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COMMON PROPERTY LAW: ISSUES OF THEORY AND PRACTICE

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Abstract

The issues of common ownership have always been the subject of disputes and discussions. Since Roman law, people also asked questions of what belongs to persons who possess one thing together, a part of a thing in nature, or the right to the whole thing in general. To answer these and all other related questions, first and foremost, we need to understand the features of common property law. There are two main approaches to the way we realize the rights of ownership, the use, and the disposal concerning a common thing - individualistic and commonality. In turn, the scope of rights to own, use and dispose of a thing depends on which right the thing belongs to – the shared ownership or the joint ownership. We should note that the right of joint ownership has relatively recently received proper legal regulation. All attempts to propose other types of common property law proved to be untenable. There are also problems concerning the differentiation of rights of share ownership and joint ownership. At the same time, the dynamics of the development of the legislation on the common property law indicates a decrease in cases when such property may arise following the law.

Keywords: Right, share, the right of share ownership, the right of joint ownership

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1. Introduction

In recent years, the problems of reforming the property law have become the most urgent (Pyatkov, 2017). One of the most controversial issues raised in the Concept of the Development of the Civil Legislation of the Russian Federation, approved by the decision of the Presidential Council for the Codification and Improvement of the Civil Legislation of October 7, 2009, was the issue of the common ownership. The developers of the concept proposed to abandon the term "common property right," directed by the definition of the term, which is enshrined in the current Civil Code of the Russian Federation (further referred to as the Civil Code of the Russian Federation). They said it "gives a false idea that there is a kind of the right of common ownership other than the right of the property" (Koncepcija..., 2009).

It seems that the conclusion about the rejection of the category of "the right of common ownership" is rash. We need to investigate the "common ownership," studying the peculiarities of some of its types to comprehend this category and answer the question of its uselessness.

Currently, the provisions on the common property right are explained in Chapter 16 of the Civil Code of the Russian Federation "The Common Property." The Federal Law "On the Amendments to Part One of the Civil Code of the Russian Federation (further referred to as the Draft on the Amendments to the Civil Code of the Russian Federation, the Draft). It provides for a new version of Section II of the Civil Code of the Russian Federation "Property Law," which has not been adopted yet, while many norms of the current legislation need to be improved. In their turn, scientists rethink the provisions of the Project (Suhanov, 2017).

2. Problem Statement

Following clause 1 of Article 244 of the Civil Code of the Russian Federation, the property which is the ownership of two or more persons, shall belong to them by the right of common ownership. Back in 1914, Shershenevich (1914): "If a thing is an object of the joint right of all persons, then what is the object of the right of each of them?" (pp. 358-359) This feature of the property rights in our time is also noted by Shhennikova (2019), emphasizing that in essence, the right of ownership, and this basic and main side of it, presupposes the sole and even "despotic" domination of a person over a thing.

In the Concept of the Development of the Civil Legislation of the Russian Federation in 2009 (Koncepcija..., 2009), it was proposed to abandon the term "the right of common ownership." And at the same time, it was established that common property is the legal regime of a thing (things) belonging to two or more persons on the "common" property right.

The right of each person of the common property extends to the entire property as a whole. It indicates that the Russian common property law is based on the positions of an individualistic concept. It explains that the share ownership is considered a system of rights of co-owners to shares, which together form one right. This concept was laid down in the Roman law and reflected later in the codified acts of European states, which correspond to the general direction of the influence of the Roman law on countries with a continental system of law (Salogubova & Zenkov, 2018). And Russia is no exception. At the same

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time, most foreign countries base their understanding of the right of common ownership on the concept of community. What is the difference in approaches?

The scope of rights to own, use and dispose of the common property depends, primarily, on the rights that co-owners possess the property: the share ownership or the joint ownership. In connection with the above, the question arises concerning the differentiation of the rights in the share ownership and the joint ownership.

Today, the legislature provides two types of the rights of common ownership: share and joint. However, this is not an exhaustive list of cases proposed by the doctrine.

3. Research Questions

The study of acts of foreign countries and national legislation, the practice of their application, and scientific sources on issues of common property law are the research questions of the paper.

4. Purpose of the Study

The research is aimed at analyzing the main doctrinal and practical problems of the rights of common ownership and identifying legal regulation gaps. The authors suggest ways to improve legislation.

5. Research Methods

The authors used universal, theoretical, and empirical methods of scientific cognition.

6. Findings

6.1. 6.1. The right of common ownership arises in all those cases when several subjects own one thing

The features of the right of common ownership include:

6.1.1. The presence of the common property

Following paragraph 4 of Article 244 of the Civil Code of the Russian Federation, the common ownership shall arise when into the ownership of two or of several persons falls the property which:

1) cannot be divided without changing its intended purpose (the indivisible things);

By an indivisible thing, it is necessary to understand a thing which shall not be subject of division, destruction, or changing its purpose and that acts as a single subject of the property rights. From the definition enshrined in Article 133 of the Civil Code of the Russian Federation, it can be concluded that these include the following things:

a) the thing, whose division in kind is impossible without destruction, division, or changing its purpose;

b) such a thing shall be regarded as a single thing of property rights;

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c) the replacement of some constituent parts of an indivisible thing by other constituent parts does not entail the emergence of another thing, if at the same time the essential properties of the thing are preserved;

d) a penalty may be levied on an indivisible thing only as a whole unless otherwise stipulated by the law or the judicial act, including the possibility to sell it separately.

It follows from clause 4 of Article 244 of the Civil Code of the Russian Federation that indivisible things include only things that cannot be divided without changing their intended purpose. It corresponds to Article 133 of the Civil Code of the Russian Federation in the earlier version, but not in this one. Therefore, in this part, it is necessary to correlate paragraph 4 of Article 244 of the Civil Code of the Russian Federation to Article 133 of the Civil Code of the Russian Federation.

6.1.2. Such a thing is not subject to division under the law

Thus, according to paragraph 2 of Article 258 of the Civil Code of the Russian Federation, the land plot and the means of production belonging to the peasant (farmer) economy shall not be subject to division in case of the retirement of one of its members. The retired member shall have the right to receive the money compensation commensurate with his share in the common ownership of this property. Also, the common ownership in an apartment building belonging to the owners of apartments in the right of the share ownership shall not be subject to division (Korotkov, 2016; Stepanov, 2019).

Moreover, the right of common ownership of the divisible property arises in cases provided by the law or the agreement. For example, under paragraph 3 of Article 34 of the Family Code of the Russian Federation, the property acquired by the spouses during the marriage shall be their joint property. As it is rightly noted, "the registration of marriage should lead to the socialization (recognition as common) of any property acquired during the marriage, except for what is directly listed in the Family Code of the Russian Federation (Aleksandrova & Fedorova, 2021).

6.1.3. The multiplicity of subjects of ownership of the same property, that is, there is a multi-subject property.

It is impossible not to state that the participation of several subjects in the right of common ownership requires mandatory regulation of such relations since the right of common ownership contains the prevailing number of norms. They "oblige co-owners to a certain behaviour model" (Bondarenko, 2018, p. 109).

The main feature of the individualistic concept is the principle of unanimity. It has received its consolidation in Articles 246-247 of the Civil Code of the Russian Federation. In conformity with it, the possession, the use, and the disposal shall be effected in accordance with an agreement between all its participants. And only in case an agreement on the ownership and the use of such property cannot be reached - in accordance with the order, ruled by the court. The principle of unanimity was rooted in Soviet Civil Law. For example, under article 117 of the Civil Code of the RSFSR of 1964 (Grazhdanskij..., 1964), the possession, the use, and the disposal of the share, the property shall be effected with the consent between all its participants. In case the consent cannot be reached on the ownership, the use, and the disposal, any of the participants can take legal action.

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However, in the norms of the Civil Code of the RSFSR of 1922 (Grazhdanskij..., 1922), Article 62 reflected more the concept of community, since the article stated that the possession, the use, and the disposal of common property should be effected with the common consent of all its participants, and in case of a disagreement - by majority vote. Therefore, the statement that the principle of unanimity was heavily rooted and received a solid foundation in the Soviet period is at least hasty. Another thing is that the generality principle was criticized in the Soviet doctrine. Zimeleva (1941) gave a very vivid example of when a majority decision can remove a minority from access to a thing or the actual use of it, as a result of "disagreements" on the ownership and the use of the common house, the majority of co-owners shall judge that only the residents of the second floor can use the common staircase, but not the residents of the third floor, or it shall simply decide to break part of the house for reconstruction.

In turn, the principle of unanimity is not without drawbacks. Let us suppose that in the above example, one of the co-owners does not already want everyone, living in the house, to use the common property. Besides, in case of a dispute on the ownership and the use of property, it can be brought to court. Whereas, the situation is unresolvable at all if the owners cannot agree on the disposal of the property. The only way out will be to use the preferential right of the purchase, but its implementation is fraught with numerous problems.

However, the appeal to the norms of the Draft on Amendments to the Civil Code of the Russian Federation indicates that no deviation from this concept is possible. The legislature chose the individualistic concept as the basis for the Russian common property law.

But due to the above reasons, the attitude to the individualistic concept in modern science is ambiguous. Since it "generates the untimeliness of making decisions important for owners, the inefficiency of management, which ultimately leads to the depreciation of the idea of the share ownership and the desire of the co-owner to terminate property relations" (Filatova, 2013, p. 72), "the wording from the codified legislation of the 20-s of the past century seems to have a special significance for the development of the modern institution of the common property law in our country" (Shhennikova, 2017, p. 49).

The last quote refers to Article 62 of the Civil Code of the RSFSR of 1922 (Grazhdanskij..., 1922), which just fixed the concept of community, providing for the implementation of the rights of common ownership concerning a common subject. Moreover, we note that even the chapter devoted to the common ownership right is called "Community" in the German Civil Code (further referred to as the GCC) (Grazhdanskoe..., 2006).

The main feature of the community concept is the application of the majority principle. This principle mainly applies to the conventional use of a thing belonging to several co-owners. If it concerns the disposal of a thing or changing its intended purpose, the principle of unanimity is applied to solve these issues. It is natural since the use of a thing in its usual properties is primarily a goal for which the participants of common ownership enter into a community.

Both in the General Civil Code of Austria (further referred to as the GCCA) (Vseobhhij..., 2011) and in the GCC (Grazhdanskoe..., 2006), it is stipulated that decisions related to the ordinary management and use of things are taken by a majority vote (§ 833 of the GCCA) (Vseobshhij..., 2011), (§ 745 of the GCC) (Grazhdanskoe..., 2006). The size of the participants' shares determines the majority of votes.

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Another feature is giving a significant role to agreements between the co-owners. For example, as follows from § 1010 of the German Civil Code (Grazhdanskoe ..., 2006), the decision on the management and use, the cancelation, and the right to demand termination of the property community shall be valid for the third parties only if it is registered in the Land Register as an encumbrance of a share.

A significant guarantee of each co-owner's interest's protection is the ability to demand the community termination. Thus, according to §749 of the German Civil Code (Grazhdanskoe..., 2006), each part-owner may at any time demand cancellation of the co-ownership. In this part, the provisions fixed in the GCCA turn out interesting (Vseobshij..., 2011). If the co-owners are unable to reach an agreement on the division of the thing, then the decision shall be made based on a lot or an intermediary; if a unanimous decision on a lot or an intermediary shall not be reached, then a judge shall solve a case §841 GCCA (Vseobshij..., 2011).

Restrictions, provided for the ability to dispose of one's share, both by alienating it and by renouncing a share in the right of common ownership, promote the implementation of the community principle. Thus, following § 747 of the German Civil Code (Grazhdanskoe..., 2006), each part-owner can dispose of his share. At the same time, there are no special rules on the refusal of the share in the right of common ownership in codified acts. If we draw an analogy between the right of common ownership and the limited proprietary right, then in case of the refusal of the latter, the ownership right is restored in full. In other words, it acquires its natural boundaries. In case of the possibility of the alienation of the share, we will be dealing with the ownerless share. But it is impossible since due to the specifics of the subject of the right of common ownership (as a rule, it is an indivisible thing), it is difficult to imagine how co-owners can escape using the common property in a strictly defined share (for example, 1/3 of the table). Differently, it is possible to alienate the share. Such a mechanism is implemented in countries adhering to the individualistic concept and based on community principles.

6.2. 6.3. In Civil Law, the following positions have developed on the issue of distinguishing the rights of the share ownership and joint ownership

1. In the right of the share ownership, each co-owner owns a defined share. In the right of joint ownership, such a share is not defined. These definitions of share ownership and joint ownership correspond to the wording of paragraph 2 of Article 244 of the Civil Code of the Russian Federation.

2. The differentiation of the right of common ownership to the share ownership and the joint ownership is conditional since the size of the shares in both cases is defined.

3. There are no shares in the joint ownership, which predetermines the impossibility of the participant of the joint ownership to dispose of shares. It is impossible not to agree that denying the existence of the right of the share in the joint ownership is equivalent to the alienation of it as such.

4. The right of joint ownership characterizes the equality of the co-owners' rights due to the personal-trust nature of the relations between such property owners. According to the authors holding to this opinion, this feature distinguishes the right of joint ownership from the right of share ownership. Meanwhile, co-owners have equal rights in share ownership.

At the same time, supporters of the latter point of view expressed an interesting opinion that the right of common ownership is characteristic only for persons between whom a personal-trust relationship

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has arisen. It is necessary to answer when the right of joint ownership appeared in the domestic legislation to decide whether this is true or not. The right of share ownership was fixed only (Article 61) in the Civil Code of the RSFSR of 1922 (Grazhdanskij..., 1922). The right of joint ownership was introduced by the RSFSR Land Code of 1922. (Zemelnyj..., 1922) for members of the collective farm or the individual peasant economy (Articles 65-84), the Code of Laws on the Marriage, Family, and Guardianship of 1926 (Kodeks..., 1926) was introduced for spouses (Article 10). In the civil legislation, the division of the common ownership into the share ownership as property with a definition of shares and joint ownership without a definition of shares was first fixed in Article 26 of the Fundamentals of Civil Legislation of the USSR and the Union Republics in 1961 (Osnovy..., 1961). The Civil Code of the RSFSR 1964 (Grazhdanskij..., 1964) already declared the right of joint ownership of the collective farmyard members and those engaged in self-employment in agriculture. The family legislation provided for the joint ownership of the common property of the spouses. Despite the differentiation of the common ownership into the share ownership and the joint ownership back in 1961, the joint ownership received its status as a type of common ownership with an appropriate amount of legal regulation, only in the norms of the current Civil Code of the Russian Federation. The joint ownership applies to the property acquired by the spouses during their marriage (Article 256 of the Civil Code of the Russian Federation), the peasant economy belonging to its members (Article 257 of the Civil Code of the Russian Federation). Moreover, in both cases, the contract, and in the case of peasant farming and the law, may provide otherwise.

Undoubtedly, there is a personal-trust relationship between the spouses, which is predetermined by the peculiarities of these relations. At the same time, if we proceed from the definition of a peasant (farm) economy, thus it is formed by the citizens related by kinship and (or) property (Article 1 of Federal Law No. 74-FZ of May 23, 2003 "On peasant (farm) economy") (O krestyanskom..., 2003). Although, Article 3 of the given law says about the possibility of being farm members to citizens who are not related to the head of the farm. The maximum number of such citizens cannot exceed five people. And following the Draft on Amendments to the Civil Code of the Russian Federation, the property of a peasant (farmer) economy can be exclusively in the share ownership of its members.

As Sukhanov (2017) rightly notes:

> *the right of joint ownership was initially formalized by the unification of the property of members of the same family, whose relationships were largely based on personal trust and often on cohabitation. But it neither implies nor requires necessary certainty in the scope of the participants rights*. (p. 114)

Therefore, the participation of other entities in such cases is impossible, and if allowed, only in cases provided by law. As such an exception, which existed for a considerable time, there was a provision enshrined in paragraph 2 of Article 4 of Federal Law No. 66-FZ of April 15, 1998 "On Horticultural, gardening, and dacha non-commercial associations of Citizens" (O sadovodcheskih..., 1998). According to which public property acquired or created by a horticultural, gardening, or dacha non-commercial partnership at the expense of earmarked contributions was the joint property of its members.

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According to most scientists, it could not be considered differently but a misunderstanding. Another case was provided for by Article 2 of the RF Law No. 1541-1 of July 4, 1991 "On Privatization of the Housing Stock in the Russian Federation" (O privatizacii ..., 1991), according to which we could also transfer residential premises to the joint ownership. However, such an opportunity to privatize residential premises on the right of joint ownership gave rise to many problems in reality, which in 2001 led to the exclusion of the given provision from the analyzed law.

We should note that the tendency to reduce the number of joint ownership cases fully corresponds to the authors' idea of the Concept of the Development of the Civil Legislation (Koncepcija..., 2009). It is reflected in the norms of the Draft on Amendments to the Civil Code of the Russian Federation, fixing the possibility of the joint ownership of only property belonging to the spouses.

Nowadays, the legislature provides two types of common property: share ownership and joint ownership. However, this is a non-exhaustive list of cases proposed by the doctrine. So, Sidorenko and Chefranova (2004) suggest distinguishing such a type of property as "the indivisible share ownership". According to scientists, such a necessity is caused by property peculiarities. For example, it could be the share ownership of premises in an apartment building since the share in such a right is deprived of the possibility of being alienated. Its division and allocation in the right of common ownership are impossible. The pre-emptive right of purchase concerning such a share does not apply. A majority vote makes decisions on the ownership and the use of such property.

At the same time, it is impossible not to state that all varieties of a particular type of property have their specifics, but this does not prevent them from being attributed to the kind whose general features are its characteristic.

Attempts are also being made to single out such a type of property right as the corporate right of a legal entity, which "represents a form of the corporate property management for industrial and commercial purposes" (Pahomova, 1995, p. 62). In our opinion, the contradiction lies in the very definition of corporate property since such a type of property is associated with the legal entity creation. It contradicts such a feature of the common ownership as a multiplicity of subjects on the same property. Therefore, it is impossible not to agree with the negative attitude to such an opinion, because "only the absence of a legal personality (juridical personality) in the collective as a whole creates the ground for the existence of the studied construction - the right of common property" (Belov, 2017, p. 179).

We should note that some scientists see a legal structure similar to the "divided" ("split") property model used in Western European legal systems in the regulations. The Draft on Amendments to the Civil Code of the Russian Federation on the several persons' ownership concerning one real estate subject contains them (paragraph 1 of Article 271 of the Draft (Semyakin et al., 2018).

7. Conclusion

7.1. Common ownership is one of the oldest legal constructions, which is characterized by the following features: 1) the presence of common property;

2) the multiplicity of ownership subjects of the same property

The provisions of the legislation on the right of common ownership have been consolidated in the codified acts of most countries. Historically, two concepts have been involved in ownership relations, the use, and the disposal: individualistic and community. Russian law adheres to an individualistic concept, which corresponds to the tradition of our legislation.

Two types of common property are fixed. They are the share ownership right and the joint ownership right. The differentiation criterion, fixed in paragraph 2 of Article 244 of the Civil Code of the Russian Federation, most corresponds to the essence of the studied relations.

The allocation of other rights than the share ownership and the joint ownership does not correspond to the nature of such relations.

Thus, it is necessary to state that the legislation on the right of common property has gaps and contradictions, which necessitates the improvement of the legislation in the area under study.

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