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PREVENTING CO-OWNERS FROM USING CO-OWNED (COMMON) PROPERTY

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Abstract

The possibility of exercising (co-)ownership rights by every co-owner of (a thing) property is restrained by the fact that each and every co-owner holds the same rights thereto. In real life, it is unlikely that all the co-owners will reach an agreement on the exercise of their ownership rights. Therefore, one can say that the ancient Roman maxim *communio est mater rixarium* (co-ownership is the mother of disputes) has never lost its sense. Some cases handled by Croatian courts have impelled the Supreme Court of the Republic of Croatia or more precisely, its Civil Law Department to adopt the stance, according to which a co-owner whose exercise of his/her ownership rights was not proportional to his/her fractional interests in the property shall compensate the co-owner who was not in possession of the property for all the benefits derived from such property use. This paper examines the meaning and consequences of the said stance of the Supreme Court for ownership rights-related dispute resolution. It also investigates the possibility of judicial review (second appeal), which depends on the Supreme Court's permission. Finally, it sheds light on some pending issues relating to the exercise of ownership rights *de lege lata* as well as on possible legal solutions and the potential need for intervention by the legislator *de lege ferenda*.

Keywords: co-ownership; real property; thing; possession; review

1. INTRODUCTION

The right to property is inseparable in the light of ownership rights (every co-owner holds all the typical property rights: possession, use, enjoyment and disposal). Hence, co-ownership is divided into shares, i.e. each co-owner is entitled to his/her aliquot share in the property.[667] The scope of the research in this paper refers to cases instituted before Croatian courts, in which one co-owner exercises his/her ownership rights to the extent disproportional to his/her fractional interests in the property. A special emphasis is placed on judicial proceedings initiated due to damaged relationships between co-owners in

[667] Each owner's share is based on a quota; that is why it is called aliquot share. Lat. *aliquoties* – several times (Klarić, Vedriš, 2006 p. 248).

regard to their common real property.[668] Such cases have urged the Civil Law Department of the Croatian Supreme Court to imperatively instruct the lower courts to establish the legal status of co-owners when deciding on claims in which dispossession is not necessarily sought, but the respective co-owner has expressed his/her will to possess the property in an appropriate way. The paper analyses the case-law concerned and challenges the stated views from the perspective of legal science. It also explores the meaning and consequences of the said stance of the Supreme Court for ownership rights-related dispute resolution as well as the possibility of judicial review (second appeal), which might be permitted by the Supreme Court[669] based on the 2019 and 2022 amendments to the Civil Procedure Act[670]. Finally, the paper elaborates some pending issues relating to the exercise of ownership rights *de lege lata* as well as possible legal solutions and the potential need for intervention by the legislator *de lege ferenda*.

2. CO-OWNERSHIP CHARACTERISTICS

Co-ownership can be defined as several persons' participation in the ownership of property whereat each co-owner holds part of rights resulting from the ownership, which is expressed as a percentage of interests in the property (ownership share or stake) (Gavella et.al., 2007 p. 683). In other words, if several persons own property (object, thing) in a way that each of them holds part of rights resulting from the ownership of that property, which is expressed as a percentage of interests in the property (ownership share or stake), they should be all regarded as property co-owners and their parts of property ownership are called fractional interests.[671] When property (object, thing) is co-owned, none of the co-owners may neither claim nor act as if he/she was the only owner of his/her fractional interest in the property (undivided interest). Thus, each co-owner is simultaneously a co-owner of the whole property as well as every single part thereof, but only to the extent of his/her aliquot share. When one says that co-ownership is divided into shares, this means that every co-owner holds all the property rights (possession, use, enjoyment and disposal of property), but only to the extent of his/her aliquot share (Klarić, Vedriš, 2006 p. 249). The Act on Ownership and Other Proprietary Rights defines the limits of the exercise of ownership rights with respect to the whole property (object, thing), particularly concerning property management rights, desist of property possession and exercise of ownership rights. In this sense, co-ownership is substantially restrained by modifications necessary for the existence and survival of a community of owners, which results in relativization of proprietary rights and claims (Maganić, 2008 p. 2).

Considering the exercise of ownership rights in regard to the whole property (object, thing), it can be generally concluded that every co-owner may exercise all of his/her powers provided to him/her as a holder of part of ownership rights without consent of other co-owners if such exercise does not violate their rights.[672] In this context, every co-owner has the right to make independent (regardless of the opinion of other co-owners thereon) decisions on, among other things, co-owned property management, clearance of the accounts and benefits resulting from property use, requests to other co-owners based on relationships arising from the co-ownership and requests to third parties made in the role of the property owner (e.g. request for property protection) (Gavella et.al., 2007 p. 691). If a co-owner of property (object, thing) makes

[668] Most of those cases concern (co-)ownership of real (immovable) property. However, a case can also revolve around movable property. Before all, around those objects which a user can benefit from, e.g. a vehicle registered to provide taxi services.

[669] Hereinafter: SCRC.

[670] Civil Procedure Act, Official Gazette of the Socialist Federal Republic of Yugoslavia no. 4/77, 36/77, 6/80, 36/80, 43/82, 69/82, 58/84, 74/87, 57/89, 20/90, 27/90, 35/91 and Official Gazette of the Republic of Croatia no. 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, hereinafter: CPA.

[671] Article 36 paragraph 1 of the Act on Ownership and Other Proprietary Rights, Official Gazette no. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15, 94/17, hereinafter: AOOPR.

[672] Article 38 paragraph 1 of the AOOPR.

a deal relating to that property without consent of other co-owners, the negotiorum gestio rules shall apply[673] and the consequences of such a deal are prescribed by the law of obligations. Every co-owner is entitled, regardless of the size of his/her fractional interest, to decide, along with other co-owners, on every issue related to their common property. Co-owners may express their views in any way, shape or form unless an agreement or law requires them to express their will in a specific way.[674] Every co-owner can co-possess the co-owned property. Co-owners may arrange desist of property possession. The possibilities of property division are various since the co-owners can do with their property everything that is not prohibited by the law. General government (ordinary administration) is in charge of affairs related to desist of property possession.[675, 676] A co-owners' decision on desist of property possession can be revoked and the co-owners are entitled to revoke or amend such a decision. The final decision on the revocation or amendment is made by ordinary administration too (Gavella et.al., 2007 p. 697).

3. CASUISTRY

At its session held on 1 March 2012, the Civil Law Department of the SCRC adopted the following stance: ''As far as relationships between co-owners (owner and possessor) are concerned or more precisely, if one co-owner prevents the other from using co-owned (common) property (object, thing), the provisions of Articles 164 and 165 of the AOOPR shall apply-''.[677] In terms of a court case revolving around a (co)-owner's claim against the possessor of another person's (thing) property (or another co-owner's share in the property), the legal status of the possessor needs to be determined for the purpose of providing compensation for having used the property or having benefited from it or for all benefits of the possession pursuant to Articles 164 and 165 of the AOOPR. On such an occasion, the claim does not have to include a request for surrender of the property (thing) if the (co)-owner has expressed his/her will to possess the property in an appropriate way. A fair possessor becomes an unfair possessor after receiving a claim for surrendering the possession or co-possession, but his/her unfairness may also refer to the period preceding the claim if the claimant had invited him/her to surrender the property in an appropriate way."[678]

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[673] Article 39 paragraph 2 of the AOOPR.

[674] E.g. in case of the ownership of apartments, the AOOPR requires from the co-owners to make a written decision thereon. (Gavella et.al., 2007 p. 693).

[675] Article 42 paragraph 2 of the AOOPR.

[676] Common property management is not always regulated by the same rules. There are special rules for deals governed by ordinary administration and special rules for deals governed by extraordinary administration. In the event of deals governed by ordinary administration, a simple majority of co-owners' votes is required. The majority of votes is based on fractional votes, not on the number of co-owners. If a majority of votes cannot be achieved and a deal is necessary for property maintenance, the competent court shall make a respective decision in non-contentious proceedings initiated by one of the co-owners. Article 40 paragraphs 1-3 of the AOOPR.

[677] Articles 164 and 165 of the AOOPR define legal status of both a fair and unfair possessor. Namely, Article 164 of the AOOPR sets forth that a fair possessor of another person's thing (property) which he does not have the right to possess, shall surrender such a thing to the owner or to the person designated by the owner; however, he/she is not bound to provide compensation for having used it or having benefited from it to the extent appropriate in view of the right to possession he believed to have been entitled to, neither shall he provide compensation for anything damaged or destroyed. On the other hand, an unfair possessor of another person's thing (property) shall surrender such a thing to the owner or to the person designated by the owner and compensate for all damages on the thing and all benefits he/she enjoyed for the duration of his/her possession, including those that the thing would have yielded had he not neglected them. As of the moment a fair possessor becomes unfair, his/her rights and obligations are governed according to the rules laid down for an unfair possessor; they are also governed according to the same rules with respect to what the fair possessor did with the thing that was inappropriate in view of the right to possession he believed to be entitled to. Article 165 paragraphs 1 and 6 of the AOOPR.

[678] Vrhovni sud Republike Hrvatske/Pravna shvacanja-gradjanski-odjel. Downloaded from *https://www.vsrh.hr/custompages/static/HRV/files/2021dok/Pravna%20shva%C4%87anja_GO/VSRH_GO_Su-IV-16-2021-5.pdf*

In the referring judicial proceedings, the claimants seek surrender of possession from the respondents, i.e. co-owners of property (thing) or vice versa, the respondents have taken possession of the claimants' share in the property and refuse to provide them with co-possession. The claimants are granted the right to compensation since the respondents used the property and benefited from it during the time of their possession. Those cases generally pertain to co-owned (common) real property. Therefore, the court provided the claimants with compensation in the form of forgone benefits (i.e. rent for using the claimant's share in the property). For instance, the Municipal Court in Osijek (sitting in Beli Manastir) adjudicated as follows: ''The Court appointed a construction expert witness to conduct expertise to specify the monthly rent for using the respective property during the period covered by the claim and the expert witness came up with the amount of 530.00 EUR…."[679]

As indicated in the standpoint of the SCRC, making a decision on a claim for compensation for having used the property or having benefited from it or for all benefits of the possession requires determination of the legal status of the possessor. On such an occasion, the claim does not have to include a request for surrender of the property (thing) if the (co-)owner has expressed his/her will to possess the property in an appropriate way. What is imposed here is the question what means that the (co)-owner's will shall be expressed in a way convenient to detect an intention to possess property (thing)? This legal standard[680] is expected to provide the court with the possibility to adapt the legal standards to the needs of a concrete case (Triva, 1978 p. 87). In the above judgement, the Municipal Court in Osijek (sitting in Beli Manastir) established that the claimant required from the respondent to surrender possession of the property on several occasions, but the respondent refused to act accordingly each time. The surrender of possession referred to a request for delivery of the building (real property) keys. In this case, the decisive fact was the respondent's refusal to provide the claimant with the said keys, adding that she should take them from the lock herself. The Court deemed such an attitude as the respondent's rejection of the claimant's request and thus ordered the respondent to provide the claimant with the aforementioned compensation. When deciding on the respondent's appeal, the County Court in Varaždin delivered a judgement[681] in which it dismissed the respondent's appeal and uphold the first instance judgment. The reasoning suggests that the first instance court was right when it found that the claimant had been prevented from coming into possession of her part of the real property.

Similar legal positions can be found in the reasoning of the SCRC itself: Rev-834/87: ''If there is no agreement between co-owners on the manner of possession of common property whereat one or more co-owners have taken possession thereof to the extent disproportional to their fractional interests, other co-owners shall be entitled to compensation for foregone benefits.'' Rev-1419/98: ''The Court holds that one spouse obtained financial advantage wrongfully by using the other spouse's co-ownership share in the

[679] Municipal Court in Osijek (sitting in Beli Manastir), P-553/2019-26 of 19 March 2021.

[680] A legal standard is an indefinite concept, the content of which varies depending on a case while retaining its essence. The substance of a legal standard relies on its addressee (court) and the generally accepted rules of the environment in which the addressee acts. When applying legal standards, one needs to take account of objective criteria and the objective of a standard, which implies that one must not act arbitrarily but identify the action that best reflects the substance of the standard in a concrete case (Vidaković Mukić, 2006 p. 857).

[681] County Court in Varaždin, Gž-581/2021-2 of 22 September 2021.

property[682, 683]. The wrongly obtained advantage relates to the rental for the respective part of the property.'' Rev-1786/88: ''The co-owner who took advantage of the other co-owner's share in the property without providing compensation to the latter in the form of due rent, shall provide the latter with nominal rental fee for the period of wrongful property occupation.''[684]

Based on the judicial proceedings which preceded the judicial review (second appeal), the SCRC concluded that the parties resided together in the respective property for some time during which the claimant occasionally went to Germany and used to stay there for a while. Still, the claimant had not been prevented from co-possessing the property until 1999 when the marital relations were disturbed, after which (2000) the respondent changed the front door and thus prevented the claimant from using the property. Through the use of the claimant's share in their common property between 2002 and 2015, the respondent obtained financial advantage which can be expressed in the form of rental fee for the period of property occupation. The due rental fee was specified by an expert witness.[685]

Based on the pertaining provisions of substantive law, the AOOPR envisages the exercise of ownership rights on the whole property (thing, object). Furthermore, the same act stipulates that every co-owner may, if not regulated otherwise, exercise all of his/her powers granted to him/her as the holder of part of ownership rights without consent of other co-owners if such exercise does not violate the rights of other co-owners. Yields and other benefits related to the use of the whole property as well as relating costs and burdens shall be, if not agreed otherwise, distributed among co-owners in compliance with the size of their fractional interests. Every co-owner has the right to demand clearance of the accounts and distribution of all benefits.[686]

The use of other people's property (thing, object) is governed by Article 1120 of the Civil Obligations Act, setting out that if someone has used another person's thing for his own benefit, the owner may, irrespective of the right to compensation for damage, or in its absence, request from the former to compensate for the benefit conferred from the use of the thing.

4. SURRENDER OF PROPERTY (THING, OBJECT) POSSESSION

1.

As disclosed in the aforementioned cases, the case-law depends on the manner in which surrender of possession was requested and performed. In this context, the proprietary law doctrine stipulates that a

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[682] Unjust enrichment refers to a relationship regulated by the law of obligations, in which the acquirer is bound to return or compensate for the value of the part of the property or proceed obtained without a legal ground or based on a ground which was later suspended or did not come into existence. Enrichment without or past legal grounds is considered unjust. A person whose assets have increased without a proper ground is said to have become rich unjustly. Unjust enrichment is in principle connected with other people's unjust asset decrease. Transfer of property (things) and other benefits without a legal ground supporting it shall be neutralized. Although it does not always have to come to enrichment in this context, there must be a change in someone's assets. The respondent's property (assets) has been provided with a right that has been transferred from the claimant's property (assets). Unjust enrichment is always related to a change in someone's assets. Of course, if such a change is not supported with a proper ground. (Klarić, Vedriš, 2006 p. 644).

[683] Where a portion of assets of a person is transferred in any manner to the assets of another person and such a transfer is not based on a legal transaction, decision of a court or another competent authority or law, the acquirer shall return that portion of assets, or if this is not possible, compensate for the value of the benefit conferred. Transfer of assets shall also imply benefit conferred by the performed act. The liability to return or compensate for the value shall occur when something is received on the basis which has not been realised or which has subsequently been suspended. Article 1111 paragraphs 1-3 of the Civil Obligations Act, Official Gazette no. 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, hereinafter: COA.

[684] Supreme Court of the Republic of Croatia, Rev-2705/12-2 of 3 November 2016.

[685] Supreme Court of the Republic of Croatia, Rev-X215/16-2 of 23 November 2016, downloaded from *https://informator.hr/informatori/6491*

[686] Article 38 paragraphs 1-3 of the AOOPR.

person shall come into direct possession of property through physical (traditional) surrender and into indirect possession of property through expression of his/her will.[687] Direct surrender does not entail transfer of property if the acquirer is not in position to exercise his/her de facto power over the property.[688] In real life, direct surrender does not mean bringing the acquiring into the property but handing over instruments for controlling the property possession, e.g. front door keys.
Transfer of property possession takes place when the instruments for controlling the property possession are handed over to the acquirer. Transfer of property possession to the acquirer (e.g. possession of an apartment) is completed when the acquirer gets the possession controlling instrument (e.g. front door keys). In this case, one cannot speak about symbolic tradition[689] since the person who has been provided with the apartment keys, has also been granted the de facto power over the property. The receiver of the keys gets in the situation in which he/she has the de fact power over the property which can be entered by opening its front door with the received keys. In this light, the judiciary believes that it is of utmost importance to come into possession of a property possession controlling instrument to come into possession of the property itself and that cannot always be achieved by obtaining a simple approval for entering the property (Gavella et.al., 2007 p. 200). Indeed, the Municipal Court in Osijek (sitting in Beli Manastir) established that the respondent prevented the claimant from coming into possession of her share in the common property. More precisely, when transfer of property is to be carried out through handover of the keys to the claimant, the acquirer should come into direct possession thereof. The respondent statement that the claimant should have taken the keys herself does not hold water in this context.

5. PENDING ISSUES

As stated above, making a decision on a claim for compensation for having used the property or having benefited from it or for all benefits of the possession requires determination of the legal status of the possessor. What has also been mentioned in this view is that the claim does not have to include a request for surrender of the property (thing) if the (co)-owner has expressed his/her will to possess the property in an appropriate way. However, in real life, such issues are not resolved so easily. For instance, in a situation where the relationship between property co-owners is so hampered that property co-possession is not possible and then one co-owner leaves the property voluntarily. Should he/she be then entitled to compensation corresponding to the rental fee for his/her fractional interest in the property due to the other co-owner's occupation and utilization of the property?
In its ruling[690], the County Court in Varaždin set aside the judgement of the Municipal Court in Ivanec and referred the case back to the latter. The former explained that the first instance court bound the respondent to provide the claimant with compensation for using the whole real property (also for the claimant's share (½) in the property) and added that: ''considering the relationship between the parties, the claimant's decision to leave the apartment did not have effect on the resolution of this dispute.'' It also asserted that the parties were spouses and the apartment was very small (59,49 m2), which entails that the parties would

[687] Physical surrender is an externally visible physical act whereas will expression-related surrender represents transfer of property without its physical surrender, which takes place in the form of consensual expression of the will of both the possessor and the acquirer about the handover of the property to the acquirer. (Gavella et.al., 2007 p. 203).
[688] *Ibid*,, p. 196.
[689] Symbolic tradition is a kind of tradition which implies transfer of property through an instrument, document or similar. Symbolic tradition applies primarily in case of remote objects (from the perspective of both the possessor and acquirer) and those that cannot be physically rendered. It is used instead of physical surrender when certain goods need to be transported. It is based on physical handover of documents (bill of lading). One of the examples of symbolic tradition is also cattle labelling, on the occasion of which a livestock unit is marked with a trader's label as a proof that the unit is now the property of the buyer (as to avoid the need to physically detach every unit from the herd immediately after the purchase) (Klarić, Vedriš, 2006 p. 211).
[690] County Court in Varaždin, Gž-116/08-2 of 9 April 2008.

meet regularly and, the court held, ''that there was a danger of a verbal and physical conflict between the parties, which indicates that the claimant did not leave the apartment voluntarily but the circumstances made her do so, particularly the respondent's attitude towards her in case no. P-30/00. On the other hand, the County Court found that when ordering the respondent to provide the claimant with compensation for his unjust enrichment resulting from the claimant's apartment abandonment, the first instance court neither found sufficient factual background for its decision nor clarify the respondent's behaviour nor explained why exactly the claimant was forced to leave the apartment. Moreover, the second instance court highlighted that the first instance court, without stating a logical ground for its opinion, found irrelevant for the outcome of the case that the claimant could or could not enter the apartment. The second instance court concluded its reasoning with the thesis that the crucial point in the dispute was whether the respondent had directly or indirectly prevented the claimant from co-possessing the apartment with his action or not and the first instance court failed to provide an answer to this question. Thus, the second instance court set aside the contested judgment.

As demonstrated above, it is not clear whether the claimant should be entitled to compensation for not using common property in situations where property co-possession is almost impossible. This issue becomes particularly evident when it comes to small apartments where personal contacts cannot be avoided. In such cases, one co-owner does not even wish to co-possess the common property (e.g. due to the fear that it might come to domestic violence), so it cannot be expected that he/she will express his/her will to possess the property in an appropriate way.

Consequently, with the aim to ensure legal security and uniform application of law, the legislator should adopt a special rule which would regulate situations in which a co-owner who does not want co-possession of property, shall be entitled to compensation without clearly expressing his/her will to possess the respective property. Indeed, the Act on the Protection against Domestic Violence[691] could include an irrebuttable presumption of fact (*praesumptio juris et de jure*), according to which it could be automatically assumed that a person, victim of domestic violence, due to which he/she has left the respective property, has expressed his/her will for property possession in a proper way.[692, 693] That way, the legislator would recognize and protect the prevalence of the interest to protect a person from economic violence over the interest of the perpetrator and over the substantive truth-finding principle in a litigation (civil action).[694] Implementation of such a rule would improve the procedural status of a co-owner who has left common property due to domestic violence-related acts and thus is not able to co-possess it.

[691] Act on the Protection against Domestic Violence, Official Gazette no. 70/17, 126/19, 84/21, 114/22, hereinafter: APDV.

[692] In its Article 6 paragraph 1 item 13, the APDV already mentions the right of a victim of domestic violence to be provided with temporary accommodation in a convenient institution. Article 10 paragraph 1 item 5 of the APDV defines economic violence as preventing the use of common or personal property and preventing disposal of property acquired based on employment income or inheritance.

[693] Regardless of the proclaimed right of a victim of domestic violence to temporary accommodation in a convenient institution, existence of removal measures for perpetrators of domestic violence, foreseen in Article 13 of the APDV and duty of urgent intervention by competent bodies in case of domestic violence, envisaged in Article 4 of the APDV, it may happen that the victim leaves her/her apartment without activating the protection measures laid down in the APDV.

[694] Moral and tangible goods protected by truth-finding limitation in civil proceedings are undoubtedly more significant from the social perspective than the court's potential benefit which could be gained if the court would be authorized to ignore them. Legal presumptions bear such relevance, for example. (Triva, 1978 p. 128).

6. (SECOND) APPEAL BY PERMISSION

What is imposed in the light of the 2019[695] and 2022[696] amendments to the Civil Procedure Act is the question of the legal effects of the stance of the SCRC with regard to the possibility of filing an appeal against judgements in cases revolving around claims for compensation for having used common property or having benefited from it. The amendments were aimed at new appeal regulation, based on which appeal has become redress[697] (Poretti, Mišković, 2019 p. 505). In fact, the 2019 amendments transformed appeal into redress with the intention to promote the role of SCRC in ensuring uniform application of law and corresponding equality for all. Making a decision on the permissibility of an appeal is now detached from decision-making on its substance. The 2022 amendments regard appeal by permission of the SCRC as the only type of appeal (review) (Jug, Pajalić, 2022 p. 37). The SCRC shall permit an appeal if it can encourage a decision on an issue that has been elaborated by lower courts and is highly relevant[698] for reaching a final decision in the dispute, for uniform application of law and corresponding equality for all or for judicial practice development.[699, 700] There are some doubts whether the new regulation will impact the possibility of lodging this legal remedy in proceedings similar to those mentioned in this paper. More precisely, there is a chance that the SCRC permits, based on the above CPA amendments, an appeal only in those proceedings which have already been tackled by it and the ruling of the second instance court is based on SCRC reasoning. However, taking into account the reasons presented in the first instance and appeal proceedings, new legislation, international treaties and decisions of the Croatian Constitutional Court, European Court of Human Rights and Court of Justice of the European Union, one can say that the relevant case-law should be reviewed.[701, 702]

Since the SCRC has already adopted a stance in the aforementioned proceedings, it can be assumed that the possibility of an appeal is reduced to review of the relevant case-law as a result of the changes in the Croatian legal system, initiated under the influence of decisions of the Croatian Constitutional Court,[703] European Court of Human Rights and Court of Justice of the European Union. Also, since Article 3 of the Croatian Constitution[704] depicts the inviolability of property and ownership rights as one of the highest values of the constitutional order and since its Article 48 guarantees the right to property, it is to be expected that the workload of the Constitutional Court will grow.[705, 706] Yet, it should be pointed out that Article 62

[695] Act on Amendments to the Civil Procedure Act, Official Gazette no. 70/19, hereinafter: AACPA-19.

[696] Act on Amendments to the Civil Procedure Act, Official Gazette no. 80/22, hereinafter: AACPA-22.

[697] Appeal (review) is an extraordinary, autonomous, devolving, unsuspendible, limited and bipartite legal remedy used against an effective second instance decision made following an appeal against a first instance decision (Triva, Dika, 2004 p. 718).

[698] In the event of an appeal (review), the SCRC should make decisions that should serve as a precedent and guiding light for lower courts. That way, the outcome of court proceedings would become more predictable and the legal security would increase. What really matters here are legal standards which are shaped only by the SCRC while the legislator only adopts criteria that needs to be met by the SCRC. To ensure uniform application and progress of law, it is necessary to deal with relevant legal issues. (Bratković, 2018 p. 860).

[699] The new appeal regulation expects from the SCRC to provide, as the highest court in the country, uniform application of law and corresponding equality for all. (Bratković, Katić, 2019 p. 5).

[700] Article 62 paragraph 1 of the AACPA-22.

[701] Article 62 paragraph 1 item 4 of the AACPA-22.

[702] If a case involves interpretation of EU law in which regard the lower courts have not submitted an application for a prior decision to the Court of Justice of the European Union, the second appeal should be permitted since the SCRC is obliged, as the highest instance in Croatia, to submit such an application (Jug, Pajalić, 2022 p. 38).

[703] Hereinafter: CCRC.

[704] Constitution of the Republic of Croatia, Official Gazette of the Republic of Croatia no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, hereinafter: CRC.

[705] In the period from 1 August 2019 to 1 November 2022, the CCRC received 4800 constitutional complaints relating to second appeal. This figure comprises both appeals permitted *ex lege* and appeals by permission (Arlović, 2022).

[706] In this context, one should bear in mind that the CCRC is not in charge of interpreting laws, which is primarily a task of regular courts. This particularly concerns procedural rules such as requirements for filing legal remedies. The

of the Constitutional Act on the Constitutional Court of the Republic of Croatia[707] stipulates that everyone can lodge a constitutional complaint with the Constitutional Court if he/she deems that state authorities have breached one of his/her human rights or fundamental freedoms guaranteed by the constitution. If there is another legal pathway to defend his/her allegedly violated rights, a person can lodge a constitutional complaint if that pathway has already been exhausted. In cases in which an appeal is permitted, the legal pathway is regarded as exhausted if the application for appeal permission has been decided upon. To sum up, an appeal in cases with the features described in this paper should be permitted if the Constitutional Court has already handled them and made a referring decision while a constitutional complaint can be lodged only if the application for appeal permission has already been decided upon. In real life, this *circulus vitiosus* can be tackled by instructing the parties to submit an application for appeal permission to the SCRC and lodge a constitutional complaint to the Constitutional Court.[708] Therefore, the Constitutional Court sends a notice of appeal (Croatian: revizijsko prismo) to applicants, informing them that it is going to suspend the decision-making on their constitutional complaint until the SCRC makes a decision on their application for appeal permission. If an application for appeal permission is rejected, the applicant is obliged to immediately inform the Constitutional Court thereon, stating the reference number of his/her constitutional complaint in a separate letter. In the event that the SCRC permits the appeal, a new constitutional complaint can be lodged within 30 days after receiving the decision on appeal permission.[709]
On the other hand, judges of the SCRC believe that the new appeal regulation will be embraced by the CCRC since it is expected to considerably decrease the number of constitutional complaints. Their opinion is based on the fact that Article 385.a paragraph 2 of the CPA prescribes that the SCRC shall permit an appeal if the party demonstrates that he/she has experienced substantial violation of one of his/her fundamental human rights guaranteed by CRC and European Convention on Human Rights (right to a fair trial, right to an access to court, right to an effective remedy, right to an appeal, right to reasoning, right to home, right to peaceful enjoyment of possessions) in the first and second instance proceedings as a result of a severe breach of civil action rules and substantive law, and that the party has, if possible, complained thereabout at lower instances. Yet, the same judges stress that illegality and irregularity at lower instances cannot be always interpreted as violation of fundamental human rights and the scope of second appeal should not be expanded much. Finally, they hold that the parties should indicate possible violation of fundamental human rights already in the first instance proceedings since such a legal pathway is promoted both by the CCRC and the European Court of Human Rights (Jug, Pajalić, 2022 p. 38).
What also has to be highlighted is that the chances of using the instrument of second appeal can be soon diminished due to the intention of the SCRC to focus on its case-law (Ljubenko, Nagy, 2022 p. 54), which may be regarded as restriction of the right to a fair trial, guaranteed by Article 6 paragraph of the European Convention on Human Rights.[710] The right to an access to court is deemed violated when the respective legal rules cease to serve as a tool for ensuring legal security and effectiveness of justice, and become an obstacle for the party to plead his/her case before the court (Gović Penić, 2022 p 437). In the end, the future will show whether the 2022 amendments to the CPA will accomplish the set gaols and simplify the appeal

basic task of the CCRC is to examine whether the legal effects of interpretation of regular courts are compliant with the CRC from the aspect of the protection of human rights and fundamental freedoms. Therefore, in every single case, the CCRC shall consider whether the SCRC has provided the applicant with an appropriate access to court from the perspective of the rule of law (Gović Penić, 2022 p 447).

[707] Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette no. 99/99, 29/02, 49/02, hereinafter: CACCRC.

[708] Article 64 sets forth that a constitutional complaint can be lodged within 30 days after receiving the decision on appeal permission.

[709] Constitutional Court of the Republic of Croatia, U-III-xxxx/2021 of 1 June 2021.

[710]Europe Convention on Human Rights (former European Convention for the Protection of Human Rights and Fundamental Freedoms), Official Gazette, International Treaties no. 8/97, 6/99, 14/02, 13/03, 9/05, 1/06, 2/10, 13/17, hereinafter: ECHR.

procedure or the number of constitutional complaints and applications submitted before the European Court of Human Rights will continue to rise.

7. CONCLUDING CONSIDERATIONS

Some cases handled by Croatian courts have impelled the Supreme Court of the Republic of Croatia or more precisely, its Civil Law Department to adopt the stance, according to which a co-owner whose exercise of his/her ownership rights was not proportional to his/her fractional interests in the property shall compensate the co-owner who was not in possession of the property for all the benefits derived from such property use. On such an occasion, the claim does not have to include a request for surrender of the property (thing) if the (co-)owner has expressed his/her will to possess the property in an appropriate way. In the referring judicial proceedings, the claimants seek surrender of possession from the respondents, i.e. co-owners of property (thing) or vice versa, the respondents have taken possession of the claimants' share in the property and refuse to provide them with co-possession. The claimants are granted the right to compensation since the respondents used the property and benefited from it during the time of their possession. Therefore, the court provided the claimants with compensation in the form of forgone benefits (i.e. rent for using the claimant's share in the property).

What is imposed here is the question what means that the (co)-owner's will shall be expressed in a way convenient to detect an intention to possess property (thing)? This legal standard is expected to provide the court with the possibility to adapt the legal standards to the needs of a concrete case. One of the key elements for making the right decision in such cases is the way in which surrender of possession is sought and carried out. In real life, direct surrender does not mean bringing the acquiring into the property but handing over instruments for controlling the property possession, e.g. front door keys. In this light, the judiciary believes that it is of utmost importance to come into possession of a property possession controlling instrument to come into possession of the property itself and that cannot always be achieved by obtaining a simple approval for entering the property.

What bears enormous relevance in this context are situations where the relationship between property co-owners is so hampered that property co-possession is not possible and then one co-owner leaves the property voluntarily. Consequently, with the aim to ensure legal security and uniform application of law, the legislator should adopt a special rule which would regulate situations in which a co-owner who does not want co-possession of property, shall be entitled to compensation without clearly expressing his/her will to possess the respective property. Indeed, the Act on the Protection against Domestic Violence could include an irrebuttable presumption of fact (praesumptio juris et de jure), according to which it could be automatically assumed that a person, victim of domestic violence, due to which he/she has left the respective property, has expressed his/her will for property possession in a proper way. That way, the legislator would recognize and protect the prevalence of the interest to protect a person from economic violence over the interest of the perpetrator and over the substantive truth-finding principle in a litigation (civil action).

What is imposed in the light of the 2019 and 2022 amendments to the Civil Procedure Act is the question of the legal effects of the stance of the SCRC with regard to the possibility of filing an appeal against judgements in cases revolving around claims for compensation for having used common property or having benefited from it. More precisely, there is a chance that the SCRC permits an appeal only in those proceedings which have already been tackled by it and the ruling of the second instance court is based on SCRC reasoning. However, taking into account the reasons presented in the first instance and appeal proceedings, new legislation, international treaties and decisions of the Croatian Constitutional Court, European Court of Human Rights and Court of Justice of the European Union, one can say that the relevant case-law should be reviewed. To sum up, an appeal in cases with the features described in this paper should be permitted if the Constitutional Court has already handled them and made a referring decision while a constitutional complaint can be lodged only if the application for appeal permission has already been decided upon. In real life, this circulus vitiosus can be tackled by instructing the parties to submit an

application for appeal permission to the SCRC and lodge a constitutional complaint to the Constitutional Court. It is to be expected that the workload of the Constitutional Court will grow as a result of a growing number of lodged constitutional complaints due to violation of ownership rights.
What also has to be highlighted is that the chances of using the instrument of second appeal can be soon diminished due to the intention of the SCRC to focus on its case-law, which may be regarded as restriction of the right to a fair trial, guaranteed by Article 6 paragraph of the ECHR. To conclude with, the future will show whether the 2022 amendments to the CPA will accomplish the set gaols and simplify the appeal procedure or the number of constitutional complaints and applications submitted before the European Court of Human Rights will continue to rise.

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