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Institute of common ownership right of France, Germany, Switzerland and the Netherlands

The features of the common property institution in the codifications of France, Germany, Switzerland and the Netherlands, which form the basis of the General Part of the Civil Code of the Republic of Kazakhstan, are considered in the article. The peculiarity of these civil codifications is that the recited norms of Roman private law coexisted in them along with national norms. The implementation and development of these rules led to the fact that over time taking into account some specifics in most countries two codifications German and French were developed in European countries. In accordance with them, the rules on common property were also developed. The work indicates that common property in the legislation of European states is characterized by the existence of a common right to common property, which is not unique, because its implementation depends on the will of other co-owners, which is a kind of restriction of the right of each participant to common property and the right to share, the implementation of which does not depend on the will of other members of the community, however, in some cases, requires the observance of certain rules - the preemption right. In addition, a legal community in European jurisdictions arises either on the basis of a contract, or by virtue of the law, it has both a real and a binding nature, it can be shared or joint. The principle of majority, and the principle of unanimity, which is used at making decisions on the management of property in common ownership is characterized both for the countries of Europe.

Keywords: common ownership, participatory share ownership, limited interest, owner, common thing, agreement, possession, use, disposal, property right.

The Roman-German law that emerged as a result of the reception of Roman law began to develop actively from the XIII century, and, after a certain time, became the law of almost all of Europe, excluding England. The subsequent process of the formation of nations and the formation of their states added national legal elements to it, with the result that the general principles of Roman law were integrated into national jurisdictions. The greatest interest in the aspect of the study of common property relations is the legislation of such Western European states as France, Germany, Switzerland and the Netherlands, since the civil legislation of these countries formed the basis of the Model Civil Code, on the basis of which the Civil Code of the Republic of Kazakhstan was developed.

France. Due to a number of historical events, France was divided into two halves. The southern part of France was considered a country of written law, since it was dominated by the Romanesque population and retained its effect, provided by the force of custom, Roman law. In the northern part, customary German law was applied, influenced by local folk customs, despite the fact that, as such, there was no common customary law in the northern part of France. Starting from the XIII century, all these customs begin to be synthesized under the influence of ordinances. As in most European countries, the unification of French law was greatly influenced by the reception of Roman law, which in some cases led to the neglect of local customs in favor of applying the general principles of Roman law.

Despite the desire to unite the law, this process in France was not entirely successful, due to the separation of the southern and northern regions, certain obligations guaranteed by the kings to individual provinces when they joined, class estate fragmentation based on various privileges. The situation changed only after the revolution, as a result of which France rushed to complete unity, creating the possibility of developing a common civil law for France, which ended with the adoption of the Civil Code of France in 1804.

The materials for the compilation of the French Civil Code were former local customs, ordinances, Roman law and French scientific literature [1; 37]. This codification consisted of three books, the first of which was devoted to persons, the second — to property and various modifications of property, the third — to ways of acquiring property rights.

Despite the fact that the French considered their code to be the height of perfection, it was repeatedly criticized. The incompleteness, the surface, the mechanicalness of the unifying principles were called among its shortcomings [1; 37]. One way or another, this act became widespread almost throughout the entire territory of Western Europe: in some countries it was adopted entirely (Belgium, Sardinia, the Warsaw Duchy,

many German princedoms), in others —in a revised form (Spain, Italy). Moreover, codifications of countries denying it were developed on its basis (the Saxon Code of 1863). It played an important role in the creation of the Code of Laws of the Russian Empire.

In legal regulation of common property relations, the Civil Code of France (hereinafter — the CC of France) adopted the Roman individualistic approach as a basis [2; 94]. However, in the French Civil Code there is no special chapter on common property. In the text of this codification there are norms about it in relation to the common wall and the ditch (Art. 653-673) [3] and about the division of inheritance and returns to the hereditary mass (Art. 815-842) [4].

Thus, in accordance with Article 653 of the Civil Code of France, in cities and villages, any wall that serves as a division between buildings to the height to which the lower building rises, or between courtyards and gardens, and even between the enclosed areas of the field, is assumed to be common, if otherwise not set by the document or external feature [3]. Thus, the right to a common wall is a common right of ownership.

Civil Code of France regulates the planting of trees adjacent to the common fence. So, if a neighbor wants the tree he planted to belong to him on the right of sole proprietorship, he must plant it at a distance not less than two meters from the common fence. Otherwise, this tree falls into the common property of the neighbors, which gives the right to the dissenting neighbor to demand their uprooting.

There are no such requirements regarding the common wall. Each neighbor has the right to plant a tree near the common wall; however, the crown of such a tree should not be higher than the common wall. Otherwise, the neighbor has the right to demand a cut of the branches that hang on his site to the desired height. The same goes for the roots. At the same time, the fruit that fell on the plot of such a neighbor is its sole proprietorship.

In addition to the common ownership of the moat, hedge and common wall, the CC of France provides for a common property for inseparability during inheritance.

In the Civil Code of France it is stipulated that no one has the right to demand the preservation of separateness that arose during inheritance. At the same time, by agreement of the heirs, it can be suspended for a period not exceeding 5 years with the right of subsequent renewal. Such inseparability can be preserved on movable and immovable things, which form agriculture, even if one of the owners or his successors objects to this in two cases:

– at the request of the surviving spouse, if he is a co-owner of the estate and has lived there since the day of the death of the spouse;

– at the request of the surviving spouse or his heir, if the dead were left behind by minors in a descending order (Article 815) [4].

Inseparability can be saved on materials, tools and livestock, provided that the total value of the listed items does not exceed a quarter of the value of the property forming the economy.

The requirement of such inseparability cannot exceed 5 years, however, it can be renewed until the surviving spouse dies.

Thus, each joint-heir has the right to demand separation of his share in the inheritance. The shares of the heirs are assumed to be equal. In the case when joint heirs deviate from equality of shares, the court may appoint an expert who determines the size of these shares. Such cases, according to the Civil Code of France, are subject to tribunals at the place of opening of the inheritance.

The Civil Code of France establishes the rule according to which the division of estates should be avoided when dividing the estate. Inequality of the allocated shares in kind can be compensated by other property.

If inseparability is preserved, then the co-owners must determine the person to whom documents on common property are deposited before it is divided.

Thus, common property under inheritance, according to the Civil Code of France, is temporary. This, apparently, explains its rather narrow legal regulation. Based on this, it is possible to formulate the conclusion that in France the community is considered as forced: due to the presence of common walls, a ditch, a fence and a common inheritance.

There are practically no rules on common property that arises by the will of the participants, apart from preserving, by agreement, undividedness during inheritance, in the Civil Code of France. Separate norms are fragmentary in nature and are completed by special legislation. In particular, common property arising in buildings. Due to the adoption of the law on common ownership of houses, divided into separate premises on June 28, 1938, this question received proper legal regulation. According to this law it is allowed to establish partnerships for the purpose of building and purchasing houses, which in parts are provided to members of

such partnerships. Parts of the house are provided to these comrades who form the «syndicate» on the right of ownership or use. It took almost 30 years of practice analysis for this law to be adopted in its final version in 1967.

Thus, the rules on common property in France testify to the co-owners of the rights to a common thing and to a share. If in relation to a share a participant in a community is guided by his own discretion, then in relation to a common thing all actions are consistent with the general will. In this case, the principle of unanimity is. Moreover, each of the co-owners has the right to object to the actions of others in relation to the common thing.

In addition to the types of condominium considered, the type of common ownership in France can be called the collective property of spouses and partnerships. The common property of the spouses is built according to the type of German joint property, and in this respect has many features similar to it. Powers in a private partnership belong to a community in which relations are governed by the contract. On this basis, it can be concluded that, despite the similarity of certain principles in the legal regulation of relations in common property of France with other codifications, it still has a certain originality dictated by the peculiarities of the development of civil law in this country.

Germany. By the beginning of the XVIII century, Germany consisted of more than 300 states, each of which had its own legislation, among which Prussia, Saxony, Bavaria and Austria can be distinguished [5; 485].

Germany has repeatedly tried to unite. Thus, as a result of the defeat of France in 1814, the German Union was created, the center of which was Austria, which united 35 states, in 1866 the North German Union led by Prussia, which included 22 German states.

Both in the first and in the second case, the United States maintained their independence and, accordingly, their laws. The aspiration of small German states to independence from the center was persistent, with the result that city states remained in some states, others - adapted prescriptions of Roman law, in the third, French law in the third, and Danish law in the fourth [6].

The process of unification of Germany ended with the entry into the Union of the South German states as a result of the victory of Prussia in the war with Napoleon and the proclamation of the German Empire on January 18, 1871 [7; 111].

Thus, at the time of the unification of Germany, the civil law of the states included in it was a combination of different content sources that in one way or another influenced the further development of the general civil law of Germany, among which the Bavarian Civil Code of Maximilian of 1756 and the Prussian Code of Law 1794, Civil Code of Galicia 1797, Austrian General Civil Code of 1811, 1863 Saxon Civil Code. The further development of German civil legislation was also influenced by the French Civil Code of 1804 [8].

One of the earliest codified sources of the period under review was the Bavarian Civil Code of Maximilian of 1756. Regulations on common property have been included in its content. Also, as in the early codifications of the classical period, the community of owners in this codification was considered as one person [9; 293]. The basis of decision-making on the disposal, management and use of a common thing is the principle of unanimity of common property participants. There was a rule that served as a certain guarantee of compensation of expenses incurred by one of the participants in common ownership on the maintenance of a common thing. The co-owner could be deprived of his share only if he was informed about the necessary expenses for maintaining the general thing, and these expenses in no way impair his interests [9].

The next codified act to which would like to draw attention is the Prussian State Code of 1794. It is based on German national and Roman law, united in one and regulating mainly private relations.

Filatova U. writes that «despite certain identifiable differences from Roman law, the Prussian State Code defines common property as a basis for Roman common property by shares, although the wording of chapter 17 § 1 is closer in content to modern German joint ownership» [2; 68]. And then she quotes Bruno Schneider's statement: «In some cases, common property in Prussian civil code resembles a cross between joint and shared property. And although the Prussian Code regulates common shared property, various organizational norms represented an appeal to the theory of joint property» [2; 68].

In contrast to the Bavarian codification, the basis for solving issues related to the management of a common thing, its content in the Prussian Code is based on the principle of majority, and not unanimity. But not all questions. Here we see a mixed type of reaching agreement on a common thing between co-owners: basically decisions are made by the majority, but, for example, there are cases when unanimity was required, in particular, when deciding whether to change the purpose of a common thing.

The concept of a majority when making decisions was established depending on the size of the share. Filatova U. indicates that the Prussian Code does not establish a mechanism for counting votes with the majority, on the basis of which, she concludes that this was established by the participants in the common property themselves [2; 70].

In 1811, the General Civil Code, created on the basis of the Civil Code of Galicia of 1797, which also contained a section on common property, entered into force in Austria. This code contained only general principles, which, according to some scholars, seemed completely empty and useless for practice [1; 40]. In this regard, the best codification work, in their opinion, was the Saxon Civil Code of 1863, which entered into force in 1865.

Part two was devoted to property law in the Saxon Civil Code, the sixth section of which contained rules on common property [10].

In the Saxon Civil Code of 1863 in the section of common property refers to the common joint property. To dispose of a common thing requires the consent of all joint owners. At the same time, when making decisions regarding the use and management of a common thing, the principle of majority of votes in terms of shares is applied. At the same time, the procedure for making a decision on an issue with equal votes is interesting. In this case, the co-owners choose a person (Obmann), who must take one side or the other [11; 75].

The Saxon Civil Code contains the requirement that each owner must treat common property with the care with which he relates his own business (p. 336).

Any of the joint owners has the right to demand the termination of the community (Gemeinschaft) [11; 76]. The co-owner may waive the right to demand the termination of the community. Such a waiver is optional for execution by his heirs and is valid for the first for 25 years.

The order of termination of the community is determined by the agreement of joint owners. If the lot is chosen as such, then the eldest divides the common thing into parts, and the lot is drawn, starting with the youngest [11; 77]. The section should be made in the most satisfying way of all co-owners.

The general civil code was developed in Germany only by 1896. It combines all the achievements of the civil law thinking of the XIX century.

The structure of the German Civil Code (hereinafter referred to as GCC) is represented by 5 books. Directly the third section of the third book is devoted to the right of ownership, in which the rules on common property are placed in chapter five (Art. 1108-1011). Along with this, Section 7 «Separate Obligations» of the second book contains Chapter Fifteen «The Commonality of Law», including the rules on equity rights to property.

Filatova U. writes that according to the prevailing German doctrine, relations connected directly with the exercise of the right of ownership are governed by the property law §§ 1008-1011 of the GCC, the community itself has an obligatory nature, therefore the provisions on shared community are located in the «Obligatory law» section of chapter 17 «Community» §§ 741-758, where the shared community is regulated as the most important form of expression of common property [2; 70, 71].

On this occasion, we can say the following. If we take the property community in the broad sense, which, along with real rights, includes general liabilities, then it is unlikely to call this community of things real and, accordingly, the appropriateness of placing the rules on such a community in the «Real Rights» section is doubtful. On the other hand, splitting up such a community, highlighting in it a community of real nature, placing it in the «Real rights» section, and property of obligations, including the rules on it in the section of the law of obligations, as an acceptance of legal technique leads to an increase in codification. From our point of view, such an approach is advisable. It is necessary to place the rules on common property in the section of property rights, as required by the nature of this right, and to apply these rules by analogy when regulating the obligation community in that part in which it does not contradict the essence of this general obligation. The German legislator acted differently, apparently, based on the fact that common property is one of the sub-types of common rights, most of which, judging by the placement of this section among obligations, have an obligatory nature. This explains the rather scant amount of norms in the GCC on common property.

In Germany, shared and joint common ownership is distinguished. Thus, according to §1008 GCC, the right of ownership may belong to several persons in certain shares [12]. The analysis of the norms of the GCC gives the right to assert that the preemptive right to purchase the transfer of a share to third parties to German law is unknown [13; 202–205]. At the same time, with respect to a share, those rights that are exercised in relation to the whole common thing cannot be realized, since their realization depends on the agreement of all the participants in common ownership and only if it can be exercised.

Thus, common shared ownership confers a person participating in it with powers with respect to a share and with powers with respect to a common thing.

Another type of common property is co-ownership. It is characterized by the fact that it should be in the same hands [2; 71]. As a rule, joint ownership of a specific thing in the GCC is not allocated, it is considered as part of other rights to joint property, and therefore, it is considered that the right to joint property does not have a real nature [13; 202]. That is why there are no general rules in the GCC providing for a uniform procedure for all cases of common joint ownership, as for shared ownership. For each case of joint property, there are separate rules. For example, joint property may arise:

– in a partnership, under a contract for which to achieve a common goal, the partners are mutually obligated to make fixed contributions, which, in addition to things, can be provided as a service (§§705, 706);

– in a contracted marriage, by virtue of which the property of the wife is subordinated to the management and use of the husband (contributed property) (§ 1363);

– upon inheritance, if after the testator several heirs are left (§ 2032) [12].

In other cases, according to GCC, joint ownership cannot arise [13; 202], this list is closed. Accordingly, it cannot arise on the basis of a contract.

Thus, joint ownership is considered as a component of the right to common property, the nature of which is not proprietary, this explains the fact that the rules about it are located in the section of obligations of the GCC.

A feature of joint ownership is the fact that each of its members cannot freely dispose of its share. If, as applied to the partnerships of the GCC, the prohibition of the disposal of its shares (§ 720) is explicitly established, then during inheritance such right is granted to co-heirs provided that the disposal of shares is put in the form of a judicial or notarial act (§ 2033). At the same time, in the GCC it is fixed that the co-heir cannot manage his share in individual hereditary objects.

The owners jointly manage the common thing. At the same time, § 744 GCC grants the right to an individual co-owner of a lawful disposal of a common thing as an exception. In accordance with this provision, any member of the common property can individually decide on the common thing in order to preserve it. For example, a participant in a common property may dispose of a common thing in order to avoid its death [14]. The disposition of a common thing can be carried out both in the framework of one transaction together and sequentially by disposing of each participant in the common property of their shares [15; 90].

Thus, an analysis of the formation of legal regulation of common property relations in Germany allows us to formulate the following conclusions.

Common property rules were part of each Germany codification, starting with the Bavarian Civil Code. The most developed mechanism of legal regulation of common property among them was the Prussian State Code of 1794 and the Saxon Civil Code of 1863. The current GCC has consolidated the experience of previous codifications, dividing at the same time the legal regulation of the relations of the owners among themselves and the relations of their realization of the powers of the owners, awarding the obligation to the first, and the second the nature of the legal nature.

Switzerland. In Switzerland, as in Germany, before the adoption of the German civil code, extreme diversity of national rights reigned. In some cantons, various local sources acted; in others (Geneva, Bern Jura), Napoleon's Recipient Code, and in the third (Bern, Lucerne, etc.) cantonal codes, drafted under the strong influence of the Austrian code [16; 75]. Such fragmented legal regulation hindered the effective development of economic relations, which led to the conscious need for the formation of legal unity.

Swiss civil law was formed under the influence of German legal doctrine. At the same time, the Swiss refused to directly copy the norms of the GCC, but only took its general principles as a basis. Thus, Swiss civil law is collective in nature and takes into account historical and national peculiarities [17; 255–259].

Purposeful work on the development of a single codified act in the sphere of civil law in Switzerland was started in 1892 and ended on December 10, 1907 with the adoption of the Swiss Civil Code [16; 76] (hereinafter referred to as SCC), which consists of 4 books: 1) Law subjects — individuals and legal entities; 2) Family law; 3) Inheritance law; 4) Ownership [18]. The Swiss Book of Obligations Act, passed in 1881 and updated in 1911, is considered to be a separate 5th book of SCC.

SCC provides for 2 types of common property: shared (art. Art. 646-651) and joint (art. art. 652-654) [19].

According to C. Brunner and D.Wihterman, the share ownership in the SCC is formulated individually [20]. Its peculiarity is that each owner has an individual right to an ideal share, which he has the right to dispose of as a sole proprietor at his own discretion without the consent of the other participants (paragraph 3

of Article 646 of the SCC). At the same time, being a participant in common property, he has the right to a common thing.

Thus, the right to share ownership covers the sole right to share and the joint right to a common thing.

If common share ownership may arise by virtue of a certain transaction, then common joint ownership, according to Swiss law, arises on the basis of law in certain commonalities: spouses (Art. 211 SCC); heirs (Art. 602 SCC); relatives (art.336 SCC); in a simple partnership (Article 530 of the Obligatory Law of Switzerland (hereinafter - the OLS)); in a limited partnership (Art.552 OLS) [19].

Unlike shared ownership, in the joint ownership under Swiss law, its participant, in addition to the joint right to a common thing, does not own any sole right to a share. We can only talk about it when a section is being carried out. In some sources, this right was called «the right of expectation» [21].

All decisions on common property in the joint ownership of Switzerland are made by all participants together. If in shared ownership we can talk about the transfer of rights to other persons, for example, in the event of the alienation of a share to third parties and to other co-owners due to the exercise of the preemptive right to purchase, then rights cannot be transferred to joint ownership. This is explained by the fact that rights in joint ownership arise only by virtue of belonging to a community. For example, to participate in joint property of spouses, you must be a spouse. There can be no talk of any sale of a share in joint ownership in Switzerland, since the object as such is that there is no share in Swiss joint ownership. On the basis of this, it can be concluded that the regime of common share and common joint ownership in the SCC is different.

Thus, each participant in common ownership has an exclusive right to a share and a common right to the whole common thing. If the co-owner decides on his share at his own discretion, the principle of unanimous decision applies to the realization of common rights. The category of such rights includes, for example, the right to dispose of a common thing. So, according to Art. 648 SCC will to alienate things must be expressed unanimously. The right to dispose of a common thing is an indivisible right and is not considered as the sum of rights to dispose of shares [22; 67].

In the 50s of the 20th century, the common property institute was subjected to a significant audit, during which it included the rules on common property in an apartment building, eliminated a number of law enforcement problems [2; 74].

It should be noted that the legal technique used in the SCC was appreciated by many countries that used the Swiss experience (Italy, Greece, etc.). Cases and full reception of SCC are known. The practically unchanged SCC was adopted in Turkey in 1926 [17; 258].

The Netherlands. The formation of the civil law of the Netherlands was greatly influenced by the Napoleonic Code. Its norms are reflected both in the Civil Code of 1809 and in the Civil Code of 1838. In fact, the latter was the actual translation of the French Code of 804 into Dutch [23]. The only thing that distinguished these two acts is the structure. The Dutch Civil Code of 1838 was represented by 4 books: persons, things, obligations and proofs, while the French codification included only 3: persons, property and various modifications of property, ways of acquiring property rights. The similarity of these codes suggests that issues related to common property in the Netherlands were regulated in the same way as in France.

The Civil Code of the Netherlands in 1838 existed almost unchanged, not counting individual amendments introduced in the form of separate independent laws, for about 150 years. The current civil codification of the Netherlands was adopted in 1992 and is among the youngest codifications of Europe.

The Civil Code of the Netherlands (hereinafter — the CC of the Netherlands) consists of nine books: 1) family law and individuals; 2) legal entities; 3) general provisions regarding ownership; 4) inheritance; 5) property rights; 6) general provisions on obligations; 7) certain types of contracts; 8) transport law; 9) intellectual property law [24]. Unlike the previous codification, there is no prevailing foreign influence in this code, it can be said to be balanced in it. The Dutch CC has a «own style, developed on the basis of common continental European law» [24]. Section 5 of the book 5 is devoted to issues of common property.

According to Article 60 of the Civil Code of the Netherlands, common property arises when the property is owned by two or more persons who use it to achieve a common benefit based on an act concluded between them and registered in the prescribed manner [25].

The legislation of the Netherlands allows asserting that it is familiar with both shared and joint common ownership.

The separate partition, palisade or fence, separating the property belonging to different owners may be In a shared ownership.

The owners jointly participate in the costs of maintaining and keeping of common property. The right to property is not separated from the right of common ownership, which means that everyone has the right not to a part of the property, but to all the property along with other co-owners.

A participant in the common property may transfer his share to third parties. However, the remaining co-owners have the right to provide them with servitude so that they can exercise rights in relation to their property.

Every owner has the right to make improvements in respect of property under common ownership. At the same time, he should produce them in such a way that they do not violate the rights of other owners and do not harm the common property itself. Besides emergency cases, each owner has the right to require the involvement of experts to determine the best way to make such improvements before making improvements to the common property.

Shared joint ownership in the Netherlands arises on the property of the spouses. The main source of legal regulation of common property relations in the family, along with the norms of the Civil Code, is the Law «On Community of Property» [26], which was enacted in 1970. According to the general meaning of the law, if the spouses have not foreseen otherwise before entering into marriage, from the moment of marriage registration they enter into a property community, which includes property belonging to each spouse at the time of marriage, including debts and the property that they will acquire in future. Such a property regime may be excluded or significantly limited by the marriage contract [27].

From January 2018, property acquired by spouses prior to marriage is not included in the community of spouses in the Netherlands; property inherited or received as a gift, both before and during marriage; pensions; spouse company, created by him before marriage.

Issues related to the management of the property are decided by the spouse who introduced it into the community. Spouses are obliged to inform each other about the state of the property in the community and the presence of debts on it. As can be seen from the analysis, a closer relationship is present in the relations of joint owners.

The total joint ownership of spouses in the Netherlands ends in the following cases:

- divorce;
- separation of spouses by the court;
- availability of a court order to annul the community;
- the presence of a post-marriage property agreement on annulment of a community (Art. 1:99) [28].

When dividing the property, the spouses have equal shares. Each of them leaves half of the total property. However, even after the termination of community, each of the spouses continues to be responsible for all the common debts for which he was responsible while in the community. In this regard, each spouse continues to be responsible for half the debts of the other spouse (v.1: 102) [28]. After the termination of the joint property of the spouses, each of them has the right to purchase clothes and jewelry, which he wore during the existence of the marital community.

Thus, analyzing the norms of the legislation of European states, which formed the basis of the civil legislation of the Republic of Kazakhstan, we can formulate the following conclusions.

Common property in the legislation of European states is characterized by the existence of a common right for two or more persons to own property, which, as a rule, is indivisible (fence, ditch, wall, etc.). Each participant has the right to common property, which is not unique, because its implementation depends on the will of other co-owners, which is a kind of restriction of the right of each participant to common property. In addition to the right to common property, participants own the right to a share, the realization of which does not depend on the will of other members of the community, however, in some cases, it requires compliance with certain rules - the pre-emptive right to purchase.

The legal community in European jurisdictions arises either on the basis of a contract, or by virtue of the law, it has both a real and a binding nature, it can be shared or joint.

As applied to the management of common property, the codification of Europe can reveal both the principle of majority and the principle of unanimity, which is used when making decisions, for example, in managing common property. Moreover, in extreme cases, in order to avoid the destruction of common property, decisions are allowed by one of the participants in the community, who must act only in the common interests, which eliminates the need to coordinate such actions with the other co-owners.

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Франция, Германия, Швейцария және Нидерландыдағы жалпы меншік құқығы институты

Мақалада Нидерланды, Швейцария, Германия және Франция кодификацияларында Қазақстан Республикасының Азаматтық кодексінің Жалпы бөлімінің негізін құрайтын ортақ меншік институтының ерекшеліктері қарастырылды. Азаматтық кодификацияларындағы мәліметтер ерекшелігі болып рим жеке құқығының түзетілген нормалары ұлттық нормалармен бірге әрекет еткендігі табылады. Осы ережелердің нормалардың дамуы және имплементациясы еуропа елдерінде және көптеген елдерде германдық мен француздық екі кодификацияның кейбір ерекшеліктерін ескере отырып, қайта жасауға алып келді. Соның нәтижесінде жалпы меншік туралы нормаларда дамыды. Жұмыста жалпы меншікке қатысты еуропа елдерінің заңнамасында жалпы мүлікке жалпы құқықтың болуымен сипатталғаны көрсетілді, себебі ортақ мүлікте басқа меншік иелерінің еркіне байланысты сатуға болады, бұл өз кезегінде қалған қатысушылардың еркіне байланысты болмайтын, ал кей жағдайда белгілі бір ережелердің – сатып алудағы басым құқығының сақталуын талап ететін, ортақ меншіктегі әрбір қатысушының құқығын және үлеске құқығын шектейді. Бұдан басқа еуропалық юрисдикцияда құқықтық қауым не шарт негізінде, не заң күшіне байланысты туындайды, заттық, сондай-ақ міндеттемелік табиғатта болады, үлестік және бірлескен түрде болуы мүмкін. Еуропа елдері үшін ортақ меншікте болатын мүлікті басқару бойынша шешімді қабылдауда қолданылатын көпшілік қағидасы және бірауыздылық қағидасы тән.

Кілт сөздер: ортақ меншік, үлестік меншік, құқықтағы үлес, меншік иесі, ортақ зат, келісім, иелену, пайдалану, билік ету, меншік құқығы.

Т.Т. Утеубаев, А.С. Киздарбекова

Институт права общей собственности во Франции, Германии, Швейцарии и Нидерландах

В статье рассмотрены особенности института общей собственности в кодификациях Франции, Германии, Швейцарии и Нидерландов, положенных в основу Общей части Гражданского кодекса Республики Казахстан. Особенностью данных гражданских кодификаций является то, что рецепированные нормы римского частного права сосуществовали в них наряду с национальными нормами. Имплементация и развитие данных правил привели к тому, что со временем в европейских странах были разработаны и большинством стран восприняты с учетом некоторой специфики две кодификации — германская и французская. В соответствии с ними развивались и нормы об общей собственности. В работе указывается, что общая собственность в законодательстве европейских государств характеризуется наличием общего права на общее имущество, которое не является единоличным, поскольку его реализация зависит от воли других сособственников, такая собственность является своего рода ограничением права каждого участника на общее имущество и права на долю, реализация которого не зависит от воли иных участников общности, однако, в некоторых случаях, требует соблюдения определенных правил – преимущественного права покупки. Кроме того, правовая общность в европейских юрисдикциях возникает либо на основании договора, либо в силу закона, имеет как вещную, так и обязательственную природу, может быть долевой и совместной. Для стран Европы характерен как принцип большинства, так и принцип единогласия, используемый при принятии решений по управлению имуществом, находящимся в общей собственности.

Ключевые слова: общая собственность, долевая собственность, доля в праве, собственник, общая вещь, соглашение, владение, пользование, распоряжение, право собственности.

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