownership, as the name itself suggests, was originally understood as decisive. It was even considered to be part of rulers' privileges and was closely intertwined with public authority – the superior ownership was referred to as the *dominion eminens*. However, the meaning gradually shifted to the "utility" ownership, which resulted in the German jurisprudence at the turn of the 18th and 19th centuries in the understanding of the rights of the feudal lord and land nobility rather as a burden restricting the property of the vassal or subject. In the 19th century, in the Czech lands, peasant's and vassal's utility ownership became the exclusive ownership according to the Roman-law model.[8]

Another interesting fact is that the medieval doctrine of divided ownership became a general category, which is applied to property relations within the older and newer legal developments (including archaic Rome and socialist states). However, it is also useful for explaining ownership relationships in a dynamically developing modern society.

II. Roman law

If we look into the textbooks of Roman law, we will see today's acknowledged definition of ownership as a general legal dominion over a thing.[9] This ownership right is characterized by a positive aspect, that is, the owner has disposition of his thing in any possible way and no one other than the owner can use or otherwise act on the thing ("negative aspect of ownership"). The positive aspect of ownership can be further defined by its components – the right to hold and enjoy the thing, the right to change the nature of the thing, and the right to destroy the thing. L. Heyrovský emphasizes that "the ownership right is not merely a union of certain privileges, but is a unified right, a full and sovereign legal dominion over a thing that only proves and manifests itself, but does not exhaust itself, by the individual entitlements".[10] R. Sohm states that older Roman civil law only tolerated (duldet) the co-existence of servitudes.[11]

[7] For example, Baldus distinguished dominium superius (proprietas) and dominium inferius (in German terminology Obereigenthum and Minder- / Untereigenthum).
[8] It is also interesting to note that the theory of domination eminens popularized by Groti was used to justify the regulation of ownership interference (especially expropriation) within the Czech-Austrian codification of private law in the second half of the 18th century. For more details see: Schmoeckel (2017).
[9] Pagentscher (1859), Heyrovský (1910).
[10] Heyrovský (1910).
[11] Sohm (1908).

It would appear, therefore, that the concept of divided ownership was created only in the Middle Ages[12] as a misunderstanding or modified application of Roman law on changed social conditions of feudalism. J. Sedláček sees the roots of divided ownership in Roman law and speaks about the *hypostasis* of ownership law in the Middle Ages,[13] and the confusion of *reivindicatio* for *reivindicatio utilis*, to which an owner was never entitled under Roman law. It should be emphasized, however, that Roman law also recognised the wider concept of ownership,[14] and that the notion of "ownership" as a unified concept involving a tangible thing was created only within the late-classic Roman law. In older (archaic) Roman law – and due to the lower level of jurisprudence development – the concept of divided ownership was typical. Thus, the construction of divided ownership was replaced by the construction of undivided ownership in late classical Roman law, using the Greek philosophical doctrine of *substantia* and *species*. The lawyer *Iulianus* is considered to be the architect of this departure from the divided ownership to the undivided ownership.[15]

However, the traces of the earlier legal opinion on the substance of ownership have nudged the Roman jurisprudence approach towards those institutes for which it is typical to exercise partial entitlements of the owner by another person, and through Roman law also significantly influenced the modern understanding of the substance of ownership (if J. Sedláček speaks in his interpretation of the owner's entitlement about the right to substance, follows – probably unwittingly – on the construction of *Iulian*).[16] Roman law contained elements of divided ownership, for example, in the legal relations of patronage law – i.e. in the bonds between a freed slave and his former master or within the guardianship institute (*tutela*). However, later research has shown that a master does not have limited ownership over his former slave, but that the duties of the freed slave are based on a combination of norms of sacral law and good morals, and that a guardian's entitlement to the ward's property is limited esp. to *fides*.

The real and significant traces of divided ownership doctrine can be seen, on the one hand, in the oldest land servitudes (*iter*, *via*, *actus*, and *aequaeductus*[17] and, also, some urban servitudes (*paries communis*[18] and *servitus oneris ferrendi*)[19] and especially the right of usufruct (*ususfructus*).[20] We can also consider building on the land of another (*inaedificatio*) as divided ownership.

M. Voigt contributed significantly to the discussion about the legal nature of servitudes. The entitlement to walk, drive or conduct water over a land of another was understood in the early times in a way that the entitled person acquires the ownership right to the piece of land on which the pipe or path/road is situated. These pieces of land were conceived

[12] Urfus (2001).
[13] Sedláček (2012).
[14] Pernice (1963).
[15] Sommer (1932).
[16] Sedláček (2012).
[17] That is, the right to take water from the land of another or to conduct water across the land of another.
[18] The issue of a common wall.
[19] That is, the right to put a beam into the adjacent wall.
[20] Bonfante (1932).

as part of the land but owned by a person other than the one owning the rest of the land. According to P. Koschaker, this theory has two great advantages – it explains the strictly *in-rem* nature of the subjective entitlements of servitudes, and also the concise notion of "the land is yours but the passage is mine" is much more suitable for the primitive stage of development of Roman jurisprudence corresponding to the archaic Roman law.[21] Older sources refer the right to walk across the land as *iter* (instead of the correct term *ius eundi*), and to the right to drive cattle across the land as *actus* (instead of the correct term *ius agendi*). Even classical Roman lawyers used the term *habere viam* (to have a passage)[22] in the same context as *habere rem* (to have a thing).[23] Even the aqueduct claim was not included in the Praetorian edict among servitude claims but under a title simply called *de aqua*. That is why, in the context of the old *legisactio in rem*, the claimant claimed the ownership of passage, and used the same term as a claimant who claimed ownership to a thing (*meum esse aio* – I say that it is mine). Finally, the strongest proof of the existence of an earlier opinion that permits divided ownership is its denial by the classical Roman jurisprudence concerning servitudes.

Another argument for the recognition of the oldest servitudes is the fact that in the early days it was possible to acquire the right of servitude by acquisitive prescription and that this possibility was revoked only after the intervention of the legislature (*lex Scribonia*).[24] The similarity with ownership is evidenced, in particular, by the fact that the time limit for the acquisitive prescription of servitude is the same as that of land, thus referring to the period when the servitude to land (*iura praediorum*) was considered as an object of ownership.

Significant evidence of the "ownership" nature is the fact that the person entitled to the servitude of passage may carry a lance, but must not raise it.[25] In the Roman world, a spear symbolizes ownership[26] and the symbolism of a spear carried but not raised clearly shows ownership of the passage. What is the nature of such ownership to the passage or to a piece of land where cattle may be driven? These pieces of land belong to the main land as accessory to the principal thing; only their use belongs to the dominating land. We can talk about "principal ownership" and "servitude ownership", which is functionally restricted. Servitude ownership does not extend beyond its purpose.

[21] Boháček (1945).
[22] Dig. 8, 3, 1, pr.
[23] Dig. 45, 1, 38, 9.
[24] Dig. 41, 3, 4, 22.
[25] Dig. 8, 3, 7, pr.
[26] See the bronze piece in the case of mancipatio, the sale of prisoners of war in the case of sub hastam, etc.

III. Development in the Czech Lands in the 19th and 20th centuries

Divided co-ownership in the Civil Code

Divided ownership *sui generis* referred to various relationships based on co-ownership. They involved cases of co-ownership with divided (*condominium pro diviso*) rather than undivided shares (*condominium pro indiviso*). In particular, they included "floor ownership".

The imprecise wording of Section 361 of the Civil Code led to a diversity of views of the admissibility of real division of buildings in Austria and later in our lands. In the past, floor ownership was a substitute for lease relationships and co-ownership, which has always been a source of contention. In the nineteenth century, horizontal ownership was gradually abolished for individual Austrian lands. In the Czech lands, this was getting close in 1857, following the decision of the High Court in Prague, which was deciding one of the cases of divided ownership from Mladá Boleslav. The result was a ban, so-called *Zerstückung* (i.e. fractionalisation of buildings). In the end, floor ownership disappeared with the effect of Act No 50/1879 ř.z., on the division of buildings by material interests, whose Section 1 provided that "floor ownership" (*Stockwerkeigentum*, *Geschosseigentum*, *Gelasseigentum* or *Etageneigentum*[27]) is inadmissible. The inconsistency of opinion for practice has thus disappeared. However, floor ownership continued to exist. It could not be created anymore, but the existing ones were not abolished and survived in various forms until the present.[28]

In this context, it is a paradox, which was discovered by Rouček as a member of the recodification committee in 1924, when the reference to "zápověď" (prohibition) was dropped from the text of the Civil Code, that the superficiary right of building may not be created in respect of individual floors. This was justified as *superfluum*, with reference to the 1879 law. But the problem was elsewhere. The 1879 law did not apply to the Slovak Republic and the Carpathian Ruthenia. Therefore, in the absence of an explicit prohibition, a paradox could arise in Slovakia that would not be possible in the western part of the country.

Legal historians believe that the reasons for the creation of floor ownership lied especially in difficult economic situation (in the case of Baden-Württemberg, the number of floor ownership cases increased after the Thirty Years War). Other reasons may also be geographic (higher number of cases of horizontal ownership in the south than in the north of Germany).[29] The fact remains that floor ownership was not an anomaly for Medieval law, because the differences between a part and accessory to a thing were blurry until the 19th century.[30] After all, in the Middle Ages, buildings were usually made of wood and could have had the nature of a movable thing in the times of the principle *"Was die Fackel verzehrt, ist Fahrnis"*[31].

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[27] Natelson (1987).
[28] Floor ownership (Ivančice (CZ), Prešov (SK)).
[29] Schusterová (2013).
[30] Horák (2014).
[31] Kocher (1997).

Although the question of the admissibility of floor ownership was resolved by the Building Division Act, some of the specifics of the then approach to *in-rem* rights raise questions to this day.[32]

The real division of houses was known, for example, in Jewish ghettos[33], being permitted by the then Talmud law. This division entails divided shares (e.g. single apartment or room[34]) and undivided shares (land, common parts of the house). The reason for the admissibility of real division of property was the attempt to prevent the Jews from freely trading in the entire city. The limited construction sites that were assigned to them led to a real division out of necessity. On the other hand, it does not apply absolutely. For example, in Salzburg, floor ownership was very common and more than 5% of the houses were empty.[35] Apart from the floor ownership, the law also included *Kellerrechte*, i.e. right to cellars, as the second most significant set of divided co-ownership relationships.

The real division of houses did not contradict the rules on *inaedification*.[36] There can be no question that the house and the land constitute a single thing. Ownership is thus divided into two units. Sub-units, such as an apartment in an apartment building, and the global unit, which consists of all sub-units. The land is then owned by sub-unit owners in undivided ownership. In Bohemia (not in Moravia and Silesia), real divided parts of the house were even recorded as separate library bodies written in a separate insert. The co-owner was free to dispose of his divided share as an independent thing. Although the law later banned floor ownership, the socio-political aspect was so strong that apartment co-ownership was later adopted even during the socialist Czechoslovakia, and again in the form of the Apartment Ownership Act after the revolution. Let me quote Emil Svoboda's work[37], who saw the real division of houses as a vision that the legislator should bet on, emphasizing the benefits of divided co-ownership: *". . . in the legislation of the real division of buildings, I see the resolution of a certain, and very important, issue of urban housing. Perhaps in the near future we will consider this issue, we will recognize its bright aspects, consisting mainly of the social significance of providing the masses with access to municipal real property . . . "*

However, the above mentioned floor ownership, which evolved by way of custom, did not cover a single type of immovable thing. An owner could own a floor, a single room on the floor or only a part of it. Schusterová[38] mentions the absurd 19th century case from Halič, when one room was divided by chalk and cords to 48 parts.[39] It is also interesting that, for example, in Switzerland, floor ownership still exists (cf. § 712a ZGB). For example, Portuguese refer to horizontal ownership (cf. 1414 Código Civil).

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[32] Cf. Petr (2017).
[33] Including that of Prague. Cf. Svoboda (1909).
[34] Also business rooms, workshops, etc.
[35] Kohl (2007).
[36] The original acquisition title (accession to an immovable thing).
[37] Svoboda (1909).
[38] Schusterová (2013).
[39] The transition between the parts was accompanied by a pantomime knocking when crossing the line dividing individual "apartments".

It should be added that on the basis of a Court Office Decree of 1832, cellars under the land of another could also be legally divided. This practice was later adopted by the new Czechoslovakia.

Developments in 1918–1948

After the foundation of Czechoslovakia in 1918, fideicommissum was abolished by Act No 179/1924 (and this was also the case in Germany and most of the successor states of the Austro-Hungarian Monarchy). But even then, the provisions on divided ownership did not become obsolete (see, in particular, spiritual *beneficia*, but also other specific legal relationships). Their use was even considered in the preparation of land reform legislation. Finally, another solution was chosen, but it was also inspired by the past, because the so-called Allotment Law (No 81/1920) introduced the "peasant allotment" (the owner was obliged to properly manage the allotment and could sell it only with the consent of the State Land Office). This legislative solution, however, resembled divided ownership, and therefore the "peasant allotment" was sometimes referred to as "peasant fideicommissum" or "peasant fief".[40] According to the period literature, such cases of split ownership (other than cases of fiefs or fideicommissum) could also arise, but either as with the right to buy-out or without the right to buy-out but only for a certain period of time: for example, it was possible to set up *superficies* (i.e. the superficiary right) or *emfyteusi* (i.e. right of purchase), but only with the right of buy-out for the utility owner.

Only during the inter-war recodification of civil law (1920–1937) it was proposed to abolish all the provisions that enacted divided ownership; however, the final governmental proposal (1937) was not approved and it was approved only as part of the 1950 Civil Code. Yet, under the influence of the German pandectistics, some leading civil law experts (e.g. A. Randa and J. Krčmář) reinterpreted the "so-called divided ownership" as undivided ownership.[41]

Strengthening of the user concept was also reflected in the approach of the period jurisprudence to a thing in the legal sense (supporters of the wider approach to ownership were, in particular, the normativists from Brno) and in the preparation of the inter-war recodification. A thing in the legal sense was not to be originally defined, arguing that its definition should be left to jurisprudence. However, the superrevision committee returned the legal definition of a thing to the 1931 outline (Section 229) in the broad *ABGB* concept, but the ownership remained limited to tangible things (Section 278); in the government proposal of 1936/37, it dropped this limitation.[42]

We can also mention the overt and influential controversy between the Romance scholar Miroslav Boháček and the normative law expert František Weyr about the character of usufructuary lease, on the distinction between *in-rem* and obligation rights. Specifically, the dispute focused on whether the usufructuary lessee may claim protection from third party interventions. According to Boháček, reflecting the traditional civil-law doctrine,

[40] Cf. Sedláček (1922).

[41] Cf. Randa (1922) & Krčmář (1946).

[42] Cf. Explanatory Report to the government proposal of act enacting the Civil Code: http://psp.cz/e-knih/1935ns/se/tisky/t0425_18.htm.

the obligation rights only involve *inter partes* relationships and the owner must ensure protection for the detentor (resulting from the obligation to allow undisturbed use of the thing to the entitled person). Conversely, Weyr stated that third parties must not disturb not only the owner or the possessor, but also the detentor, so he saw no logical reason why he should not be also granted *"erga omnes"* protection. Further development has shown that both of them were right to some extent, because the Supreme Court accepted the criticism of its earlier decisions and, in its plenary decision of 17 May 1932 (Vážný Civ. 11674) it acknowledged Boháček's arguments that usufructuary lease is of obligation nature, stating that "the lessee may defend his lease right by a petition only against the lessor, but not against a third party who detains the leased thing or otherwise disturbs his leased use".[43] In the context of the recodification, however, Weyr's idea of the *in-rem* effects of usufructuary lease prevailed, and the 1936/37 Government proposal amended Section 155 entitled *"Analogy to ownership claims"* as follows: *"The use rights to a thing of another, unless otherwise provided in law, enjoy protection from the beginning of the use of the thing analogously to ownership claims."*[44]

Developments in 1948–1989

After the Communist coup in 1948, the user and social approach to ownership prevailed, highlighting the priority of social interest. According to the Soviet model, ownership was distinguished depending on the entity, with preference given to State ownership.

The superiority of collective interest was characteristic of property regulation in the Civil Code (Act No 141/1950), mentioning in particular: (1) references to the general interest, and (2) preference to and special protection of socialist property and socialist legal entities. Ownership was divided into socialist ownership (Section 100 et seq.), personal ownership (Section 105) and private ownership (Section 106), while socialist ownership was further divided into State and cooperative ownership, where state socialist ownership was considered the higher form of ownership; cooperative and personal ownership were to be developed alongside socialist ownership, while private ownership was to be gradually abolished. Although the object of ownership was limited to tangible things (Section 23), which prevented the increased protection of the use rights through the ownership of right as an intangible thing, the entitled detentor was granted similar protection against third parties as the owner (Section 152(2)).

The user approach was also applied in the marital property law, when a legal community property (Sections 22–29 of Act No 265/1949, on family law) was introduced (following the Slovak-Hungarian co-acquisition).

In response to social and legal changes, a new codification of civil law (Act No 40/1964) was being prepared in the early 1960s. Paternalism and references to the interest of the society were once again characteristic of property-law regulation. The user approach was further strengthened, which was reflected especially in the regulation of personal use of apartments, other rooms and land (Sections 152–221). However, the adoption of the Civil

[43] For more details, cf. Dostalík (2010).
[44] For more information, see Horák (2015).

Code also brought about a significant departure not only from the civil-law tradition but also from the real functioning of the society, which resulted, for example, in the absence of regulation of possession and acquisitive prescription or the abandoning of the concept of no one's thing (the impossibility of appropriation of things of even insignificant value). Many of these shortcomings were later remedied by later amendments (especially by Act No 131/1982).

In the context of the new concept of ownership relations, the idea of divided ownership, reflecting the discussion from other socialist countries (Soviet Union, Yugoslavia and Poland), which, according to some authors, may have characterized the relations of state and corporate ownership, was rejected as "revisionist" in the era of normalization.[45]

While the socialist era was characterized by the user approach, the "power" approach was strengthened in some civil-law concepts, such as acquisitive prescription, acquisition from a non-owner or inheritance on the basis of a testament (as compared to *ABGB*).

The 1950 Civil Code simplified and tightened the regulation of acquisitive prescription (Sections 115–118). It required the so-called "legitimate possession" when the possessor had to believe *"in good faith that the thing or right belongs to him, given all the circumstances"* (Section 145); extraordinary acquisitive prescription or acquisitive prescription of inalienable things was not possible under socialist ownership.

The 1964 Civil Code did not regulate acquisitive prescription or possession at all (the reason being excessive strictness against the owner, collision with the constitutional protection of ownership and rare occurrence in practice); on the contrary, they were retained in the International Trade Code (Sections 95–99). By amendment No 131/1982, however, acquisitive prescription (cf. Section 132a, Section 135a) returned to the Civil Code: however, by acquisitive prescription it was possible to acquire only personal (not private) ownership, so that it was impossible to acquire the ownership right to land (if the acquisitive prescription conditions were met, the land became owned by the State, and the person that legally owned the land, had the statutory right to an agreement for free personal use of the land). Acquisition from a non-owner was adopted from ABGB to the 1950 Civil Code (Section 154 and 557), but in the 1964 Civil Code it was, in addition to the traditional acquisition from a false heir (Section 486), limited to acquisition from a socialist organization (Section 228). Acquisition from a non-owner was regulated in the International Trade Code (Section 325).

In relation to inheritance law it was impossible to restrict the heirs by conditions and orders (and in particular by the substitution by fideicommissum): in the 1950 Civil Code (Sections 550 and 565), in the 1964 Civil Code (Section 478), with the exception of the order for collation (Section 484); still, in practice, conditions and orders were allowed to a limited extent (they were interpreted as designation of a heir – order to an heir to pay sums to other persons or the possibility of general substitution). The regulation aimed to attempt to favour "the living over the dead" and to limit the new owner as little as possible.

[45] Luby (1975).

Development after 1989

The changes made after the revolution accentuated the power approach to ownership. This was done both at the statutory level (in particular by the "major amendment" No 509/1991) and the constitutional level (the Charter of Fundamental Rights and Freedoms of 1991, Article 11, which stated that the *"ownership right of all owners has the same legal content and protection"*).

The major amendment to the Civil Code included for example the implementation of the unified concept of ownership, which is also related to the change of the right to personal use of land to ownership (Section 872). The weakening of the user approach was also due to the possibility of a contractual modification of the extent of undivided co-ownership (Section 143a); on the contrary, it was strengthened in the case of the acquisition of the ownership right from a non-owner in the 1991 Commercial Code (Section 446), used through the so-called facultative transactions (Section 262) also by natural persons (non-entrepreneurs).

Following the 1950 Civil Code model, the entitled detentor enjoyed similar protection as the owner (Section 126(2)). Special attention should also be paid to the case law of the Supreme Court, according to which the eviction of persons residing in an apartment without a legal reason can, in essence, only be claimed by the lessee alone and the lessor does not have legal standing for this (cf. 26 Cdo 503/2000, 26 Cdo 451/2000, 26 Cdo 2720/2004, 26 Cdo 1998/2005, 26 Cdo 548/2006). This is a relatively unusual case of exclusivity within the user approach, where the obligation right applies *erga omnes* and the right *in rem* does not apply at all or applies only *inter partes*. We can say that this is the power approach "inside-out".

An important milestone in the development of private law was the adoption of the 2012 Civil Code, which returns to the Czech-Austrian legal tradition. Under its influence there is a partial strengthening of the user approach: this is the case in the imposition of extra-ordinary acquisitive prescription (Section 1095), the acquisition of the right of ownership from a non-entitled person (Section 1109 et seq.), superficiary right of building (Section 1240 et seq.), real burdens (Section 1303 et seq.), succession by fideicommissum (Section 1512 et seq.) or clauses of lesser importance in a testament (Sections 1567 and 1568)[46].

Apart from the domestic tradition, we must mention, in particular, the regulation of trust (Section 1448 et seq.), inspired by the Quebec Civil Code and currently one of the most discussed issues.[47] Concerning the 2012 Business Corporations Act, we can mention the so-called sanction liability of influential and controlling persons (cf. Section 74 et seq., esp. Section 76(3).

A great potential for developing user approach is in the wider concept of a thing in the legal sense (including intangible things) and the so-called absolutisation of obligation rights, which is particularly applicable to use rights (see Sections 979, 1011, 1044, especially for lease Sections 2211–2212). There will certainly be attempts to reinterpret it, as was

[46] In the case of succession by fideicommissum, condition precedent or determination of time, the rights of the preceding heir are limited as the rights of a usufructuary (Sections 1521 and 1567).

[47] The legal nature of a trust is controversial, it is "property in transit", which is the closest to the so-called "idle estate" in terms of continental legal thinking (cf. Stloukalová (2014)).

the case during the *ABGB's* period, but I think that we will no longer return to the state of classical differentiation of *in-rem* and obligation rights before the normative school; conversely, I believe the "absolute" element will also be reflected in the case of receivables (e.g. in the case of acquisition from a non-entitled person).

IV. Conclusion

All these insights from the sources lead to the conclusion that the ownership right became a real, absolute dominion which cannot coexist with any other entitlement only in the classical Roman law. In the archaic Roman law, there was an independent ownership right to the standing natural fruits (*fructes naturales*), which included limited, that is, divided ownership right to the fruitful thing (e.g. land). In the classical Roman law, land and fruits were regarded as unity. It used help from the philosophical doctrine of *species* and *substantia*, as in the case of mixing, merger of a right and duty and processing. The authors of this study believe that, in the same way as in the case of the right of usufruct and servitude, there was divided ownership in the case of buildings on land, and that only in the classical period land and buildings were declared to form unity and *inaedificatio* was declared a method of acquiring ownership right.

Although classical law lawyers have tried to eradicate the doctrine of divided ownership (remember how *Ulpianus* emphasizes that a person entitled unde a servitude is not the owner in Dig. 8, 5, 4, pr.), it left deep traces both in the case of individual servitudes (e.g. the duty of all co-owners to establish the servitude together, or prohibition of servitude which would concern *facere* – action), and in the case of the right of usufruct. Only by the influence of the divided ownership doctrine can we explain the prohibition to free a slave who is subject to the right of usufruct[48] or the fact that a landowner could not burden a land encumbered with the right of usufruct with another servitude without the consent of the usufructuary.[49] These traces of divided ownership can be found in today's law.

The reintroduction of the *superficies solo cedit* principle and the superficiary right of building into the Czech law does not, of course, mean the return of feudal relationships. However, it should be reminded that it disrupts indivisibility (exclusivity, completeness, limitlessness) of ownership, which is traditionally seen as the foundation of ownership right.[50] If we add a change in the concept of thing in the legal sense, it is obvious that we will encounter the problem again. The fact remains that the superficiary right has a different owner than that to land. Superficiary right of building is conceived as a right to a thing of another. It is clear that the legislator had to place it somewhere in the system, as it makes no sense to create a "special" category for this specific right *in rem*, regardless of the fact that it is an institute between two categories.[51] Additionally, it would break the

[48] Kaser (1939).
[49] Dig. 7, 1, 15, 7.
[50] Sommer (1932).
[51] The specifics of the superficiary right of building are well-understood by the Poles. Their legal doctrine has long discussed the nature of the superficiary right of building, classifying the superficiary right of building among in-rem rights. However, this institute is on the border between ownership rights and in-rem rights. Cf. e.g. Rudnicki (2011).

homogeneity of the law and could lead to further fragmentation of the system. The fact remains, however, that this is not a typical *iura in re alieni*.

In its today form, we understand divided ownership as a simplification that serves as *ideological abstraction for a situation where the owner is subject to a long-term limitation by a very broad in rem right of another, which is hereditary and alienable*. In this context, Horák[52] talks about three approaches to divided ownership in jurisprudence: (*a*) it does not exist at all; (*b*) it is limited solely to the feudal era; (*c*) it is a general term without relation to any specific social situation.

Our approach to divided ownership can therefore be included under the last category. It was already Svoboda who commented the following on the concept of divided ownership: *It turned out that the principle of divided ownership is today needed in legal life, though not in so far as it was under the rule of feudal systems*.[53] On the other hand, to consider the relationship between the owner of the building and the owner of the superficiary right of building as a very wide entitlement *iura in re alieni* would be a great simplification. In this context, one cannot ignore the strong socio-ideological character which the superficiary right of building originally had, i.e. the political implications of the reintroduction of the two institutes into the law of countries that had not yet been familiar with such regulation. The current economic reality leads to the decay of traditional dogmas which previously formed the foundation of the legal order. Sometimes it is a step in the right direction, sometimes it is not. On the other hand, it is alarming when over time, fundamental principles become a tear-off calendar. This phenomenon should be avoided because it is the compliance (although not blind) with the fundamental principles that ensure stability and legal certainty. Let us remember the negative example of the current situation in Austria, where the former mandatory principle of *superficies solo cedit* has become a non-mandatory rule. In particular, the case-law led to the preservation of this principle only on the formal level and re-established divided ownership.[54]

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References

Boháček, M. (1945). *Nástin přednášek o soukromém právu římském. I. Úvod a práva věcná*. Prague: Own publication.

Bonfante, P. (1932). Instituce římského práva. *Právník*, 4, 360–366.

Brandt, R. (1974). *Eigentumstheorien von Grotius bis Kant*. Stuttgart: Frommann-Holzboog.

Busz, B. (1966). *Die historische Schule und die Beseitigung des geteilten Eigentums in Deutschland*. Ein Beitrag zum Verhältnis von Rechtswissenschaft und Rechtswirklichkeit im 19. Jahrhundert. München: self edited.

[52] Horák (2010).
[53] Svoboda (1939).
[54] Kletečka (2007).

Dostalík, P. (2010). Obligační nebo věcně-právní účinky pachtu? Spor mezi Františkem Weyrem a Miroslavem Boháčkem. Bubelová, K. (ed.). In: *Polemiky a spory v právní vědě*. Olomouc: Univerzita Palackého.
Heyrovský, L. (1910). *Dějiny a systém soukromého práva římského*. Prague: J. Ott.
Horák, O. (2010). Tzv. dělené vlastnictví v 19. a 20. století (k proměnám chápání tradičního pojmu v domácí právní vědě). Sehnálek, D. (ed.). In *Sborník z konference*. Dny práva.
Horák, O. (2014). Sdílí příslušenství osud věci hlavní? Ke změnám v souvislosti s novým občanským zákoníkem. *Právní rozhledy*, 6, 191–194.
Horák, O. (2015). Ochrana oprávněného detentora proti zásahům třetích osob (ke kořenům a výkladu § 1044 ObčZ). *Právní rozhledy*, 4, 114–118.
Kaser, M. (1939). *Festschrift Paul Koschaker*. Erste Band. Wiemar.
Kletečka, A. (2007). Dvořák, J. (ed.). *Sborník statí z diskusních fór o rekodifikaci občanského práva*. Prague: ASPI.
Kocher, G. (1997). *Privatrechts Entwicklung und Rechts Wissenschaft in Österreich*. Wien: Bóhlau.
Kohl, G. (2007). *Stocwerkseigentum. Geschichte, Theorie und Praxis der materiellen Gebäudeteilung unter besonderer Berüksichtigung von Rechtstatsachen aus Österreich*. Berlin: Duncker & Humblot.
Krauss, F. M. (1999). *Das geteilte Eigentum im 19. und 20. Jahrhundert*. Eine Untersuchung zum Fortbestand des Teilungsgedankens. Frankfurt am Main: P. Lang.
Krčmář, J. (1946). *Právo občanské*. Díl II. Práva věcná. Prague: Knihovna Sborníku věd právních a státních.
Lehmann, J. (2004). *Sachherrschaft und Sozialbindung? Ein Beitrag zu Gegenwart und Geschichte des zivilrechtlichen Eigentumsbegriffs*. Berlin: Duncker & Humblot.
Luby, Š. (1975). *Kritika buržoazních a revizionistických koncepcí státu a práva*. Prague: Academia.
Natelson, R. G. (1987). Comments on the Historiography of Condominium: The Myth of Roman Origin. *Oklahoma City University Law Review*, 12(1), 24–33.
Pagentscher, E. (1859). *Die römische Lehre von Eigenthum*. Heidelberg.
Pernice, A. (1963). *Labeo. Römisches Privatrecht im ersten Jahrhundert der Kaiserzeit*. Aaalen: Scientia Verlag.
Petr, P. (2017). *Vlastnictví bytů – Kondominium*. Praha: C. H. Beck.
Poslanecká sněmovna ČR. (2017). Retrieved from http://psp.cz/eknih/1935ns /se/tisky/t04-25_18.htm.
Randa, A. (1922). *Právo vlastnické dle rakouského práva v pořádku systematickém*. Prague: Česká akademie pro vědy, slovesnost a umění.
Rudnicki, S. (2011). *Komentarz do Kodeksu cywilnego. Ksiega druga. Własność i inne prawa rzeczowe*. Warsaw: LexisNexis.
Schmoeckel, M. (2017). Omnia sunt regis: Vom allgemeinen Eigentum des Königs zur Enteignung des Bürgers. Ein Überblick zur Geschichte der Enteignung bis zum 18. Jahrhundert. In *Die Enteignung. Historische, vergleichende, dogmatische und politische Perspektiven auf ein Rechtsinstitut*. Berlin – Heidelberg: Springer.

Schusterová, M. (2013). „Streithäuser“ aneb malé poohlédnutí za patrovým vlastnictvím. In Vojáček, L., Tauchen, J. (ed.). *I. česko-slovenské setkání doktorských studentů a postdoktorandů oboru právní historie a římského práva (conference proceedings)*. Brno: Masarykova univerzita. pp. 248–259.
Sedláček, J. (1922). *Pozemková reforma. Pět civilistických úvah o záboru velkého majetku pozemkového a o tom, co se záborem souvisí*. Brno: Barvič & Novotný.
Sedláček, J. (2012). *Vlastnické právo*. Prague: Wolters Kluwers.
Sohm, R. (1908). *Institutionen. Geschichte und System des Römischen Privatrechts*. Leipzig. Duckler & Humblot.
Sommer, O. (1932). *Prameny soukromého práva římského*. Own publication. Prague.
Stloukalová, K. (2014). Svěřenský fond a jeho paralely v římském právu. *Acta Iuridica Olomucensia*, 3, 175–188.
Svoboda, E. (1909). *O reálném dělení domů v obvodu bývalého pražského ghetta*. Prague: Lidové družstvo tiskařské.
Svoboda, E. (1939). *Výbor z prací z práva občanského a z právní filsofie*. Prague: Melantrich.
Urfus, V. (2001). *Historické základy novodobého práva soukromého. Římskoprávní dědictví a soukromé právo kontinentální Evropy*. Prague: C. H. Beck.
Venědiktov, A. V. (1948). *Gosudarstvennaja socialističeskaja sobstvennosť*. Moscow: Izdat. Akad. Nauk SSSR.
Wagner, H. (1938). *Das geteilte Eigentum im Naturrecht und Positivismus*. Breslau: Märtin.