# SOME CONSIDERATIONS ABOUT JOINT POSSESSION AND SEPARATION OF GOODS IN THE NEW ROMANIAN CIVIL CODE

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**Abstract**. *The study is an analysis of the provisions of the Romanian Civil Code regulating joint possession and partition of goods.*

*In the presented context, based on the normative inconsistency within the legislature regarding the two issues discussed, there were made proposals for regulations regarding their unity and the desire to avoid different interpretations.*

*Concerning the problem of joint possession there are about to be established some general rules, regardless of their source and partition about an intervention legislature, meaning marginal change topography and name of contents Chapter IV of Title II of Book III. Consequently, it is necessary and appropriate to modify the names of all sections and subsections and the content of all articles of this chapter.*

*Specifically, Chapter IV should be placed immediately after Chapter I (About Goods in general), Title I, and his name should be "About the Common Goods".*

*Also, this chapter should have four sections, namely: Section 1 - Common Provisions, Section 2 - Partition in joint ownership, Section 3 - Condominium common ownership, and Section 4 - Partition.*

*The content of the articles that compose Chapter IV should refer generally to "common goods" or to the joint ownership or Partition in the condominium, as appropriate.*

*The proposed solution would eliminate any confusion among the previsions of the Civil Code. "Community of goods" is normal unless the owners have the status of spouses and for others only if it relates to the "ownership".*

**Keywords:** *Romanian Civil Code, joint possession, partition of goods.*

## 1. The notion of joint possession

In tune with the opinions expressed in the research literature, any "partition" necesarly implies a "joint possession"[1] (s.n.). In other words, the "division of property" presents itself as the main way in which joint possession can be ended.

The present Civil Code[2], as well as the Romanian Civil Code since 1864[3], just conjures joint possession[4], without establishing its significance.

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[1] See: I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole*, Editura C. H. Beck, Bucureşti, 2013, p. 1244; Gh. Comăniţă, *Partajul judiciar*, Editura Lumina Lex, Bucureşti, 2002, p. 7.

[2] *Law no. 287/2009 concerning the Civil Code* was published in the Official Gazette of Romania, part I, no. 511 from the 24th of July 2009 and republished in the no. 505 from the 15th of July 2011. Law no. 287/2009 has entered into force starting with the 1st of October 2011, according to Article 220 (1) from *Law no. 71/2011 for the implementation of the Law no. 287/2009 concerning the Civil Code,* published in the Official Gazette of Romania, part I, no. 409 from the 10th of June 2011. *Brevitatis causa*, in order to avoid reinteration and for the ease of expression, hereinafter, in the present study, references to the Law no. 287/2009 concerning the Civil Code shall be made, as a general rule, by using the abbreviation "Civ. C." or by using the expression "the present Civil Code".

[3] The Romanian Civil Code since 1864 was elaborated after the model of the Napoleonic Civil Code (1804) in 1864 and promulgated in the 4th of December 1864. The Code entered into force in the 1st of December 1865. According to Article 230 lett. a) from the Law no. 71/2011, starting with the 1st of October 2011, the Civil Code from 1864 was repealed, with the exception of the previsions of the Articles 1169-1206, which were repealed at the date of the entry into force of the Law no. 134/2010 concerning the Code of Civil Procedure, published in the Official Gazette of Romania, part I, no. 485 from the 15th of July 2010 and republished in the no. 545 from the 3rd of August 2012. We specify that this law has entered into force on the 15th of February 2013, according to Article 81 from the Law no. 76/2012 for the implementation of the Law no. 134/2010 concerning the Code of Civil Procedure, published in the Official Gazette of Romania, part I, no. 365 from the 30th of May 2012. *Brevitatis causa*, in order to avoid any confusion, hereinafter, in the present paper, references to the Civil Code from 1864 shall be made by using the expression "the old Civil Code", and references to the Law no. 134/2010 concerning the Code of Civil Procedure, by using the abbreviation "C. Civ. Pr.".

[4] The old Civil Code conjured joint possession only in Articles 728 and 791.

In concrete, Article 1143 (1) Civ. C., under the marginal denomination of "joint possession", provides that no one can be forced to remain in joint possession (the 1st thesis) and that the successor can ask at any time to get out of the joint possession, even when there are conventions or testamentary clauses which provide otherwise (the 2nd theisis)[5].

References to the joint possession are also made by other texts of the Civil Code, as the following: Article 1142 (1) and (2) concerning the getting out of the joint possession in the case of goods that are family heirlooms only by means of voluntary partition[6]; Article 1155 (1) concerning the payment of creditors from the goods which are in joint possession and whose claims derive from the preservation or administration of the goods of the inheritance or that were born befor the opening of the inheritance; Article 2187 (4) concerning the indivisible account.

In the absence of a meaning established by the legislator[7], in the common language, the term "joint possession" has the meaning of "the ownership interest of two or more persons, in quotas, over some goods seen as an indivisible totality"[8].

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[5] With some differences of form and even of content, Article 1143 (1) Civ. C. assumed the previsions of the Article 728 from the old Civil Code.

[6] "Family heirlooms" are the goods that belonged to the members of a family and that witness its history. There are included in this category goods, as for example the correspondence carried aut with the family members, family archives, decorations, firearms collections, family portraits, documents, and also any other goods with special moral significance for the family (in this sense, see Article 1141 Civ. C.).

[7] According to Article 36 (4) from the *Law no. 24/2000 concerning the rules of legislative technique for the elaboration of the normative* acts, published in the Official Gazette of Romania no. 139, part. I, from the 31st of March 2000 and republished in the no. 260 from the 21st of April 2010, drafting texts is done by using the words with their current meaning in the Romanian maternal language, avoiding idioms. The drafting process is subordinated to the desideratum of understanding with wase the text by its addessees.

[8] See: *Dicţionarul explicativ al limbii române* (*Dex*), second edition, published under the aegis of the Romanian Academy, Institutul de Lingvistică „Iorgu Iordan", Univers Enciclopedic Publishing House, Bucureşti, 1998, p. 754.

So, from the analysis of the definition given by the Dex to the joint possession it results that, basically, for the existence of the joint possession, the following requirements must be cumulatively met: the existence of a common ownership interest in quotas; the ownership interest must belong to two or more persons; the object of the ownership interest is an indivisible totality of goods.

In accordance with this meaning, in the research literature, some authors have defined joint possession as being the ownership interest of several persons over an universality of goods[9] or as a form of property which is characterized by the fact that a mass of goods belongs, in different quotas, to several persons who can exercise together and simultaneously, the rights recognized by the law to the owners, so that the asset is not split in its materiality (s.n.)[10].

Also, in the research literature it was shown that, when the ownership interest of several persons stretches over a single good or over some goods seen in a singular manner (*ut singuli*), their right depicts in the form of a "common ownership interest"[11].

In this context, we appreciate that, according to the present Civil Code, the common ownership interest can take two forms, namely [Article 632 (1)]: the common ownership interest in quotas or joint ownership [lett. a)]; common ownership interest as a condominium [lit. b)]. Within joint ownership the right is divided in quotas or in fractions, and in the case of the condominium the right is not fractioned, unlimited, with reference to the goods that represent its object[12].

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[9] See: I. Adam, *Drept civil. Drepturile reale*, All Beck Publishing House, Bucureşti, 2002, pp. 445-446; V. M. Ciucă, *Procedura partajului succesoral*, Polirom Publishing House, Iaşi, 1997, p. 11; C. Stătescu, *Drept civil. Persoana fizică. Persoana juridică. Drepturile reale*, Editura didactică şi pedagogică, Bucureşti, 1970, p. 709.

[10] See: Al. Bacaci, Gh. Comăniţă, *Drept civil. Succesiunile*, Universul Juridic, Bucureşti, 2013, p. 253.

[11] See: I. Leş, *op. cit.*, p. 1309.

[12] Idem.

So, if the common ownership interest of several persons stretches over some universalities of goods (patrimony or a fraction of the patrimony), we are in the presence of the status of joint possession.

Finally, according to the research literature, the distinction between joint ownership and joint possession concerns their object. In other words, the object of joint ownership is one good or singular goods (seen *ut singuli*). In exchange, joint possession stretches over a universality of goods[13]. In fact, even though the two concepts should not be confused, the research literature and the jurisprudence in the field often use them, one instead of the other[14].

Also, it was stated that the difference between "joint possession" and "common ownership" is not qualitative, but quantitative. More than that, in the old research literature it was expressed the opinion that the distinction must not be generalized, because "common ownership in quotas is a type of joint ownership, just as joint possession is a type of common ownership in quotas"[15].

In exchange, other authors, in a trial of generalization, see joint possession as "a way of the patrimony which, belonging to several persons, has as an object an undivided universality of goods"[16].

At last, some authors[17], combining the doctrinal thesis previously exposed, appreciate that joint possession is a "form of the common ownership", more precisely of the ownership in quotas, even though Article 632 Civ. C. does not acknowledges it as such. Hereinafter, the same authors state that joint possession appears as "a

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[13] Idem.

[14] See: I. P. Filipescu, *Drept civil. Dreptul de proprietate şi alte drepturi reale*, ediţie revăzută, Actami, Bucureşti, 1996, p. 154; D. Lupulescu, *Drept civil. Drepturile reale principale*, Lumina Lex, Bucureşti, 1997, pp. 61-62.

[15] See: Fr. Deak, *Tratat de drept succesoral*, Actami, Bucureşti, 1999, p. 544.

[16] See: I. Leş, *op. cit.*, p. 1244; M. N. Costin, *Dicţionar de drept procesual civil*, Editura didactică şi pedagogică, Bucureşti, 1977, p. 489.

[17] See: C. Macovei, M. C. Dobrilă, *Cartea a IV-a. Despre moştenire şi liberalităţi*, in "Noul Cod civil. Comentarii pe articole", (coord.) Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C. H. Beck, Bucureşti, 2012, p. 1186.

specific condition of the ownership in quotas, common in the case of the transmission of the inheritance".

We consider that, as a principle, the question that arises is weather "joint possession" can have as an exclusive object a "patrimony" or only the "ownership interest", as it can be deduced from the common language and even from the legal one, and also from the research literature in the field, or it can concern a "patrimony", "an universality of goods" or "a good" seen as *ut singuli*, where necessary.

Agreeing that the status of joint possession can concern a patrimony or an undivided mass of goods, we express our reserves about the doctrinal conclusion that joint possession can have as an exclusive object "the common ownership interest in quotas" over them.

For the following reasons, we consider that joint possession can have as an object any "common good", no matter that it is common in quotas or it is a condominium. Having as object "common goods", joint possession can concern any right *in rem* or even rights-claims.

Refering to the first aspect, the criticised doctrinal thesis is strongly influenced by the fact that, as a general rule, "joint possession" is analyzed in the context of the works dedicated to the "field of inheritance". Indeed, in the case of inheritance, especially of the legal one, the patrimony of *de cujus* is transmitted to the heirs according to the quotas foreseen by the law[18].

Nevertheless, in the field of testamentary inheritance there is the posibility of undivided transmission of the patrimony or of a category of goods or even of certain goods seen as *ut singuli* towards two or more persons. Indeed, with the exception of the texts dedicated to the successional reserve, there cannot be identified a legal norm that obliges *de cujus* to transmit them in a divided way. For example, a testamentary prevision through which *de cujus* transmits towards two or more heirs the ownership interest over a certain land without establishing a quota for each of them or without establishing a certain mathematic criterion of division or without leaving to the assessment

[18] See: Article 971 and the following Civ. C.

of the heirs or of any another person the way of establishing their quotas, is perfectly legal. Obviously, in this case, from the moment of the acceptance of the inheritance and until the establishment of the quotas rightful for each heir, the ownership interest over the land is not transmited in a "divided way", but in condominium.

In fact, in a general way, Article 1055 Civ. C. provides that the universal legatee is the testamentary prevision which confers one or several people successional vocation to the entire inheritance. In exchange, according to the Article 1056 (1) Civ. C., the universal legatee is the testamentary prevision which confers to one or several people vocation to a quota of the inheritance[19]. Obviously, in the absence of a demand imposed by the law, "the inheritance" or "the fraction of the inheritance", if it is transmited to two or several people, it can be fractioned in quotas for each person, or undivided.

Without having to enter the details, in this context, the tipical example of joint possession whose object is "a mass of goods" over which the owners exert, until the partition of goods, condominium rights, is the one of the "common goods of the spouses during the matrimonial property regime of the legal or conventional community of goods.

In the context, we specify that, as a general rule, in the research literature is accredited the thesis that, in case of divorce, if the spouses were married under the matrimonial property regime of the legal or conventional community of goods, their condominium community over the common goods transforms into a co-ownership in quotas. Obviously, for this transformation to produce, it is necessary to establish the quota of each spouse at the moment of the acquirement of the common goods in condominium. In other words, this transformation does not produce in full right (*ape legis*), but at the

[19] According to Article 1056 (2) Civ. C., by "fraction of the inheritance" we understand: either the ownership interest over a quota from it [lett. a)]; either a item of the ownership interest over the entire of over a quota of the inheritance [lett. b)]; either the ownership interest or an item over the entire or over a quota of the universality of all the goods determined according to their nature or to their provenience [lett. c)].

request of the spouses, within the separation of goods decided by notarial act or by the court of justice through its final ruling.

Also, without getting into the details, in this context, we evoke the fact that Article 357 Civ. C. regulates "the liquidation of the spouses' community of goods" by means of the "partition of goods". In fact, the establishment of the quota which is proper to each of the spouses represents one of the operations of the partition of the common goods in condominium, according to Article 357 (2) and to Article 358 (2) Civ. C.

With regard to the presented aspects, we must admit that, within the "joint possession", the persons involved can have, where necessary, "common goods in quotas" or "in condominium".

In relation to the other aspect, in our opinion, "the object of the joint possession" must be analysed "in the new legal context", determined by the entrance into force of the current Civil Code.

In concrete, according to Article 535 Civ. C., there are considered goods the tangible or intangible things which represent the object of the property right.

In the research literature it has been observed that the text of the Article 535 Civ. C., establishing the meaning of the term "goods", did not assume their classic division in "tangible" and "intangible" [20], in the sense of "goods", and of "property rights" over them[21]. Indeed, Roman legal counsels considered all things as being "tangible goods", including the ownership interest. In exchange, they qualified all

[20] For some details related to the division of goods in "tangible" and "intangible", see: Gh. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, VIIth edition, revised by M. Nicolae, P. Truşcă, Universul Juridic, Bucureşti, 2001, pp. 103-104; E. Lupan, I. Sabău-Pop, *Tratat de drept civil român*, vol. I, *Partea generală*, C. H. Beck, Bucureşti, 2008, pp. 85-86; O. Ungureanu, *Drept civil. Introducere*, Vth edition, revised, All Beck, Bucureşti, 2000, pp. 88-89; O. Ungureanu, C. Munteanu, *Tratat de drept civil. Bunurile. Drepturile reale principale*, Hamangiu, Bucureşti, 2008, pp. 50 and the following.

[21] See: *Dex*, *op. cit.*, p. 119.

patrimony rights as being "intangible goods", except the ownership interest[22].

At present, according to Article 535 Civ. C., from a legal point of view, only "things" [23] are "tangible" [24] or "intangible"[25].

In the research literature, there are considered "tangible" the things that have a physical existence, directly perceivable with the help of human senses, or indirectly through various mechanisms[26]. There are directly perceivable, for example, lands, buildings and vehicles,

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[22] For some details to this effect, see: V. Hanga, M. – D. Bocşan, *Curs de drept privat roman*, Rosetti, Bucureşti, 2005, p. 110; C. Munteanu, *Consideraţii asupra bunurilor incorporale în actualul şi noul Cod civil*, in „Dreptul" no. 3/2010, p. 62; I. Reghini, Ş. Diaconescu, P. Vasilescu, *Introducere în dreptul civil*, 2nd edition, revised, Colecţia Universitaria, Sfera Juridică, Cluj-Napoca, 2008, p. 316.

[23] In common language, the term "thing" designates everything that exists in reality, besides beings, and which is conceived as a freestanding unity (to this effect, see: *Dex*, *op. cit.*, p. 548). At present, in legal terms, for a "thing" to convert into a "good" it's necessary to meet three requirements, namely: to have economic value, that is to be assessable in money; to be useful to man, meaning that it must serve him for satisfying different material and/or spiritual necessities; to be the object of a property right. Under the old regulations, in the absence of a legal text which to establish its significance, in the research literature it was decided that for the existence of the "good", along with the possibility to evaluate it in money and to assess its utility for man, it was enough the "possibility" (susceptibility) to reapproche it by patrimony right (to this effect, see: Gh. Beleiu, *op. cit.*, p. 94; E. Lupan, I. Sabău-Pop, *op. cit.*, p. 144; M. Mureşan, P. Ciacli, *Drept civil. Partea generală*, Cordial Lex, Cluj-Napoca, 2000, p. 80). Obviously, at present, it is not enough for the thing to be "reapproachable", it must actually be the object of a patrimony right. Therefore, under this aspect too, Article 535 Civ. C. marks a new legal option.

[24] In common language, the term "tangible" is explained as "something pertaining to the body" (in this sense, see: *Dex*, *op. cit.*, p. 230).

[25] For a censure of the idiom "intangible things" from the content of the Article 535 Civ. C., see: E. Chelaru, *Titlul I. Bunurile şi drepturile reale în general*, in "Noul Cod civil. Comentarii pe articole", (coord.) Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, C. H. Beck, Bucureşti, 2012, p. 580. Agreeing with the criticism of the author, we do specify that, in reality, Article 535 Civ. C. refers to "intangible things". Even though the two phrases are synonymous, for the sake of the accuracy of expression, it is preferable we use the well-known legal collocation.

[26] For some details to this effect, see: V. Hanga, M. – D. Bocşan, *op. cit.*, p. 110; C. Munteanu, *op. cit.*, p. 62; I. Reghini, Ş. Diaconescu, P. Vasilescu, *op. cit.*, p. 316.

and there are indirectly perceivable electromagnetic waves or the ones assimilated to them, and also the energy of any kind[27].

In exchange, there are "intangible" the things which have an ideal or an abstract existence. The research literature includes into this category, for example, claims, bearer securities[28], Commerce Funds, clientele, effects of trade and intellectual creation[29].

Hence, according to Article 535 Civ. C., in order to be in the presence of a "good" is required the concomitant existance of a "thing", whether it is tangible or intangible, and of a "patrimony right" over that thing, whether it is *in rem*[30] or a right-claims. In a

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[27] See: Article 539 (2) Civ. C.

[28] See: E. Chelaru, *op. cit.*, p. 580. We can see that some "intangible things", listed by the distinguished author, incorporates "patrimony rights". We bear in mind, for example, "the claims" and "the bearer securities". Furthermore, there are authors who, analyzing the previsions of Article 535 Civ. C., have come to the conslusion that in the category of "intangible goods" there are included "rights *in rem*, others than the right of ownership". Obviously, this "conclusion" evoques, in fact, the old meaning that the Roman jurists have given to the collocation "intangible goods", being contrary to the new legal option of the Romanian legislator (in this sense, see: D. - Şt. Spânu, *Drept civil. Drepturile reale principale*, 2nd edition, revized, Universul Juridic, Bucureşti, 2012, p. 31).

[29] In the research literature, some authors consider that "intellectual property rights have as an object an intangible good, namely the intellectual creation and are not to be confused to the ownership over the material object in which is incorporated" (to this effect, see: V. Stoica, *Drepturile reale principale*, C. H. Beck, Bucureşti, 2009, p. 40, quoted by E. Chelaru in *op. cit.*, p. 580). With regard to the new legal significance of the term "goods", the statement of the author who said that "intellectual creation" is an "intangible good" is obviously outdated. In reality, intellectual creation is an "intangible thing" (for some details concerning patrimony rights which are born from the intellectual creation, see: T. Bodoaşcă: *Contribuţii la studiul reglementărilor legale referitoare la definirea noţiunii drepturilor de autor şi durata protecţiei juridice a acestora*, in "Dreptul" no. 6/2009, pp. 76 and f.; Idem, *Unele consideraţii asupra drepturilor rezultate din creaţia intelectuală în reglementarea Codului civil* (*Legea nr. 287/2009*), in "Dreptul" no. 6/2012, pp. 25 and f.; Idem, *Dreptul proprietăţii intelectuale*, 2nd edition, revized, Universul Juridic, Bucureşti, pp. 11 and f.).

[30] According to Article 551 Civ. C., there are rights *in rem*: the ownership right (point 1); the right of superficies (point 2); the right of usufruct (point 3); the right of use (point 4); the right to stay in (point 5); the right to servitude (point 6); the right to manage (point 7); the right to concession (point 8); commonage (point 9); *in rem* guarantee rights (point 10); other rights to which the law recognizes this character (point 11).

syntesized manner, from a strictly legal point of view, the "thing" and the "patrimony right" represent the required and sufficient elements for the legal existence of the "good".

In this context, we specify that the actual legal significance given to the term "goods" was also consacrated by default by the old Romanian Civil Code. Hence, for example, Article 480 from the old Civil Code, with all its imperfections which, over time, were reproached to it, defined "ownership" as being "the right that someone has to enjoy and dispose of a thing exclusively and absolutely, but within the limits determined by law" (s.n.)[31]. Hence, according to this text, there was made a distinction between the terms "right" and "thing". Nevertheless, the authors of the old Civil code were inconsequents, because in other texts, they have materialized the Roman conception about the division of the goods into tangible and intangible. Thereby, for example, Article 479 from the old Civil code provided that "someone can have over the goods, either an ownership right or a right of use, commonage, or just a right to servitude" (s.n.)[32].

Vis a vis the presented aspects, it is obvious that the thesis which concerns joint possession exclusively as a form of the "ownership right" ignores obvious realities.

Finaly, any "property right" (*in rem* or right-claims) must be analysed with reference to a (tangible or intangible) "thing". As we have already stated, for the legal existence of the "good" there are necessary a "thing" and a "patrimonial right" exercised on it by one ore or more persons.

Obviously, factually and legally it is possible that "goods which are in joint possession" to be made up by things on which there are exercised different patrimonial rights. Hence, for example, it is possible that, within the "mass of goods in joint possession" there are things over which it is exercised an ownership right and things over

[31] To the same effect, see, for example, Articles: 488, 504, 513, 517, 521, 526, 528, 539 and 540 from the old Romanian Civil Code.

[32] To the same effect, see, for example, Articles: 520, 576 and 644 from the old Romanian Civil Code.

which it is exercised only a right of usufruct. Also, it is just as likely that in joint possession there are different right-claims related to different things.

In fact, the inconsistency of the criticized thesis can also be deduced from the inconsequence of some of its defenders. Hence, some authors[33], after stating beyond debate that joint possession is a "form of the common property", in the same context they affirm that "there is joint possession if the usufruct over a good is established in favour of several persons, and also in case there are several holders of the bare ownership over a good"[34].

More than that, even the Civil Code, regulating various aspects of joint possession, in some texts, refers in a generic manner to "goods". Hence, for example, Article 1142 (1) and (2), and also Article 1152 (2) Civ. C., previously evoked, refer to "goods that represent family heirlooms", and to the "goods of the inheritance". Obviously, these texts, analysed through the angle of Article 535 Civ. C., lead to the conclusion that there are considered different "things" over which *de cujus* has exercised various *in rem* rights of right-claims and which are transmitted to heirs through inheritance.

In respect to the presented aspects, we conclude that joint possession can have as an object a mass of common goods or a patrimony.

On the other hand, for the existence of joint possession it is absolutely necessary that the mass of common goods or the patrimony, where appropriate, to belong spliced or in condominium to two or more persons.

Finally, the existence of joint possession depends essentially on the community. In fact, the conserse is also valid.

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[33] See: C. Macovei, M. C. Doblilă, *op. cit.*, p. 1186.

[34] By the way in which they express, the authors disregard the significance of the term "goods", given by Article 535 Civ. C. Indeed, in the new legal context, it is wrong to talk, for example, about the "beneficial owner of a good" or about the "usufruct of a good", or about the "bare ownership of a good". In reality, we can talk about the "beneficial owner of a thing" or about the "usufruct of a thing", and the "bare ownership of a thing".

For the presented reasons, we appreciate that joint possession could be the state of a mass of common goods or of a patrimony which belongs to two or more persons until its partition.

In the research literature[35] it was observed that, very often, joint possession is determined by the death of a person that leaves many legal heirs, universal legateers or legateers with a universal title.

Nevertheless, joint possession does not represent only a specific condition of the inheritance[36]. Hence, joint possession could also have its origins in a law prevision, in the convention of the parties (for example, a sale – purchase contract or a certificate of incorporation), or it could represent an effect of cessation of the matrimonial regime of the legal or conventional community of goods of the spouses. Also, joint possession can be determined by the long use of some real estate by two or more persons and by their acquirement through adverse possession[37].

According to the research literature in the field[38], the status of joint possession is viewed in a reserved way, especially because of the fact that it is unorganized and it can produce adverse economic effects, often generating disputes concerning the exercise of the rights over the things which are in joint possession[39]. For these reasons the legislator has conceived joint possession as a "transitory status". Hence, as it was already evoked, Article 1143 (1) Civ. C., under the denomination "status of joint possession", states that no one may be compelled to remain in joint possession (1st thesis). The rightful heir

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[35] See: I. Leş, *op. cit.*, p. 1310.

[36] Unlike the old Civil Code, which in Title I (Articles 650-799) of the IIIrd Book (about various ways by which property is aquired), refered to "succession", the 4th Book (Articles 953-1163) from the actual Civil Code is entitled "about inheritance and liberalities" (s.n.). So, in the actual Civil Code the term "inheritance" is used, as a general rule, instead of the term "succession" from the old Civil Code.

[37] See: 916 and the following Civ. C.

[38] See: I. Leş, *op. cit.*, p. 1310.

[39] See: D. Alexandresco, *Explicaţiunea teoretică şi practică a dreptului civil român*, Atelierele grafice Socec & Co. Societate Anonimă, Bucureşti, 1912, tom. III, part II, p. 454-457, *apund* I. Leş, *op. cit.*, p. 1310; M. Cantacuzină, *Elementele dreptului civil*, All, Bucureşti, 1998, p. 247, *apund*, I. Leş, *op. cit.*, p. 1310.

can ask anytime to get out of the joint possession, even when there are conventions or testamentary clauses which provide otherwise (2nd theisis). We specify that the provisions of Article 1143 (1) Civ. C. have assumed, in an improved form, the previsions of Article 728 (1) of the old Civil Code.

Nevertheless, both in the old and in the actual regulation, the norms concerning the "status of joint possession" are placed in the context of the "partition of the inheritance". Consequently, as a question of principle, the question arises whether the imprescriptibility of the action of partition, regulated by Article 1143 (1) Civ. C. also applies when joint possession is generated by other causes then "inheritance". Obviously, strictly legal, the answer is negative. Indeed, Article 1143 (1) Civ. C. establishes a special rule, applicable solely in terms of inheritance (*generalis lex specialibus non derogat*, and *specialia generalibus derogant*).

In order to avoid different interpretations on this theme, we iterate the proposal that, *de lege ferenda*, some general rules are established with reference to joint possession, regardless of its source.

**2. General aspects about partition**

Etymologically, the Romanian term "partition" comes from the French noun "le partage", with the significance of the operation of division of a fortune or of some goods[40].

In the research literature[41] and even in the legislation[42] for the term "partition" there are used other terms or expressions, as "division"[43] or "getting out of joint possession" or "cessation of joint possession".

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[40] See: *Dex*, *op. cit*., p. 754.

[41] See: I. Leş, *Noul Cod de procedură civilă. Comentariu pe articole*, C. H. Beck, Bucureşti, 2013, p. 1244.

[42] See, for example, Article 1142 (1) and (2) and Article 1143 Civ. C. In fact, Article 1143 Civ. C. is established under the denomination of "status of joint possession".

[43] See: Article 728 and the following from the old Civil Code; Articles 1948 and 2593 (1) lett. f) from the actual Civil Code.

In common language, "partition" has the significance of an operation of division of a fortune between several persons entitled to master it[44].

In the absence of an express legal significance, under the old Romanian Civil Code, in the research literature[45], "partition" was defined as being "the legal operation that puts an end to the status of joint possession (joint ownership) through splitting in nature and/or through equivalent of the goods which are in joint possession, having as an effect the replacement with a retroactive effect of the ideal quotas over them, with exclusive rights of each of the co-owners over some goods determined in their materiality.

Some authors appreciate that the reference to "joint possession" justifies through the fact that the old Civil Code did not regulate common property in a general way, but only the splitting of the inheritance.

In the legal context generated by the entry into force of the current Civil Code, the same authors define separation as being the legal operation through which joint ownership is ended through the separation in nature or/and through equivalent of the goods that form its object, having as effect the replacement of the ideal quotas over them, with exclusive rights of each of the joint owners over some goods determined in their materiality.

The same authors say that between joint possession and common property in quotas there is no difference of quality, but only of quantity, the first having as an object a patrimony, and the second determined goods[46].

In our opinion, the authors, putting the sign of "qualitative" equality between "the patrimony" and "the determined goods", must rethink their theory. Ineed, it is widely accepted that "the patrimony" encompasses a "universality of rights and pantrimony debts". In fact, at the present moment, Article 31 (1) Civ. C. provides *expressis verbis*

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[44] See: *Dex*, *op. cit.*, p. 754.

[45] See: E. Chelaru, *op. cit.*, p. 726; Fr. Deak, *Tratat de drept succesoral*, p. 494.

[46] Idem.

that the patrimony includes "all rights and debts that can be evaluated in money and that belong to a person". Hence, the patrimony does not encompasse "goods", but only patrimonial rights over some goods. Also, the patrimony is not composed only of an active side (rights), but also of a passive side (debts). Obviously, "goods", as such, whether they are or not determined, representing unity between things and different patrimonial rights, have got only patrimonial active elements.

Beyond doubt, the good is "proper" if the patrimonial right over the thing belongs to a single person and "common" if the respective right belongs to two or more persons.

Contrary to this undeniable reality, the authors of the Civil Code were not concerned with the establishment of a minimum set of general rules, applicable to any "common goods", but only with the establishment of a set of special norms, for the case of the "coomon goods of the spouses" (Article 339 and the following) and of the "common ownership" (Articles 631-686).

Consequential in this normative manner, the authors of the Civil Code also conceived only some special norms referring to the "division of the common goods of the spouses" (Article 357 and the following) and to the "division of the common property" (Articles 669-686)[47].

Obviously, the speciale provisions evoked cannot be applicable to the situations in which holders of the common goods have other quality than the one of spouses, and the common patrimonial right is different from the property one, because *generalis specialibus non derogat*, respectiv *specialia generalibus derogant*[48].

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[47] The Civil Code also encompasses some previsions concerning the partition of inheritance (Articles 1143-1163), the ascendant partition (Articles 1160-1163) and the partition of certain "goods" (Article 1761, and Article 2187).

[48] We specify that Article 686 Civ. C. does not realize the general applicability of the Articles 669-685 Civ. C. refering to "partition", in all community cases, but only in the situation of the "co-ownership". Hence, according to this text, the previsions of the Articles 669-685 are appliable to the goods which are in co-ownership, regardless of its source, and also to the ones which are in condominium (s.n.).

Practically, hence was generated an obvious legal gap with a real and important potential of doctrinal interpretations and of different jurisprudential solutions[49]. For example, in the conditions in which Article 703 and the following from the Civ. C. do not provide that it is imposible to identify the legal regime applicable to the relationships between the usufructuaries or users, when two or more persons have the joint exercise the right of usufruct, and the one of use over the same thing, and neither the one applicable to the partition of those rights.

Furthermore, being ignored the legal significane given to the term "goods" and "mixing" in an aleatory manner the general with the particular, the authors of the current Civil Code "amalgamated" the norming process even in the case of the subjects for which they established special rules.

Hence, Chapter IV (Articles 631-686) of Title II (private ownership) of the IIIrd Book (about goods), even though a special context is established, under the name of "co-ownership", it encompasses numerous provisions that refer, in a general manner, to "common goods". This is the situation of, for example, Article 633, Article 634 (2), Article 636 (2), Article 637, Article 638 (2, 3), and also Articles 639-641 of the Civ. C.

The same situation can be found in the field of "partition". Hence, even though the regulations referring to partition (Articles 669-686) are provided in the special context of the "common property", they also encompass norms that refer, in a general and exclusive manner, to "common goods" or to them also. This is the situation of, for example, Article 676 Civ. C. and of Article 675, Article 677 (2), Article 678, and Article 679 (2), Articles 680-683 and Article 685 Civ. C.

In the case of these texts, the interpreter is confused, because he is in the position of opting between the significance given to the term

[49] Also, in the field of "legal partition", Article 979 Civ. proc. code states that the prosecution of any partition legal demand concerning *goods* over which the parties have a *co-ownership right* is done according to the procedure provided by the present title, with the exception of the cases in which the law provides another procedure (s.n.).

"goods" by Article 535 Civ. C. and the classical meaning of the term "things". Obviously, depending on his option, the legal consequences are different.

Hence, for example, according to Article 633 Civ. C. if the good is mastered in common, co-ownership is presumed to the contrary (s.n.). In case the term "good" is interpreted in the sense established by Article 535 Civ. C., Article 633 Civ. C. is applicable in all "community" cases, regardless of its object. In exchange, if this term is interpreted in the sense of "thing", the presumption provided by Article 633 Civ. C. is applicable only in the case the "community" has "co-ownership" as an object[50].

In our opinion, for remediating this situation, it is necessary for the legislator to intervene, for changinh the topography and the denomination of Chapter IV from Title II of the IIIrd Book of the Code. Consequently, it is also necessary the corresponding modification of the denominations of all sections and sub-sections, and also of the content of all articles encompassed in this chapter.

In concrete, Chapter IV should be placed immediately after Chapter I (about goods in general) from Title I, and its denomination should be "about common goods". Also, this chapter should have four sections, namely: Section 1 – common provisions; Section 2 – common goods in quotas; Section 3 – common goods in condominium; Section 4 – Partition. In the content of the articles that form Chapter IV there should be made reference, in a general manner, to "common goods" or to common goods in quotas or in condominium, where necessary.

The legal solution proposed would eliminate the fact that, in the regulation of the Civil Code, "community" is regulated only in case the holders have the quality of spouses and for the other persons only in case it has as an object "the ownership right". Also, hence it would be accomplished the "common law" for all those situations in which "community" concerns any patrimonial right, regardless of its sources and of the quality of its holders. Obviously, depending on the

[50] Article 632 (1) Civ. C. provides that the forms of "common property" are the property in quotas (co-ownership) and the condominium.

various normative needs, the legislator should also establish some special rules of the community for each case of right *in rem* and even of the right-claims, and also for their other holders than the spouses, including the case of its partition.

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