Possession

Conceptual Analysis & Effects of Possession

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In this session:-

- ❑ Preliminary notes
- ❑ The concept of possession
- ❑ Possession in the Civil Code (Ethiopia)
- ❑ Legal effects of possession

Preliminary note

- **What possession is:-**
  - ✓ **Possession denotes legally recognized factual relationship between a person and a thing.**
  - ✓ **It is the legally recognized physical control of a thing by a person.**
- **What it is not:-**
  - ✓ **Possession doesn't mean property. The term possession doesn't at all express/represent a right – an *in rem* right or *in personam* right.**
  - ✓ **Possession doesn't mean ownership, which stands for a bundle of rights. Possession may imply ownership, but it is not ownership.**

Preliminary note …. *ctd.*

- **Possession is recognized and protected by law.**
- **But, why?**

1. ***To ensure order and stability in society by maintaining the status quo***
   - ✓ **Possession is a fact of life, everyday life; indeed life without possession is impossible. Possession is vital for work and private life.**
   - ✓ **From the things we eat, the clothes we put on, the room we live in, and the various things we use in every moment of our life, we have contact with things.**
   - ✓ **If our possession of these vital things is not protected by law, if everyone is free to snatch from us, or dispossess us we will also counter act or defend.**

Preliminary note …. *ctd*.

- **Why protect possession …. *ctd*.**

1. To ensure order and stability … ctd.

- ✓ **This will result in an endless cycle of claim & counter-claim, probably accompanied by violence.**
- ✓ **This will result in chaotic situation in society.**
- ✓ **One purpose of the law is to avoid this possibility by giving recognition to and protecting possession.**

2. To protect rights that may exist behind the possession

- ✓ **The person who is in possession of a thing may have *in rem* right or *in personam* right over the thing.**
- ✓ **Since rights are the creation of the law itself, the law wants to ensure the peaceful enjoyment of those rights by making sure that the thing to which the right relates remains in the possession (hand) of the person having the right.**

Preliminary note …. *ctd*.

- **Why protect possession …. *ctd*.**

❑ **For these reasons the law recognizes and protects possession.**

❑ **Thus, the law defines:**

- ✓ **What possession is;**
- ✓ **The manner of acquisition of possession;**
- ✓ **The legal effects of possession;**
- ✓ **Vices/defects of possession which limit the legal effects of /protections for possession;**
- ✓ **Remedies for dispossession;**
- ✓ **The manner of extinction of possession;**

Conceptions of Possession

- **What is possession? What constitutes possession in law?**
  - **There are two conceptions/theories of possession as understood in law**
    A. **The *subjective* theory of possession (Savigny's theory of possession)**
    B. **The *objective* theory of possession (Jhering's theory of possession)**
  - **The difference between the two theories (schools of thought) lies in their answer to the question: what constitutes possession/who is a possessor? Of course lying deep inside this question is the purpose of protecting possession (why should we protect possession?)**

Conceptions of Possession … *ctd*.

A. The subjective theory of possession

- **According to Savigny and his school of thought, possession has two fundamental elements:**
  - ***Corpus*** **(the material element) - physical control of a thing, and**
  - ***Animus*** **(mental element) - intention to control the thing**
- **The *corpus* element of possession:**
  - **The *corpus* element refers to a person's control over a thing: the external and visible relationship between the person and the thing. This may be:**
    - **Direct/immediate**
    - **Indirect/mediate**
  - **Control (possession) is said to be *direct/immediate* when a person exercises direct physical control over a thing in person. One who exhibits external power/control over a thing is said to have direct control/possession.**

Conceptions of Possession … ctd.

A. The subjective theory of possession …*ctd*.

- **Possession is said to be *indirect/mediate* when a person exercises control over a thing through another person.**
- **There are two types of indirect possession:**

1. **When a person possesses indirectly through another person (agent, servant, child, spouse, etc.) who has direct control over a thing solely for and on account of the indirect possessor and claims no interest of his own.**

2. **The direct physical control is in the hand of another person who holds the thing for himself but recognizes the superior and better right of the other person (indirect possessor) and knows he has to surrender the thing at any time/an agreed time. (Eg. lessee, borrower, pledgee, etc.)**

Conceptions of Possession … ctd.

A. The subjective theory of possession …*ctd*.

- **The *animus* element of possession:**
  - **For a direct or indirect control over a thing to qualify as possession the requisite *animus* element must be fulfilled.**
  - **By *animus* or mental element Savigny meant the *intention* with which the person is in control of a thing.**
  - **Normally, when a person establish control over a thing it may be with intention to:**
    - **Own it (*animus domini*)**
    - **Possess/hold it for himself (*animus possidendi*), or**
    - **Detain/hold it for another person (*animus detinendi*)**
  - **According to Savigny, the legally protectable possession (true possession) exists only if the person exercising control over a thing did it with intention to own it/as an owner.**

Conceptions of Possession … ctd.

A. The subjective theory of possession …*ctd*.

- **The *animus* element …*ctd***
  - **So, according to Savigny, the *animus domini* is the only mental element that need to be fulfilled to qualify direct/indirect control over a thing as possession worthy of legal protection.**
  - **This is because, according to Savigny the purpose of protecting possession is to protect ownership; It is to broaden the scope of protection of owners that the law protects possession.**
  - **The idea is, if an owner is interfered with in his peaceful enjoyment of his ownership rights, the owner gets immediate relief/remedy through *possessory action*, which is advantageous compared to *petitory action*:**
    - **Less lengthy proceeding/litigation**
    - **Less requirement of evidence**
    - **No need to show/prove ownership**
  - **So, according to Savigny, tenants, lessees, pledgees, mortgagees, usufructuaries or other persons having *in rem* or *in personam* rights over a thing they have control over are not possessors; they are mere holders/detentors.**

Conceptions of Possession … ctd.

B. The objective theory of possession

- **According to Jhering's school of thought possession is the external visible relation of a person with a thing.**
- **According to Jhering the subjective element (intent) of the person controlling the thing is not necessary to qualify as possessor in the legal sense; only the *corpus* (physical control), direct/indirect, is necessary for legal possession; the intention is to be inferred from the willful exercise of physical control over a thing.**
- **It should, however, be noted that, in the view of Jhering, not every kind of control over an object is necessarily possession.**
- **Jhering distinguishes between *possession* and *detention*. But the distinction is not based on *animus* but based on the *causa possssionis* (the cause for controlling the thing).**

Conceptions of Possession … ctd.

B. The objective theory of possession …*ctd*.

- If the cause of the control over the object is on behalf and in the interest of another person, then it is not possession but detention (holder).
- But if the cause of the control over a given thing is for own purpose, then that is possession that should be protected by law.

– Thus, according to Jhering, lessees, tenants, borrowers, bailees, warehousemen, pledgees, etc. are possessors.
– So, according to the Objective School of Thought, the category of persons regarded as possessors is larger; and holders smaller.
– According to Jhering and his school of thought, the purpose of recognition/protection of possession is to prevent disturbances & violent acts that generally affect the enjoyment of a right that a person has over a given thing.
– Because of this rationale, the protection may even extend to thieves or robbers who acquired control unlawfully.

The Conception of Possession in the Civil Code (Ethiopia)

- **Who is a possessor as per the Civil Code provisions?**
  - **Article 1140 provides a definition for the term possession.**
  - **Accordingly, possession is the actual (effective) control which a person has over a thing. This is referring to the *corpus* element of possession.**
  - **From a reading of Arts. 1141, 1145, 1147(1), the control can be *direct* or *indirect*: this implies the Code recognizes two types of possession:- direct possession & indirect possession.**

The Conception of Possession in the Civil Code (Ethiopia) …ctd.

- **Who is a possessor as per the Civil Code provisions? …*ctd*.**

- **How about the *animus* element? Art. 1140 refers only to physical control. Does this mean that no *animus* element is required to be a possessor under Ethiopian law?**
  - **No! From a reading of Arts. 1141, 1142 & 1147(1) we can understand that to be a possessor, the *animus* (intention) with which a person controlled a thing is also considered as a factor.**
  - **According to these provisions what distinguishes the possessor from the holder is his attitude towards the thing in his control.**
    - **If one is controlling the thing for himself (on his own behalf), he is ***possessor.***
    - **If he controls the thing for another person (on another person's behalf), he is a ***holder/detentor*.**

The Conception of Possession in the Civil Code (Ethiopia) …ctd.

- **Who is a possessor as per the Civil Code provisions? …*ctd*.**
  - **Thus, in the CC for possession to exist/for a person to be considered possessor two elements must be fulfilled:**
    - ***corpus* – physical control of a thing, and**
    - ***Animus* – the mental attitude with which a person is in control of the thing**
  - **But, what type of animus is required?**
    - ***animus domini* (intention to own/as an owner)?**
    - ***animus possidendi* (intention to possess for own purpose)?, or**
    - ***animus detinendi* (to hold/detain the thing on behalf of another person)?**
  - **As to the person controlling the thing as an owner or to become owner: no problem for the owner, by definition, is possessor – directly or indirectly**
  - **Persons controlling a thing on behalf of another person are regarded as holder, not possessor (Art 1147(1))**

The Conception of Possession in the Civil Code (Ethiopia) …ctd.

- **Who is a possessor as per the Civil Code provisions? …*ctd*.**
  - **As to persons controlling a thing with intention to possess for their own purpose (controlling a thing for purposes other than ownership), the provisions of the CC dealing with possession are not clear.**
  - **But a closer reading of other provisions of the CC suggests that persons who control things on their own account (other than as owner – with just only the intention to possess) are regarded as possessors:**
    - **Art 1311, usufructuary treated as possessor**
    - **Art 1341, action by the usufructuary described as possessory action**
    - **Art 2709, lessee (persons who hired things) described as possessor**
    - **Art 2830, pledge as possessor**
    - **Art 2914, lessees of immovable are regarded as possessor**
  - **So, it is not only the *animus domini* but also the *animus possidendi* that qualifies a person in control of a thing as possessor.**

The Conception of Possession in the Civil Code (Ethiopia) …ctd.

- **Who is a possessor as per the Civil Code provisions? …*ctd*.**
  - **Therefore, possessors under the CC are:**
    - **Persons who control a thing as owner (with *animus domini):* actual owners or who want to become owners;**
    - **Persons who controlled a thing because of an *in rem right* or *in personam right* or *obligations* over such thing/object, i.e., persons with intention to possess.**
  - **Who are regarded as non-possessors (mere holders/detentors)?**
    - **Possession servants: servants, employees, agents, spouse, guards, liquidators…)**

Effects of possession

- **What are the legal consequences of possession?**
  - **Being able to protect possession.**
    - **Use of force (Art 1148)**
    - **Possessory action (Art 1149)**
  - **Proof of ownership (Presumption of ownership) – Art 1193**
  - **Gives rise to ownership right – Eg. Art 1168 acquisition of ownership by *usucaption.***
- **These are the most important effects of being a possessor.**
- **If a person is not regarded by the law as a possessor he is a holder and his control will have no, or little effect.**

Effects of possession …*ctd*.

- **What are the effects of possession? …*ctd*.**
  - **But all category of possessors will not necessarily get all the benefits of being a possessor. For the purpose of operation of the effects of being a possessor, possession is classified into two: *perfect possession* & *defective possession*.**
  - **If possession is defective, it will have little or no effect of being a possessor.**
    - **Eg. possession acquired by *in personam* relationship (lessees, borrowers, usufructuaries, etc.) will not get all benefits, i.e., will not be regarded as owner**
    - **Persons who unlawfully acquired possession, will not benefit from all effects of possession, except the first one (protection of possession)**