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On the Legal Attribute of Possession

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***Abstract*—**Since the creation of Roman law for more than two thousand years, the legal nature of possession has been controversial, and it is difficult to reach a conclusion. There have been two mainstream theories of "facts" and "rights" for a long time. However, scholars have not stopped exploring, and a variety of representative theories such as "eclectic theory", "legal relationship theory" and "power theory" have appeared successively. By analyzing the problems of different theories, this paper proposes that the essential attribute of possession should be defined as "Control power". This certainty can better reveal the essence of things and demonstrate the institutional value of possession.

Keywords*—Possession; Fact Of Possession; Nature Of Possession; Control Power*

I. THE ORIGIN OF POSSESSION SYSTEM AND ITS LEGISLATIVE QUALITATIVE

The most basic common sense tells us that man cannot live without material materials, and man's possession of things is indispensable. Therefore, possession, as a state of possession of things by humans, has existed since ancient times, or since the existence of humans, there has been a problem of human possession of things. The initial possession of things by humans started with the acquisition of food and nutrition. Without this kind of human possession of things, the continuation of human existence is unimaginable. The simplest and most primitive possession of this instinct is just a state of natural existence. It reflects the natural relationship between people and things. Of course, it does not have a legal meaning, let alone the protection of possession by law.

Scholars generally believe that possession as a system originated from Roman law. The " Law of the Twelve Tables " in the fifth century BC established possession (Possessio) in Roman law for the first time, and directly named "ownership and possession" in the sixth table. The fifth table, the twelfth table, etc. also have provisions on possession. [1] Looking at the "Law of the Twelve Tables ", it not only establishes the legal status of possession, but also distinguishes possession and ownership, and handles the relationship between possession and ownership through the provision of statute of limitations and the exercise of the right of claim. The establishment of possession norms laid the foundation for the continuous development and improvement of the Roman law possession system. In particular, the established possession is the actual control of things, which has a huge and far-reaching impact on later generations. In the 6th century AD, when Justinian compiled The Ladder of Law, Roman law separated possession from the right to maintain social order. After development, Roman law regarded possession as a fact and protected it, and it has not changed.

As the source of the current possession system, in addition to Roman law, there is Germanic law. Germanic possession (ie Gewere) came into being later than Roman law. Germanic law, like Roman law, the emergence of the possession system started from the domination of land. Due to the characteristics of the Germanic nomads, their concept of land ownership was very indifferent. When they abandoned the hunting and animal husbandry lifestyles and became a settled life, they gradually formed a relatively stable relationship of control over the land. The possession system of Germanic law is very closely related to the land system. The formation and development of the land system is the direct source of the formation of the land system. In Germanic law, there is no strict distinction between possession and ownership. Gewere is not a simple fact, but a right. [2] Even people often pay attention to the possession of property, not the ownership of property. Because the rights on Germanic land are not easy to determine, the right must be commended through the state of possession, so that the existence of a certain right can be presumed by possession. Therefore, possession in Germanic law is the core concept of Germanic property law and a way of expression of property rights. [3]

It can be seen that the successive emergence of Roman law and Germanic law has led to a divergence in the qualitative question of possession. The former believes that possession is a fact, while the latter is more inclined to possess is a right. Although Possessio of Roman law and Gewere of Germanic law merge with each other after the Middle Ages, they still have a significant impact on the qualitative nature of possession in modern civil law.

German civil law adopted both Possessio in Roman law and Gewer in Germanic law, creating a mixed possession system. [4] The first paragraph of Article 854 of the German Civil Code stipulates that "the possession of a thing is acquired by acquiring de facto dominance over the thing." [5] As long as the possessor can have actual control over the thing Power can constitute possession. Obviously, in German law, possession is not defined as a right, but it is generally regarded as a fact.

The French civil code, which was deeply influenced by Roman law, inherited the possession system more from Roman law. Article 2228 of the French Civil Code stipulates that the possession or enjoyment of things in my possession or the rights exercised, or the possession or enjoyment of things or rights exercised by others in my name, is called possession. [6] "Holding or enjoying" here should be considered as actual control, and there is no provision that possession is a right.

The Swiss Civil Code (Article 919) and the Taiwan Civil Code (Article 940) also do not make it clear that possession is a right. In the Civil Code of the People's Republic of China that came into effect on January 1, 2021, in Chapter 20 "Possession", it is not clear that possession is a right.

The provisions of the Japanese Civil Law concerning possession are deeply influenced by Germanic law, which directly characterize possession as a right, that is, clearly define it as a right of possession, which is different from the above-mentioned countries. Article 180 of the "Japanese Civil Code" stipulates that "the right of possession is acquired by holding the thing for one's own will." [7] Similar to the Japanese civil law, there is also the Italian Civil Law, which also defines possession as a right. Article 1140 of the "Italian Civil Code" stipulates that possession is a right to property in the form of the exercise of ownership or other property rights. [8] The Korean Civil Code (Article 192) also defines possession as a right. It can be seen that the civil laws of countries such as Japan, South Korea, and Italy are different

from those of countries such as Germany and France. Possession is regarded as a right rather than a fact.

In short, the possession systems originating from Roman law and Germanic law, as well as the modern civil law influenced by them, have always had different understandings on the qualitative nature of possession. One type does not define possession as a right, that is, it is defined as a so-called "fact"; while the other is defined as a right. In fact, in addition to differences in the system, scholars have been arguing about the nature of possession.

II. DISPUTES OVER THE NATURE OF POSSESSION IN ACADEMIA

The controversy over possession has been around for a long time. Since the late Roman Empire, the controversy has not stopped. Representative doctrines such as "fact theory", "right theory", "compromise theory", "legal relationship theory" and "power theory" have appeared, among which the former two theories are the most typical and have become mainstream theories.

1. Factual theory

The fact theory considers that the nature of possession is fact, and this theory is currently the general theory of academic circles. The theory believes that possession is not a simple fact, but a legal fact. The law protects all possessions, regardless of whether the possessor has the right to possess, unless someone can prove that possession has a higher right than the fact. "Legal facts are the conditions under which the law enables the acquisition, loss or change of a certain right. In other words, they are facts that cause legal consequences." [9] Roman law noticed the difference between possession and ownership from the very beginning, and established possession as a fact in legislation. "Possession refers to a factual relationship of the same thing that enables people to fully dispose of things." [10] The Roman jurist Rabeo pointed out that sitting in a certain place is called possession (Possessio), because that place is naturally located. The people on it occupy it. [11] The jurist Paul said: "As far as possession is concerned, the right to possess is irrelevant. Thieves are also possessors." Famous German civil jurists Savigny and Jelling also support the facts. Savigny believes that "possession is both a right and a fact, that is to say, it is a fact according to its essence, and it is equivalent to a right in terms of its consequences."[12] Yelling believes that "possession is Facts, ownership is a right, possession is the actual exercise of a certain request, and ownership is a right to be confirmed and realized in law. When things are owned by me, my request for things is through the will of the state clearly expressed in the law Expressive; when things are in possession of me, my request for things is fulfilled by my own will. Ownership is guaranteed by law, and possession is guaranteed by factual relationships." [13] Mr. Wang Zejian believes that, "The essence of property rights lies in exclusivity and dominance. Possession also enjoys exclusivity, but it lacks the dominance of ownership of rights." [14] Mr. Xie Zaiquan believes that possession is a fact rather than a right, and this fact has certain effect in civil law. It is protected by many laws, so it has a legal meaning. It is conceptually different from simple facts, such as falling leaves and walking at dusk, which do not have any legal meaning. [15] Mr. Wang Liming also supports the fact that "treating possession as a right will inevitably make the concept of possession too narrow. In fact, in real life, many states of possession have not yet been formed as rights, but The law starts from the maintenance of social order and the relationship between people and things, and needs to protect these states of possession." [16] Scholars who support the factual theory also quote Marx's discourse on possession, "The true basis of private property, namely possession, is a Facts are unexplainable facts, not rights. It is only because the society grants actual possessions to the law that actual possessions have the nature of legal possession, that is, the nature of private property."[17]

In Germany, France, Switzerland and other countries, the nature of possession is a fact, not a right, in the legislation, which is also a strong evidence for scholars who support the fact theory.

In short, up to now, there are many scholars who hold facts theory, and it has become a general academic theory to characterize possession as a fact.

2. Rights theory

The theory of rights holds that the legal nature of possession is a right, not a fact. The theory of rights claims that the constituent elements of rights are: one is interest; the other is right. Possession is an essential element that conforms to interests and is protected by law, so it is of course recognized as a right. From the later period of the Roman Empire, scholars have proposed that possession is a kind of right, in order to better explain the issue of possession by law. In Germanic law, there is no strict distinction between possession and ownership, and it is believed that possession is not a state of fact, but a kind of property right. [18] The American scholar Albert S. Thayer believes that "both ancient Roman law and Germanic law have such a rule that rights are expressed through possession, and possession is expressed through hold. Therefore, when I hold something , Which gives me possession, and my possession of something, also gives me possession rights. Ownership is obtained by holding, and possession is enjoyed by possession. Therefore, possession is a right rather than a pure state of fact."[19] British property law scholars Lawson and Laden also support rights, saying, "When possession is linked to property law, its true meaning refers to a collection of possession rights, which are collectively called possession rights." [20] Many German scholars often interpret possession as a right. Taiwan Shi Shangkuan believes that "if the solution of possession is the relationship with the thing, it is a fact. If the solution is the legal force generated by the relationship, it is the right. Just as the contract is a fact, the legal relationship generated by the contract is "Rights." [21] Liu Dekuan also believes that "under Gewere, possession and the right are inseparably combined. The one side of possession regards it as possession, and the other side regards it as the right. This is Gewere's Nature". [22]

At present, Japan is the most typical country in the legislation that defines possession as a kind of right. In the property rights of the Japanese Civil Code, possession is clearly defined as the "right of possession", which is set before the chapter of "ownership", which shows its status. There are also the civil codes of countries such as Italy and South Korea that stipulate possession as rights, which also strongly supports the theory of rights.

The theory of fact and the theory of rights are two representative theories, each with many supporters, has been fighting each other, and it is difficult to distinguish between high and low. In addition to the above two university theories, there are also the eclectic theory (some scholars call it the mixed nature theory), the legal relationship theory, and the power theory. The eclectic theory holds that the nature of possession is first a fact and then a right. On the one hand, it is a fact, and on the other hand, it is a right. Possession exhibits different properties at different stages. The theory of legal relationship holds that possession is not a mere fact or right, but a legal relationship. The power theory believes that possession is essentially a power of ownership. The civil law

of the former Soviet Union defined ownership as the power to possess, use, and dispose of, and the civil laws of other socialist countries and some scholars were affected by it and argued that possession should be defined as a power in nature.

III. Redefining the Legal Attribute of Possession

The above-mentioned disputes over the different doctrines of the nature of possession, it is not difficult to see that although several doctrines have their own reasons and even legislative support, it must be said that they all have their regrets. Although the factual theory has become a general theory, there is a need for further discussion.

The theory of rights has always been opposed to the theory of facts. However, the theory of right has its fatal flaw, that is, it cannot explain why illegal possession becomes a right. For example, if a thief steals someone else's property and obtains possession of the object, it is hard to say that such possession is a right in any case. Therefore, the Japanese Civil Code stipulates that "the right of possession" is the most criticized by scholars. Some people believe that possession of rights is a right of possession. The author believes that the possession of rights can only mean that the right holder has the right to possess, but it cannot explain that the nature of possession is right. The two are not the same thing. It should be said that although possession and rights are protected by law, there are obvious differences between the two. For example, some rights can set security real rights, such as creditor's rights stipulated in the Civil Code, can set pledge rights, and construction land use rights. Mortgage rights are established, but possession is not. There is no so-called "direct right" and "indirect right" for rights, while possession can be divided into direct possession and indirect possession, and so on. [23] If possession is defined as a right, it is limited to the right to possess, and if there is no right to possess, it is excluded. This is obviously contrary to the value commended by the possession system, and the significance of the existence of the system itself is almost lost. In short, possession can be a rightful possession, but it does not mean that the legal nature of possession is a right. Obviously, the theory of rights is difficult to interpret the nature of possession and should be discarded.

The eclectic theory combines the fact theory and the rights theory, and seems to take care of the two aspects of mainstream disputes comprehensively, but it does not break away from the scope of possession as a right. This ambiguous and ambiguous attitude makes the nature of possession more ambiguous. Not really desirable.

The legal relationship theory defines possession as a legal relationship, which is like saying that possession is a legal system, which is almost meaningless and cannot reveal the essence of possession at all. Possession is protected by law and constitutes a legal relationship of rights and obligations, which is of course a legal relationship. If someone says that possession is a legal relationship, I am afraid that no one disputes it. This is extremely correct, but it is worthless and cannot explain the essential attributes of possession. Therefore, this argument is not worth refuting.

The power theory regards a power of ownership as the essence of possession, which is really partial. Because a considerable amount of possession does not occur by ownership, possessions other than ownership abound, such as leasehold possession. Possessions due to looting, theft, etc. also often occur. Therefore, the power theory cannot reflect the essential attributes of possession and should be discarded.

Due to the natural flaws that the theory of rights cannot make up, it is not surprising that the theory of facts has become a universal theory throughout the evolution of the long-standing possession system. In fact, it is hardly wrong to characterize possession as a fact. However, the author believes that theory of facts still fails to reveal the essence of possession and reaches the core of things. Although it can be said that possession is a fact, to conclude that the essence of possession is fact, it is suspicion of "tickling one's boots". Undoubtedly, the initial possession of mankind was merely an instinctive possession for the needs of its own survival. The possession in this period has nothing to do with the law and belongs to a purely objective fact. Of course, this is not a legal possession. When discussing the nature of possession, it is of course the "possession" based on the law, that is, the "possession in civil law." Obviously, possession is no longer a mere fact, but already has legal effect and is subject to legal adjustments. As for whether possession has a right, it is irrelevant.

Undoubtedly, possession is manifested as a fact, which on the surface is the relationship between people and things, but in essence it embodies the relationship between people. Furthermore, through the actual domination of things by man, the possessor has the legal effect of opposing ordinary people. As a result, no matter what kind of possession (regardless of legal or illegal) is protected by law, it has legal force. Therefore, the characterization of possession as a fact does not truly reflect the essence of confronting the world (of course, this kind of confrontation effect is not necessarily final, but can be overturned, but the possession before overthrow is still protected by law). Therefore, the author believes that possession is essentially a kind of "Control power", that is, possession not only has the fact that the possessor actually controls it, but also has legal power. In other words, once the possessed person actually controls it, it has the effect of being protected by law. This not only reflects the factual state of possession of property control, but also demonstrates the legal effect of possession against other people, and achieves the value orientation of maintaining peaceful social order.

Defining the legal nature of possession as "control power" is a step further than the characterization of possession as a "fact" and can reveal the essence of things. First, it is distinguished from the fact of pure possession in the early human history before the advent of the law and the possession of slaves without legal power (also known as natural possession). Second, the general theory believes that possession requires the two major elements of "voxel" and "mental element", but the "factual theory" is often regarded as only emphasizing the objective "voxel" and ignoring the subjective "mental element" . Defining possession as the control power, satisfies the requirements of possessing voxel and mind. Third, it defines possession as a kind of control power, which is not restricted by the existence of the original right of possession, which solves the problem of the scope of the possession system. Even if it is illegal possession, for example, possession obtained by theft, it still does not lose its management power and is protected by law. Fourth, the characterization of possession as a kind of control power solves the theoretical problem of direct possession and indirect possession, and distinguishes the "holding" that only manifests as the direct control of the facts of things. With regard to indirect possession, the original right holder still has not lost his control power, and can restore his direct possession if necessary. Fifth, defining possession as a control power can better rationalize the theory of the relationship between possession and property rights. Property rights are dominance in nature, and their dominance is manifested by their possessive leadership. Not only does the two have no conflicts, but they are coordinated and united organically. Ownership with the right, whether it is due to property rights or creditor's rights, can only show that the possession at this time is the possession of the right source, but there is no difference in the nature of the possession compared to the non-right possession, except that, Possession without the right is not final in

principle, and will often return to the right (of course, a clear ownership of the right is required). Sixth, to characterize possession as a kind of control power, itself is also a way to publicly display to the society, so that a third person can identify the ownership of its possession, and then respect the existing possession relationship, maintain social order, and avoid civilized society. Use of violence.

In short, the author characterizes the legal attribute of possession as "Control power", which can reflect the origin of things better than the "factual theory", which is conducive to straightening out the legal relationship related to possession, making the theoretical system more rigorous and complete, and better The display of the system value of possession.

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