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SPECIAL FEATURES OF ROMAN SERVITUDES

Abstract

The main goal of this article is to present the position, as well as the some of the most important characteristics of the roman servitudes. Having on mind the fact that they can be related to the modern types of servitudes, this article gives a detailed explanation of the ancient roman jurists' idea how to incorporate the servitudes in the system of the property law. Therefore in this occasion are especially noted the similarities as well as differences between the property-legal institutes, and main principles of Roman servitudes.

Praelactio: *Iura in re aliena* as part of the Roman property law

Undoubtedly, the central focus in the Roman Property Law is in ownership (*proprietas, dominium*) which appears in all shapes during the thirteen- year development of the Roman country and law. [1]The primate of this property-legal institutes seems unaffected nowadays, especially if theoretical discussions about different aspects though centuries are taken into consideration.

However, apart from ownership, the Roman law, within the property law, includes the possessions (*possessio*)[2] and the group of property laws of rights in foreign things *(iura in re aliena).*

In the group of property laws of rights in foreign things, the roman legal thought included the servitudes (*servitutes*), Real security law and Real security contracts (*fiducia, pignus et hypothec*a) and the long-term tenancies of agricultural and construction land *(ius perpetuumius in agro vecrigali, emphythevisis, sperficies)*[3].

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[1] The genesis and the origin of the notion *proprietas* is closely related to the possessive adjectives and the term *dominium* as a term with wider meaning.The Roman Law, besides setting the ground of the term of pure private ownership, during its long development and existence, acknowledges several types of ownership, classified according to diffetenancycriteria. One of the most important ones is certainly the division of Quiritarian and Bonitarian ownerchip, depending on the manner the ownership is acquired on *res mancipi.* Moreover, there is also knowledge of provincial ownership, but this one belongs to the category of co-ownership (condominium). The categorization of types of ownership according to the criteria of belonging of the entities to a certain category, disappears when the right on civil status is given to all Roman citizens. Subsequently, the ownership becomes *unum dminium* (sole ownership).

[2] The Roman concept for possession is a beginning of an eclectic example of the so -called classic or subjective theory for possession which considers that the following two elements are necessary: *corpus* (body, material, factual possession of property) + *animus* (will, subjective attitudes of the title bearer). This content of *possessio* actually consist of the so -called civil, interdict possession which is diffetenancyfrom the natural or detention *(detentio)* in the part of created will (in this case, the holder possesses the thing acknowledging that it is foreign),

Contrary to the classic, the objective or pandect conception of possession, believes that the material element, the factual possession of property, is sufficient as there is no difference between the possessors and holders of property. Our positive law acknowledges the objective conception for possession. See more at Родна Живковска, *Стварно право*, книга прва, Скопје 2005

[3] Hereto, proptrietas e ius in re propria (property law on own property), while the other property laws which are not very comprehensive by their content are iura in re aliena (property laws on foreign things) – see William Livesey Burdick, *The Principles of Roman Law and Their Relation to Modern Law*, , The Lawbook Exchange LTD, Clark, New Jersey, 2004

This kind of systematization of these seemingly very different legal institutes in a same group looks very odd if we take into consideration the level of development and particularly the methodology used by classic roman lawyers. Still, there is no doubt that since then they recognized the common branch that connects them, and that is the property-legal activity and surely at the same time the fact that they could not be called ownership as of their features.

In fact, Roman lawyers, apart from the above stated facts believed that *iura in re aliena* has only one more common feature which is the belonging to the property laws, but only in regard of the relationship between the title's holder and the subject. Therefore, neither the violation of law by third parties was taken as violation of law, nor means of protection were provided in that respect. This kind of violation was considered as violation of the personal or own integrity and appropriately legal protection was provided.[4]

I. SIMILARITIES AND DIFFERENCES BETWEEN SERVITUDES AND OTHER PROPERTY RIGHTS IN FOREIGN THINGS

If we take into consideration the main and special features of property law, especially sectoring and elasticity of the property-legal relation, the types of property –legal institutes will be easily explained.

Ownership was briefly mentioned as the most widespread property law and the Roman notion for it as *plena in re potestas* which comprises all property-legal authorizations such as *ius utendi, ius fruendi u ius abutendi*.

The opportunity for establishing sector authorizations practically gives the explanation about the origin and core of the so- called property rights in foreign things or *iura in re aliena.* As a reminder, this group of property laws consists of servitudes, real security law and long-term land tenancy.

In order to get more vivid picture of servitudes, it is necessary to make distinction between these related institutes in order to easily understand the content and function and to justify the need of their existence as an individual property-legal institute.

Starting from the definition about servitudes as property rights in foreign things which give the holder of the servitude right the opportunity of permanent, free of charge and unlimited use of the foreign thing, it is obvious that during the establishment of the servitude, a transfer of some property-legal authorizations from the holder of the right on ownership to the holder of the title of servitude is actually made. Or in other words, *ius untendi and ius fruendi* or one of this ownership authorizations are transferred to the holder of the title, depending on the type of servitude.

The fundamentality of servitudes does not consist of what a person can do, such as cut the grass or take care of creating a good view, or paint a picture on their own material, but to tolerate or not do D.8,1,15,1

Contrary to the servitudes, real security laws are dependent [5], accessory [6], temporary contracts that guarantee fulfilment of a prior obligatory task to the real security creditor.

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[4]Dragomir.Stojčević, *Rimsko privatno pravo Savremena administracija* Beograd, 1979

[5] For real security law and types of real security agreements see more Владо Бучковски, *Римското и современото заложно право*, докторска дисертација, Правен факултет, Скопје,1998

[6] The quality dependence, accessory, arises from the fact that real security contracts cannot be established if previously there is no debtor-creditor relationship from which arises the demand of the creditor which practically is provided with the appropriate real security contract (real provision of debt). In that manner, the debtor now becomes real security creditor as of the primary obligatory relationship and vice-versa ,the creditor becomes real security debtor in the new relationship. This implies that a real security contract cannot be signed per se.

Res hypothecae dari posse sciendum est pro quacumque obligatione…sive pura est obligation vel in diem vel sub conditione…vel pro civili obligatione vel honoraria vel tantum naturali. Marc. D. 20,1,5.pr
A thing may be given in an agreed security for any obligation….whether it is unconditioned or termed or conditioned… whether it is civil, freelance or natural obligation

In addition, depending on the type of real security contract, there are several situations. In fidicia *(fidicia),* the oldest type of roman real security contract, there is a transfer of the right on ownership to the real security thing, which means transfer of *ius utendi, ius fruendi and ius abutendi* which would be completely finished if the original obligation is not fulfilled. This real security contract was quite an unhappy solution for the creditor[7], the following form that is acknowledged by the Roman law is hand pledge (*pignus*). Contrary to fudicia there is no transfer of the right on ownership, but only the possesion, which means *ius utendi*, partially to *ius freundi* [8] as well as limited at *ius abutendi*, but in a sense of appropriation of the thing if the primary obligation is not fulfilled. [9] The last form of real security contracts that appears in Rome, mortgage, contrary to the other two forms, does not acknowledge transfer of *ius utendi* and *ius freundi*, since there is neither transfer of ownership, nor possession, but only limited *ius abutendi*, if there is no finished obligatory fulfilment again.[10].

Briefly, no matter which real security contract is concerned, servitudes differ by their features of being independent (they are not accessory), they are permanent property rights in foreign things and when it comes to servitude *ius abutendi* is never transferred to the title's holder, contrary to the real security contracts where the sale of things and settling of charges of the sales price are a special feature for all of them.

The list of property rights in foreign things ends with the long-term tenancies of agricultural and construction lands or *ius perpetuum.* Chronologically, the Roman law acknowledges the two types of agricultural land tenancy*ius in agro vectigali and emphytheysis,* as well as the long-term tenancyof a construction land that appears later or *superficies.*

Long-term land tenancies [11] are defined as property right in foreign thing that the tenant obtains relatively permanently,[12], inherited right on possession. , cultivation and usufruct of land, with the obligation of payment of a certain fee.

Hence, these contracts are independent and relatively permanent rights, such as the servitudes, where there is a transfer of *ius utendi and ius fruendi,* but they differ by the fact

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[7]. The fact that fidica provided transfer of ownership right of the real security debtor, as well as the fact that legal protection with *actio fiduciae* was introduced relatively late, the obligation of the real security thing to the returned to the real security debtor after neat fulfilment of the primary obligation, depended on the will and awareness of the real security creditor, so this restitution was often absent which is certainly unfavorable situation for the real security creditor.

[8] Using and usufruct of a real security thing was actually forbidden. If the real security creditor and debtor organized such opportunity, that was made with an additional agreement *pactum* for antichresis.
Si pignore creditor utatur,furti tenetur Gai.D.47,2,55,(54).pr.
If the surety creditor uses the pledge, he is responsible for theft.

[9] Collateral on real estate *pignu*s means transfer of possessions *ius possessionis* and conditioned *ius distrahendi* (sale of the thing if the primary obligation is not fulfilled appropriately)

[10] *Ius possessionis* and ius *distrahendi* in mortgage are taken into consideration if the condition is not full filled, on time and complete fulfillment of the primary obligation

[11] Long-term land tenancies are an interesting category, particularly as of the fact that besides their property-legal features, there are also obligatory-legal elements. Therefore, in most of the cases they are studied from two aspects, as property rights in foreign things, but also as individual obligation contracts.

[12] The permanence of long-term land tenancy contracts is conditioned with neat payment of the agreed tenancy.

that they are not free of charge. Depending on which type of long-term tenancy is concerned, appropriate tenancy fee was determined (*vecitgal, canon or solarium*)[13]
Si quid de fiscalibus agris vel aedificiis donatione principis vel venditione vel qualibet ratione ad privates fortasse pervenerit, id lex ista constituit ut soluto canone a possessoribus in perpetuumteneatur et, inpletis fiscalibus debitis,illi qua possident heredibus suis relinquendi aut quibus voluerint domandi habeant potestatem N.Marc, 3.(451ƨoԀ)Interpretatio
If private owners reach to governmental lands or be gifted by the emperor or by sale or other manner, that law defined that tenants shall pay this possession by paying rents and ofter they pay their debts to the country, those who own them, may leave them to their offspring or sell to whomever they want

Comparing the main features of property rights in foreign thing practically allows making a clear distinction between them, but at the same time it proves their common ground and their belonging to the appropriate group.

II. MAIN PRINCIPLES OF ROMAN SERVITUDES

Like any property – legal institutes, servitudes are also based on several principles which are specific for them and at the same time these principles define them as an individual institute of property law. Since Roman lawyers avoided giving definitions for legal terms, especially in the civil law[14], defining specifics of legal terms is the fruit of the researches conducted in this area, which would give a clear picture for the term and the specific features of legal institutes. Hence, that would mean their clear determinacy. Therefore, positioning of servitudes is mostly done with elaboration of the main principles that refer to them. Although Roman law created these principles, individually perceiving the certain types of servitudes, [15] we can still conclude that they are valid in the modern legal theory, which takes into consideration the servitudes as a property-legal institute, when defining the main principles.
The order of listing the main principles of servitudes in this paper is not made on basis of their importance or relevance. To the contrary, cumulative existence of the principles is necessary, in any case, without any exception.

a. *Nemini res sua servit*

In that context, *the principle Nemini res sua servit D 8,2,26 or nobody can have servitude on their own thing excludes the opportunity of the title's holder of ownership to be title's holder of servitude.*

Moreover, if ownership is the most comprehensive property law which consumes all property-legal authorizations, and servitude consists of only one or two property-legal authorizations, then the conclusion that comes as a result of the above-mentioned principal is logical, i.e. the owner of that thing, cannot base servitude at the same time, since as holder of the right on ownership he/ she can enjoy all possible property-legal authorizations. Or in other words, it would be illogical for the owner to be able to establish ownership on his/her

[13] The obligation for payment of tenancy on the occasion of long-term land tenancies, in combination with the long-duration of these rights, long-term tenancies, brings them closer to the permanent obligations by their nature.
[14]*Omnis definitio in iure civili periculosa est: parum est enim, ut non subverti posset Jav.D.50,17,202 Every definition in the civil law is dangerous: it is very rare not to be refuted*
[15] This model of drawing conclusions is characteristic for the Roman legal thought since in that period certain servitudes were known as individual institutions. Later on, they were defined as related group iura in re aliena with common characteristics.

own thing when the right on ownership has already enabled him/her freely and *erga omnes*, use all authorizations.
In possession , none of the owners can do anything contrary to the other person's will on basis of servitude, or can stop a person to do that, since nobody can have servitude on their own thing D.8,2,26 pr

Fairly, theoretically and practically there is an opportunity of arising a situation in which the holder of the right on servitude also acquires the right in possession of that thing. [16]. However, this occurrence does not derogate this principle, to the opposite, in that case there is ending or losing servitude, since ownership authorizations practically consume those established by servitudes. Therefore, the entity becomes the owner of that thing which is a sufficient ground for using all property-legal authorizations. [17].
Hence, it would be very irrational to consider that the newly occurred situation of correspondence of the owner of the servient thing with the title's holder of servitude would be considered as right on ownership on his/her own thing, as it would endanger the relevance of servitudes belonging iura i en aliena. [18]
Finitur autem ususfructus …si fructuarius proprietatem rei adquisierit, quae res consolidatio appellatur. I. 2, 4,3
The right on usufructs stops if the usufructuary acquires ownership of the thing, which is called consolidation[19]

b. Servitus servitutis esse non potest. -Servitus servitutis esse non debet

The forthcoming legal rule (principal) specifically for servitudes is that they cannot establish servitude on servitude or *servitus servitutis esse non potest.*
Servitus servitutis esse non debet D 33,2,1

Nec usus nec ususfructus itineris actus viae aquaeductus legari potest quia servitus servitutis esse non potest Paul.D. 33,2,1.pr.
They cannot register the right on use or usufruct of zebra crossing or a crossing with a car or servitude of water since there is no chance of existing servitude on servitude

In its core meaning, this principle means that the holder of the right on servitude, cannot draw one part of his/her authorizations and transfer them to a third party. In other words, establishment of servitude on servitude would mean renunciation of the holder of the right on servitude from some of his/her authorizations that belong to him/her, having in regard the type of servitude, in favor of a third party that would appear as the holder of the right on servitude, drawn from the content of the previously mentioned.

At first sight it can be easily concluded that such opportunity would be illogical, since property-legal authorizations of the holder of servitude right, as we mentioned above, are closely defined. Therefore, the transfer of more authorizations in favor of another party would not suit the holder of the right of servitude. Thereupon, he/she would renounce a part of his authorizations [20] which would cause really unsuitable situation. On the other hand, the

[16] For instance, the title's holder can buy the thing from the owner while he /she is the title's holder of the servitude
[17] The above-described situation is another manner of ending servitudes known by the name *confusio*.
[18] If there is an opportunity for the owner of the thing to be also a title's holder of a servitude based on the same thing, then it could not be said that the servitude is really a right in a foreign thing
[19] This example is appropriate and as an example for one of the manners for termination of servitudes at the moment of acquiring the right on ownership of the thing by the present title's holder, which will be explained in the part dedicated on the manners of termination of servitudes
[20] The original formulation from which the stated principle arose is the following *fructus servitutis esse non potest, i.w. servitude can not be based on usufruct*. This principle originated in the period when the usufructus

ban on establishment servitude on servitude can imply that the title's holder of servitude in no case can constitute such servitude of his/her servitude in favor of a third person, since that would mean extension of servitude's authorizations on behalf of his/her own. This kind of situation is not allowed, as it is not only contrary to the essentials of servitude but also to the principle for rational and limited usage of servitude[21], in a manner that is the least concerned in ownership authorizations. Establishing servitude on servitude in favor of a third party would additionally burden the owner of the servient estate or that would mean reduction of authorizations that the title's holder of servitude previously enjoyed from the right on servitude of the primarily established servitude a службеност. Apart from that, having in regard the fact that servitudes are defined as integral rights [22], drawing parts of the content of servitude's authorizations, the extension of servitude by establishing servitude on servitude in favor of a third party is impossible , as we already mentioned, inevitably contrary to the content of servitudes.

Diximus usum fructum a fructuario cedi non posse nisi domino proprietatis. Pomp. 23,3,66
We have already said that usufructuary cannot cede the right of usage to anybody but the owner. Servitudes cannot be separated, as the manner of their usage is connected in a manner that the one that shares them, spoils their core. Pomponii frag. de serv.

c. *Servitutibus civiliter uti debemus*

The Roman legal thought is a conceptual creator of the principle for using the right on servitude in a manner in which it would be the least disturbing for the owner of the servient estate or servitutibus civiliter uti debemus D 8,9,1 (servitutibus civiliter utendum est).

The principle defined in this manner found its justification in that that the holder of the right on ownership, as of the obligation to tolerate the established servitude, tolerates limitations of its ownership authorizations. Having in regard the fact that *proprietas est plena in re potestas*, it is logically that the pledge, limitation of full possession that the holder should enjoy is limited as reasonably as possible. In that respect, the holder of the right on servitude is obliged to serve with his/her authorizations, strictly and principally as defined in the content of his/her servitude, without any opportunity of extending of amending that contents which would undoubtedly mean additional burdening for the owner of the servient estate.

d. *Servitus in faciendo consistere nequit*

Besides the abovementioned main principles related to servitudes, the most of the romancers also include the principles of passivity and permanence. Still, in the literature that engages in this fields, these two principles are very often separated and marked as necessary assumptions for the existence of the right on servitude[23].

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was still considered as servitude. Later, when usufructus is classified as servitude, the word fructus in the said formulation was replaced by the word servitus. See more Ante Romac, Rimsko pravo,,Zagreb, 1981.

[21] The principles for rational justification as well as the strict, principal usage of servient authorizatiosn will be elaborated later in this paper

[22] Also, for the inseparability of servtudes see below in the text

[23]

Considering them as equally important and relevant for theoretical setting, both the principle of passivity and the principle of permanence in servitudes will be integrally elaborated further in the text, also as main principles which are valid for the same in general. Apart from the principles defined in this manner, they share many things with the previous ones and their detailed explanation is closely related to the explanations given for the previous principles.

For instance, the rule *servitus in faciendo consistere nequit or servitudes does not consist of doing* has similar justification as the previously mentioned principle. In order to provide protection, in a sense, the principle of passivity is defined for the owner of the servities estate.

Servitus in faciendo consistere nequit D 8,1,15,1

Furthermore, if by establishment of servitude on a certain thing the owner commits to do something, to make something, to give (*facere*, *dare*) as a content of servitude, this would seriously violate the concept of ownership [24]as a right with the most comprehensive authorizations *erga omnes.* With this kind of definition, the owner of the servient estate would be found in a unenviable position, according to which besides the obligation to tolerate or refrain of any of its rights that he/she would have if there is no established servitude, he/she would be additionally burdened with doing that would not do in the same situation by his/her own will. This situation would absolutely do not conform to neither one of the essentials of servitudes nor the core of ownership.

Thus, it seems right that this rule practically implies that the owner of the thing is obliged to tolerate something (*pati)* or to refrain himself/herself from some doing which he/she could use if there was not established servitude (*non facere*).On the other hand, this means an opportunity for the entity ,holder of the right on servitude, to avail this authorizations that were transferred to him/her by establishing the same. In fact, the principle of passivity of the owner of servient estate means to enable the title's holder to freely perform his/her servitude authorizations (defined by content of the specific servitude) ,with a sole obligation to not impede or forbid the execution of that law by any means.

Imposing additional obligation would be unjustifiable for the owner, which by definition has the greatest and most comprehensive law.

Contrary to all above-stated rules which acknowledge no exceptions, from this last one , *servitus in faciendo consistere nequit*, , there is one exception which is the example with the servitude *servitus oneris ferendi or* the law under which the wall of one house is bound to sustain the weight of the buildings of the neighbor. This servitude enables the holder's right to lean his/her building or part of it on the neighboring wall, but at the same time the owner of the servient estate is bound to repair and keep it sufficiently strong for the weight it has to bear[25]. Hence, it is perfectly clear that in this case the principle of passivity is not valid for the owner of the servient estate since walls' repairing are actions of a certain doing (*facere*).
Considering it as a sole exception and especially emphasizing it in the texts for servitudes, still *servitus oneris ferendi* continued as a sole servitude for which the principle *servitus in faciendo consistere nequit* is not valid.

e. *Causa servitutis perpetua esse debet*

[24] This eventual pledge of the owner of the thing of a certain doing would at the same time mean a flagrant break of the passive and active component of the right on ownership as property-legal institute which was explained above in the text.

[25] The specific situation of the servitude *servitus oneris ferendi* at the end of the Republic became „stumbling block" for Roman lawyers. Some of them believed that there should not be any exceptions when the main principles for an institute are defined. Therefore, the followers believed that this servitude should comply with the principle начелото *servitus in faciendo consistere nequit*, which would practically eliminate the doubts whether this principle is really one of the main and whether it is valid in all cases. The other group of lawyers that studied servitudes, defended this one exception, believing that the tradition of this servitude is established improperly, the repairing of the servient estate to be done by the owner of the servient estate, to alter, only for the reason to adjust himself/ herself to the stated general principle

The principle *servitus in faciendo consistere nequit means that servitudes are permanent rights by their nature*.

Causa servitutis perpetua esse debet D 8,2,28 Servitudes are permanent rights

Moving this principle to the group of main principles, is always related to an additional explanation, meaning that servitudes can be considered as permanent rights. Thus, land servitudes are related to the principle of objective permanence which means that this quality of them is exclusively dependent on the duration and the reason for their establishment. They are practically related to the permanence of the need, the title's holder of servitude to use the authorizations of the same until his/her servient estate is found in a position which necessarily imposes a type of usage of the servient estate. Contrary to land servitudes, personal servitudes are led by the principle of subjective permanence, as they are exclusively for the life of the holder's title of personal servitude. In these, as we will see later, the duration of servitude extends during the lifetime of the title's holder, since they are constituted in favor of specifically defined entities and are not dependent from the existence in relation to the preferential-servient estate. Consequently, *servitutes praediorum* are established so that one estate can be used in the most rational manner and that it would last until both estates are in such correlation. Therefore, servitudes established in such a way and their duration are connected to estates rather than the persons' holders of the rights for that relation or their wills. Therefore, land servitudes are considered as permanent.

Contrary to the land servitudes, personal servitutes personarum are immediately dependable from the subjects in which favor are established. More precisely, the duration of personal servitudes is conditioned mostly for the duration of the right's holder life of the servitude, since the meaning of establishment personal servitudes is not like in the case of land servitudes where there is a rational usage of estate, but to be exclusively in favor of the person they are established for.

However, having in regard that personal servitudes last as long as the life of the entity holder of the right of that personal servitude, we can support the attitude that servitudes are permanent rights by their nature, considering that personal servitudes are relatively permanent rights if the subjective criterion is taken into consideration.

III. CONCLUSION

The conclusive opinions regarding the above-elaborated topic seem not to be very different from the conclusion that could be drawn when other institute of the Roman law is a topic with special interest.

Therefore, we can conclude that there is also no legal institute that was created by the Romans, interesting for the contemporary legal science.

Thus, we believe that servitudes are particularly interesting but at the same time a complex category which deserves deeper scientific research. The basis of the term, principles and division of servitudes almost without any essential differences are recognized by modern laws. Through the example of servitudes, the skilfulness of old Romans is acknowledged again, the everyday situations and relations that the entities joined to metrify them in legal institutes, like a reflection in a mirror, became authentic human legacy.

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