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The normative paradigm of procedure protection of possession in Brazilian Law: comparisons with possession protection models in foreign Law

O paradigma normativo de tutela processual da posse no Direito brasileiro: comparações com os modelos de proteção possessória no Direito estrangeiro

El paradigma normativo de protección procesal de la posesión en el Derecho brasileño: comparaciones con los modelos de protección de la posesión en el Derecho extranjero

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Abstract
"The judicial protection of possession in the Brazilian legal system reveals itself as an adoption of the absolute normative model of possession protection, in contrast to most European national legal systems, and establishes an independent possessory procedural protection in relation to the right to property" is the hypothesis that is proposed by the present article and validated with the investigation developed with the following objectives: investigate the historical development of the possessory and petitory actions in Roman Law; examine the level of independence and binding between the possessory judgment and the petitory judgment in the national legal systems; and identify particularities of the legal treatment of possession in Brazilian law, as well as the limits of its protection. The methodology used was based on a review of different doctrinal and normative sources with an analytical approach and on the exegesis of the current norms. As results, it was possible to identify and systematize the rules related to the judicial protection of possession that demonstrate that Brazil adopts a more independent and "guarantee" system of possessory protection (normative model of absolute protection of possession), as well as defining some of the singularities of the legal treatment of possession in Brazilian Law. With this, a propositional thesis is presented regarding the functioning and limits of the system of judicial protection of possession in Brazilian Law.
Keywords: Civil Law; Civil Procedure Law; Property Law (*Jus in re*); Procedural protection of possession; Comparative Law.

Resumo
"A tutela processual da posse no ordenamento jurídico brasileiro revela-se como uma adoção do modelo normativo absoluto de proteção possessória, em contraste com a maioria dos sistemas jurídicos nacionais europeus, e estabelece um proteção processual possessória independente em relação ao direito de propriedade" é a hipótese proposta pelo presente artigo e confirmada a partir da investigação desenvolvida com os seguintes objetivos: investigar o desenvolvimento histórico das ações possessórias e petitórias no Direito Romano; examinar o nível de independência e vinculação entre a tutela possessória e a tutela petitória nos sistemas jurídicos nacionais; e identificar particularidades do tratamento jurídico da posse no Direito brasileiro, bem como os limites normativos de sua proteção processual. A metodologia utilizada se embasou na revisão, com enfoque analítico, de diferentes fontes doutrinárias e normativas e na exegese das normas vigentes. Como resultados, foi possível identificar e sistematizar as regras relativas à tutela processual da posse que demonstram que o Brasil adota um sistema mais independente e "garantidor" de tutela possessória (modelo normativo de proteção absoluta da posse), bem como definir algumas das singularidades do tratamento jurídico dispensado à posse no Direito brasileiro. Com isso, apresenta-se uma tese propositiva quanto ao funcionamento e limites do sistema de proteção judicial da posse no Direito brasileiro.
Palavras-chave: Direito Civil; Direito Processual Civil; Direito das Coisas (*Jus in re*); Tutela processual da posse; Direito Comparado.

Resumen
"La protección procesal de la posesión en el ordenamiento jurídico brasileño se revela como una adopción del modelo normativo absoluto de protección posesoria, en contraste con la mayoría de los ordenamientos jurídicos nacionales europeos, y establece una protección procesal posesoria independiente en relación a los derechos de propiedad" es la hipótesis propuesta por este artículo y confirmada por el investigación realizada con los siguientes objetivos: investigar el desarrollo histórico de las acciones posesorias y petitorias en el Derecho Romano; examinar el nivel de

independencia y el vínculo entre la protección posesoria y la protección peticionaria en los sistemas jurídicos nacionales; e identificar particularidades del tratamiento jurídico de la posesión en el derecho brasileño, así como los límites normativos de su protección procesal. La metodología utilizada se basó en la revisión, con enfoque analítico, de diferentes fuentes doctrinales y normativas y en la exégesis de normas vigentes. Como resultados, fue posible identificar y sistematizar las reglas relativas a la protección procesal de la posesión, que demuestran que Brasil adopta un sistema de protección de la posesión más independiente y "garantizador" (modelo normativo de protección absoluta de la posesión), además de definir algunas de las singularidades del tratamiento jurídico de la exención de posesión en el derecho brasileño. Con esto, se presenta una tesis proposicional sobre el funcionamiento y límites del sistema de tutela judicial de la posesión en el derecho brasileño.
Palabras clave: Derecho Civil; Derecho Procesal Civil; Derecho reales (*Jus in re*); Protección procesal de la posesión; Derecho Comparado.

1. Introduction

"There are few subjects in Law that have given rise to as many controversies as possession", José Carlos Moreira Alves (1985, p. 1) once stated. Despite the extensive bibliography, the study of this institution still faces obstacles in establishing axiological premises and defining basic parameters, such as: what is possession in the eyes of the Law? What is its legal nature? What are its effects? What is the purpose of the possessory proceedings? What do they protect and how do they protect? How do they relate to the petitory actions? What are the limits of possessory protection?

This questions, identified as the *problems* object of this research, were faced by the early scholars of *possessio* and *proprietate* and most of them persist to the present day. This study, far from attempting to exhaust the subject, seeks to offer contributions to answer some of them, according to the Brazilian Law and its comparison with other national legal systems.

To do so, we propose to validate in this article the following *hypothesis*: the judicial protection of possession in the Brazilian legal system reveals itself as a adoption of the absolute normative model of possession protection, in contrast to most European national legal systems, and establishes an independent possessory procedural protection in relation to the right to property.

The *objectives* proposed were: *(i)* investigate the historical development of the possessory and petitory actions in Roman Law and the subsequent distinctions made in modern legal systems to differentiate the protection of possession itself from the possessory protection derived from the recognition of ownership rights; *(ii)* examine the level of independence and binding between the possessory judgment and the petitory judgment in the national legal systems, and how this reflects on the protection of the right of possession (*jus possessionis*); and *(iii)* from the comparison of the system of protection of tenure adopted by other countries and the system of protection of tenure in Brazil, to identify particularities of the legal treatment of possession in Brazilian law and to understand more precisely the rules that govern the judicial protection of possession and what are the limits of this protection.

The *methodology* used was based on a review of different doctrinal and normative sources with an analytical-approach and on the exegesis of the current norms. The itinerary followed regarding specific procedures was this: in the first part, the origin and object of protection of possessory interdicts were studied; subsequently, the conception, evolution, and peculiarities of possessory interdict proceedings were examined, comparing them with the characteristics of petitory proceedings; and finally, the "normative model" of judicial protection of possession adopted by Brazilian was analyzed, based on the theoretical framework designed by Prof. Dr. Vladimir V. Vodinelić.

At the end of the research, the hypothesis initially suggested was confirmed. As *results*, it was possible to identify and systematize the rules related to the judicial (procedural) protection of possession that demonstrate that Brazil adopts a more independent and "guarantee" system of possessory protection (normative model of absolute protection of possession), as well as defining some of the singularities of the legal treatment of possession in Brazilian Law. With this, a propositional thesis is presented regarding the functioning and limits of the system of judicial protection of possession in Brazilian Law.

2. Methodology

The methodology used was based on a review of different doctrinal and normative sources with an analytical approach and on the exegesis of the current norms. The approach was qualitative based, as it analyzed the legal provisions of the Brazilian Law and foreign Law regarding possession protection, as well as the application of the theoretical platform of "normative models" of possessory protection, elaborated by Prof. Dr. Vladimir V. Vodinelić, with the aim of understanding a legal phenomenon in its complexity, its characteristics and their relationships (Gustin, 2020, p. 87).

As for epistemology, the utilized method was positivist, as it analyzed a phenomenon that can be visualized and verified in the same way based on the hermeneutical proposal presented.

As for data analysis, the method was exploratory based, as it aimed to explore and understand a juridical phenomenal, from an perspective achieved from the comparative study of Brazilian Law and foreign Law.

As for the procedures, it will be bibliographic and documentary, simultaneously: bibliographic because it will analyze scientific articles and books already published and documentary because it will collect generic data on published academic studies and also on legislation.

The itinerary followed regarding specific procedures was this: in the first part, the origin and object of protection of possessory interdicts were studied; subsequently, the conception, evolution, and peculiarities of possessory interdict proceedings were examined, comparing them with the characteristics of petitory proceedings; and finally, the "normative model" of judicial protection of possession adopted by Brazilian Law was analyzed, based on the theoretical framework designed by Vladimir Vodinelić.

All the stages were developed through a comparative study between Brazilian Law and foreign Law. This comparison allowed for the establishment of clearer outlines of the characteristics of possessory protection in the national legal system, notably in its procedural aspect, represented by the possessory interdicts.

3. Discussion

3.1 The historical origin of possessory protection: why protect possession? What is the purpose of possessory proceedings?

Two theories seek to justify the historical origin of possessory protection in Roman Law.

The first theory, elaborated by Barthold Georg Niebuhr, defended by Friedrich Carl von Savigny and more recently by Emilio Albertario and Alberto Burdese, supports the idea that the old *possessio* of the occupants of *ager publicus* was administratively protected, as they were not owners (public land could not be owned by individuals) and, thus, lacked the existing judicial protection. For this reason, the praetors began to protect the possessory situation through the granting of interdicts, and this protection was later extended to other types of possessions (Figueira Júnior, 1995, p. 95; Alves, 2018, p. 318).

The second theory, supported, among others, by Rudolf von Jhering, argues that the genesis of interdict protection lies in the power granted to the praetor in vindicatory actions to provisionally (until the final judgment) grant possession of the litigious thing to one of the litigants. According to José Carlos Moreira Alves, several modern authors lean towards this second solution, considering that many legal institutions in Rome arose due to procedural incidents, and the assignment of provisional possession in vindicatory actions possibly predates the existence of *ager publicus* itself. However, states the author, "there are no solid elements in the sources in favor of either of the two theories (Figueira Júnior, 1995, p. 95; Alves, 2018, p. 318).

Francisco Cavalcanti Pontes de Miranda (2012, p. 377) disagrees with the theories that attribute possessory protection *(i)* to the use of force (Savigny) or *(ii)* as a necessary complement to property protection (Jhering). According to Pontes de

Miranda, possessory legal protection is justified by the "general interest in ensuring factual order, so that nothing changes except within peace or by judicial decision". This means that "only the deliberation of men, without violence, and the application of laws, if there is a breach of them (= if application is not equal to the incidence of legal rules), should be able to change existing states of facts".

Joel Dias Figueira Junior, in line with Alberto Burdese's thinking (1977, p. 398), defends a similar premise to that proposed by Pontes de Miranda, stating that possessory interdict protection, from its conception, was not limited to safeguarding subjective situations recognized under the Law, but also aimed to impose on individuals the respect for the *status quo* and the recourse to state justice when someone suffers injury to the possessory situation, instead of resorting to self-defense (Figueira Júnior, 1995, p. 95).

In the study "*Cemu posesorni postupak? O razlogu posesorne zaštite državine*"[1], Vladimir V. Vodinelić acknowledges "possession" as a manifestation of possible rights and obligations, that represents the state of affairs that is immediately found (*status quo*). Accordingly,

> the violation of possession is the alteration of the state of affairs immediately encountered, and it is illegal because the alteration of the encountered state of affairs, which is a manifestation of possible rights and obligations, violates the legal (unwritten) principle that the one who wishes to change the found condition can only do so if they can prove beforehand that they have the right to do so. It is not up to the subject of the encountered state of affairs to prove that they have the right to this state of affairs and the right for it not to be altered (Vodinelić, 2014, p. 64).

For the Serbian author, this conception – similar to that defended by Pontes de Miranda and Figueira Júnior – unlike other theories, manages to justify even the possessory protection of the possessor who is not authorized to possess and whose possession has not been violated by force or any kind of conflict between the possessor and the infringer: their protection is also legitimate because the violation of the possession of such possessor represents a change in the manifestation of rights and obligations, an immediate situation that cannot be changed by human interference without prior proof of the right to make such a change, whether the possessor is authorized to possess or not, whether the infringement was violent or without conflict.

The protection of the *status quo* is, therefore, a right of the possessor. In the article "*Šta se štiti u posesornom postupku? O pojmu i prirodi državine (poseda)*"[2], Vodinelić states that the direct object of protection in possessory judicial proceedings is the 'right to exclude others from affecting possession": this right is peculiar among other rights since it is recognized even in cases where the possessor does not hold the basic right over a thing or the right of possession or when their possession violates another person's right of possession (Vodinelić, 2013, p. 798).

Vodinelić (2013, p. 799) proposes the adoption of the *theory of appearance* in the scope of possessory protection: the protection of possession – the factual state representing the "embodiment" of a right or an obligation – is protection of the state of affairs immediately found, which should not be changed without prior proof of the right to do so.

This means that if someone possesses something, it is because they must have – more accurately: they are likely to have – rights over the thing that is being possessed, as well as obligations related to it.

Although possession is not the only case in which the value recognized and protected in the legal system is represented by the appearance of a right or obligation, the Serbian author points out that the adoption of the *theory of appearance* would be a special reason for specific procedures for possessory protection, differentiating it from protection through the petitory action.

For this theory, petitory protection does not protect the apparent image itself but only the right itself, while possessory protection is both the apparent image of the right and the protection of the right itself, as protection of the existing factual

[1] On the author translation: "What is the purpose of possessory proceedings? On the reasons for possessory protection of mere possession".
[2] In our translation: "What is protected in possessory procedure? On the concept and nature of state (possession)".

situation, which, according to the legal principle, should not be changed without prior proof of the right to such a change (Vodinelić, 2013, p. 799).

Carlo Attanasio, in a comparative study between Italian law and English law, points out that, in the English legal system, unlike what happens in Italian, possession is not protected in itself, but simply as a presumption or appearance of ownership:

> non avendo una propria autonoma rilevanza, esso gode in via riflessa della medesima tutela riconosciuta all'ownership, di cui costituisce un elemento essenziale. Ne discende, dunque, che la posizione del possessore è protetta esclusivamente poiché, nello stesso tempo, egli è anche proprietario e, pertanto, potrà avvalersi dei rimedî previsti dall'ordinamento inglese a tutela della proprietà, in particolare contro le interferenze altrui nel possesso del bene (*trespass*) (Attanasio, 2016, p. 104).

In the perception of James Gordley and Ugo Mattei, this analysis is not absolutely accurate in all common law systems. In a work entitled "Protecting Possession", published in 1996, the authors explain that, in the Anglo-American common law, possession is not identified with property, having its own and distinct treatment. Gordley and Mattei develop a functional theory about the possessory protection, according to which the possessor has a right to own, but this right does not have the same extent and legal strength as the owner's right. The recognition of the autonomous right (to possession) of the possessor would take place for two main reasons:

> one reason is that the use of the possessor may be the best use of the property. In a property system, the owner has the right to decide its best use. But sometimes, they are not actively exercising this right. It is better that this right be exercised by someone else rather than no one. The other reason is that, even if the use of the possessor may harm the owner, it may cause less damage if the possessor's right is protected against the non-possessor than if it is not protected at all (Gordley; Mattei, 1996, p. 332-333).

In Brazilian Law, although possession can be considered one of the elements derived from the right of ownership (Miranda, 2012, p. 71), legislative concern for the protection of possession itself (*jus possessionis*) is not directly aimed at protecting ownership. The objective is to avoid the violence of self-help in seeking the recovery of dispossessed possession or to deter acts of disturbance. Thus, the *status quo* of the possessor is protected, so that those who claim to be offended can use appropriate means to exercise the right they allege to hold.

When violating another's possession, the legal solution is regulated through possessory actions, regardless of who the owner is. From this, it can be deduced that "the one who has the right to possess (*jus possidendi*), even if derived from ownership, cannot, by force, deprive someone else of possession without using the mechanisms devised by the system" (Barinoni, 2020, p. 148). As Claudia Cimardi (2008, p. 62) emphasizes, "possessory protection is an effect recognized for the possessor, regardless of whether they are the legitimate owner of the thing or not".

3.2 *Judicium possessorium* and *judicium petitorium*

Figueira Junior points out that in addition to protecting the *status quo* (*status quo ante*), possessory protection originally assumed a second function: preparing the vindicatory action – which initially resembles Jhering's theory[3] of the origin of possessory protection.

This function was notably performed by the interdicts *retinendae possessionis* (Wald, 1990, p. 94), typical of Roman Law, which, according to Miguel Maria de Serpa Lopes (1960, p. 175), had a preliminary function: if a controversy concerning possession equally led to a controversy of ownership, they performed a "preliminary function" to determine, among the

[3] As said, for Jhering, the genesis of interdict protection lies in the power granted to the praetor in claim actions, to provisionally grant (until the final sentence) the possession of the litigious thing to one of the litigants.

opponents, who would bear the *onus petitoris* and who would benefit from the *commodum possessoris* in the controversy of ownership.

The interdicts *recuperandae possessionis* and *adipiscendae possessionis* also presented these same characteristics: they excluded the question inherent to ownership, so that possession appeared to be regulated in and of itself, independent of ownership. The *petitory* action could always be introduced by the defeated party in the interdict *recuperandae* or *adipiscendae possessionis*, in such a way that "this interdict only serves to ensure that the winning party retains the commodum possessoris in a possible petitory instance" (Lopes, 1960, p. 175).

The performance of this function by certain interdicts did not negate the autonomy and independence of the possessory judgment. Miguel Maria de Serpa Lopes (1960, p. 176) states that the possessory instance was not a preliminary phase of the petitory instance. It was, on the contrary, independent. The purpose of its creation was to regulate the position of the litigants in a possible petitory instance, whether it occurred or not. If the question of ownership were to be mixed with the possessory instance, it would mean to deny its character as a preliminary instance, making it an integral part of the petitio.

What was allowed, therefore, was the possibility of bringing the issue of possession before the same magistrate when a *rei vindicatio* existed, without causing confusion between the two judgments, which retained their full autonomy vis-à-vis each other. One of the conclusions drawn from the Roman principle was the possibility for the plaintiff, when not feeling secure enough in their ownership title, to reinforce their *rei vindicatio* with the possessory question, shifting the burden of proof onto the opponent (Lopes, 1960, p. 187).

In truth, the separation between the possessory and petitory judgments is a consequence of the distinction between possession and ownership. Moreira Alves explains that this distinction has been clearly established since Roman Law, as stated in the famous maxims of the Digest:

> *Possessio a proprietate separata esse debet* (possession must be separated from ownership), *nihil commune habet proprietas cum possessione* (ownership has nothing in common with possession), *nec possessio et proprietas misceri debent* (possession and ownership should not be confused) (Alves, 1991, p. 25).

However, it was also realized that possession could be considered on its own – independently of having a legal title – or it could be considered as one of the legal faculties that integrated the content of the right of ownership and other narrower rights.

Therefore, a distinction was made between *jus possessionis* ("right of possession") and *jus possidendi* ("right to possess"). According to Caio Mário da Silva Pereira (2019, p. 18), *jus possidendi* is the faculty that a person has, as a holder of a legal situation, to exercise possession over a specific thing. The owner, the usufructuary, the tenant *etc*. have *jus possidendi* over the object of their respective legal relationship. *Jus possessionis*, however, is the right originating from the legal situation of possession and is independent of the preexistence of a relationship.

While in the first case (*jus possidendi*), protection is usually achieved through a petitory lawsuit (*judicium petitorium*), based on the title that ensures the plaintiff's right to possess, as there has not been a proper violation of possession, but rather of their right to possess, in the second case (*jus possessionis*), the right to possession is protected through possessory lawsuits (*judicium possessorium*). However, nothing prevents the holder of *jus possidendi* from resorting to possessory actions, if they are also in possession of the property, thus opening two avenues for the protection of their rights.

This separation is found in European countries and is recognized in some of them under the name of the "principle of non-cumulation". In France, the rule was expressed in the revoked Article 1265, paragraph 1 of the *Code de Procédure Civile*.

In Belgium, the prohibition of cumulation of petitory and possessory claims in the same action is provided for in Article 1371, n.º 1 of the *Code Judiciaire*. The same rule is observed in Italy[4] and Brazil[5], for example.

Vodinelić derives the following interpretation from these legal formulations: if a possessory action is brought, until the possessory process concerning it is judicially terminated, and moreover, until the decision is executed (voluntarily or through enforcement proceedings), the possessor defendant cannot even bring a petitory action against the possessor plaintiff (Vodinelić, 2013, p. 283). This is expressly provided in Article 1371, n.º 3 of the Belgian *Code Judiciaire*[6].

The Belgian Court of Cassation, based on this legal provision, in the precedent *rôle n° C.20.0439*[7], has settled that the two actions, possessory and petition, must be introduced separately, one after the other, or the second directly, without dealing with the first. In addition, the defendant in possession cannot act on the petitioner before the judge's decision on possession has become final (Carnoy, 2021).

It is interesting to note that there is a general rule of binding or submission of the possessory judgment to the petitory judgment in national legal systems. For example, in § 864, paragraph 2 of the BGB, it is expressly established that the claim for possessory protection (by the possessor against the owner) will be extinguished if, after the act of disturbance, a binding judgment in a petitory action recognizes the owner's right (the defendant in the possessory action) to remain in possession of the thing.

According to Patricia Miranda Pizzol (1997), this rule is adopted by the Brazilian legal system: "the *petitory* or dominial judgment encompasses the possessory judgment, but the reverse is not true". By that, once the dominial issue is resolved, the possessor loses interest in bringing a possessory action; on the other hand, if the possessory action is brought, the owner can, in theory, bring a *petitory* action, but the request presented in the latter will not be appreciated until after the possessory action has been judged with *res judicata*.

Due to this conclusion, Pizzol (1997) states that a declaratory action or counterclaim based on *dominium* (i.e., the *exceptio dominii* or *exceptio proprietatis*) is not admissible in a possessory action, given that these claims would involve requests, and the dominical request can only be appreciated after the possessory request has been judged. Therefore, "the dominium, if discussed and decided in the possessory judgment, can only be *incidenter tantum*, without the material *res judicata* affecting it".

This linkage is, in fact, as a relative provisory characteristic of typical possessory procedures. The possessory dispute has an eminently provisional nature, almost like a precautionary measure, aiming to regulate the possessory situation only until it is definitively resolved in the petitory judgment. To clarify further, it is not a provisionality of the possessory judgment itself, but in relation to the future, possible, and hypothetical dominial resolution in the petitory judgment, in which the resolution given in the possessory action should not prevail against the right of ownership. The provisionality attributed to the protection of the possessory judgment – which in itself is definitive – comes from the perspective that sees a possible change in the dominial judgment (Silvestre; Neves, 2022).

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[4] Art. 705. *(Divieto di proporre giudizio petitorio) Il convenuto nel giudizio possessorio non può proporre giudizio petitorio, finché il primo giudizio non sia definito e la decisione non sia stata eseguita. (1) Il convenuto può tuttavia proporre il giudizio petitorio quando dimostra che l'esecuzione del provvedimento possessorio non può compiersi per fatto dell'attore*.

[5] Art. 557. Na pendência de ação possessória é vedado, tanto ao autor quanto ao réu, propor ação de reconhecimento do domínio, exceto se a pretensão for deduzida em face de terceira pessoa. Parágrafo único. Não obsta à manutenção ou à reintegração de posse a alegação de propriedade ou de outro direito sobre a coisa.

[6] "*Le défendeur au possessoire ne peut se pourvoir au pétitoire avant que la décision du juge sur la demande au possessoire ne soit passée en force de chose jugée; s'il a succombé, il ne peut se pourvoir qu'après avoir satisfait aux condamnations prononcées contre lui. Néanmoins, si la partie qui les a obtenues est en retard de les faire liquider, le juge du pétitoire peut fixer, pour cette liquidation, un délai après lequel l'action pétitoire sera admise; il pourra même, dans ce cas, donner l'autorisation d'intenter immédiatement cette action à l'effet d'interrompre une prescription sur le point de s'accomplir*".

[7] The precedent (full content and summary) can be accessed through the following link: https://juportal.be/content/ECLI:BE:CASS:2021:CONC.20210607.3F.5/FR.

Furthermore, Rodrigo Barinoni (2020, p. 150) clarifies that since the possessory judgment is subordinated to the petitory judgment – and the reverse is not true –, the lack of success of the possessor in the possessory action does not prevent them from making a claim based *on jus possidendi* in a subsequent petitory action.

In this line of thought, it is concluded that when the possessor does not have *jus possidendi*, the possessory protection obtained in a judicial action may prove to be only a temporary measure until a decision is reached in a eventual petitory action that grants the right of possession to the titleholder (Barinoni, 2020, p. 150).

This was a characteristic observed even in Roman law, notably in the distinction between *judicium possessorium* and *judicium petitorium*. In this sense, according to Duard Kleyn (2013, p. 3), "the possessory remedy sometimes only provides temporary relief," as in the possessory action, the judge only deals with the factual issue of possession and its disturbance or deprivation, so the defeated party in the possessory action can subsequently assert their rights in a petitory action, while the victorious party in the possessory action, now in the defendant's position, could ultimately lose their possession.

Moreover, the limitation of the range of issues that can be discussed in the possessory process (*v.g.*, the prohibition of *exceptio dominii* – also known as *exceptio proprietatis* –, expressed in Article 557 of the Brazilian CPC/2015), which implies a horizontal limitation of judicial cognition, results from the delimitation of possessory and petitory. This limitation results, in addition to accelerating the resolution of the dispute and providing judicial relief, as recognized by Vodinelić (2013, p. 292), from the fact that the possessory decision cannot represent a definitive regulation of the relationship between the parties[8]. On the contrary, it is provisional, in the sense that the effects of success in a possessory dispute can be reversed in a petitory demand.

These conclusions reflect the historical development of the possessory and petitory actions in Roman Law and the subsequent distinctions made in modern legal systems to differentiate the protection of possession itself from the possessory protection derived from the recognition of ownership rights.

3.3 Characteristics of interdict (possessory) protection: provisionality and urgency

As we have seen, the possessory judgment maintains a provisional relationship concerning the petitory judgment. However, there is an inherent provisionality in the very summariness of possessory interdicts. In Vodinelić's words, "the idea that possessory protection must be urgent and provisional permeates the construction of possessory protection of possession"[9].

Alberto Burdese explains that the interdict procedure is notably different from the ordinary one: "the praetor issues the interdict based on the party's request after a summary examination of the cause: the addressee can comply, and then the procedure ends with the desired result; but they can also disobey, and, in this case, a second procedural phase is opened" (Burdese, 1977, p. 401). Thus, the praetor would issue the interdict (an order for maintenance or restitution), and in case of non-compliance, the judge would subsequently provide legal protection, granting the corresponding remedy to the situation presented in court.

Regarding interdicts in Roman Procedural Law, Ernest Metzger (2013, p. 15) defines them as "commands issued by a magistrate with imperium, aiming to restore order to a disordered (and perhaps restless) state of affairs or to prevent some undesirable event". What this means in practice is that a magistrate, considering an interdict, need not decide whether the plaintiff had a valid claim in law, but only whether the plaintiff was in a deserving position relative to the alleged position of the defendant:

[8] In fact, in Austria, the decision that resolves a possessory action, even if it fully examines the merits, is not called a "standard judgment" (*Versäumungsurt*), but a "final decision" (*Endbeschluss*), according to Article 459 of the *Zivilprozessordnung*, which express the idea of *non-definitiveness*.

[9] In the original: "*Ideja da posesorna zaštita treba da bude hitna i provizorna prožima konstrukciju posesorne zaštite državine uopšte*".

> If for example a person had allowed another the use of his property for some indefinite period (a so called *precarium*), and the grantee refused to return it on demand, it was enough for the magistrate to appreciate that the greater possessory right would lie with the grantor if the grantor's story were true. The magistrate would then order the grantee to restore, not "the property," but "that which he holds *precario*." In inserting the proviso, the magistrate is hedging: the grantor may in fact have no such right (Metzger, 2013, p. 16).

The idea of anticipatory summary protection, a species of the genus of provisional urgent protection, originated in the Italian medieval jurisprudence of the 14th century in the case of protective interdicts of possession and was later propagated to other European countries through the "*summarissimum possessorium*," distinct from the ancient "*summarissimum*" of Canon Law. This new *summarissimum* was a "preparatory and summary instance that culminated in a provisional judgment granting possession to one of the parties" (Alves, 1985, p. 169).

This *summarissimum* was used when there was "danger or fear of arms" ("*periculum aut timor armorum*"), or when the parties submitted to it voluntarily, even going so far as to understand that it could be employed whenever the judge deemed it necessary (*officium judicis*)[10].

In this context, the "*summarissimum possessorium*" in 14th-century Italy, as well as the granting or denial of preliminary measures in possessory interdicts, which effectuate the execution or anticipated mandate of the final judgment, are pronounced by summary cognition. The court appreciates, with limited depth (a circumstance imposed by the summary phase of "new force" actions), "the dispute in the summarized context of the unilaterally produced evidence by the plaintiff" (Alves, 1985, p. 259).

The historical maintenance of a "summary phase" of the interdict procedure until the present day is highlighted by Joel Dias Figueira Júnior, who points out that the Roman tradition of establishing a differentiated summary procedure for interdict actions was maintained in Portuguese law by the Afonsine Ordinances (Book III, Titles LII and LIII), admitting the granting of urgent possessory protection in favor of the dispossessed, provided that the offense had occurred within a year and a day, as well as by the Manueline and Philippian Ordinances (Figueira Júnior, 1995, p. 253).

These "summary actions" were preserved in the Brazilian Civil Code of 1916 and um the 1939 Brazilian Code of Civil Procedure, with the classification of possessory actions in Title XIII, Book IV, of special proceedings, and in the Brazilian Code of Civil Procedure 1973, in Chapter V of Title I and Book IV of special procedures, as well as in the current Brazilian Civil Procedure Code (CPC/2015). Therefore, summary actions are nothing more than the "new force actions" of ancient law and, more recently, the Philippian Ordinances (Book III, 48), maintained by the Civil Code of 1916, the Codes of Procedure of the States, and later by the Federal Codes (Figueira Júnior, 1995, p. 253).

The term "summary" is used, here, to differentiate from ordinary actions, which did not provide for the possibility of anticipatory possessory protection until the reforms of December 1994, which were implemented in the Brazilian CPC/1973. The *summary form* is expressly and specifically provided for the possessory interdicts, according to Tito Fulgêncio, "due to the need for prompt remedy for the possessor, celerity, and prevention of disputes that arise from the delays of the process, involving high public interest" (Fulgêncio, 2015, p. 212).

In foreign Law, we can observe some procedural similarities with the model adopted in Brazil.

Just as in the Brazilian procedural system (especially in the case of "new force actions" [ações de força nova]), possessory actions in Italian law are divided into two parts: the first of summary cognition and the second of extensive cognition. In Italy, the decision process on a possessory action is necessarily preceded by a decision-making process on the issuance of a temporary measure.

[10] Moreira Alves (1985, p. 169) explains that the *summarissimum* of the old Canon Law "was characterized by being a more summary instance than the ordinary one (although it was definitive like this one, and often provoked, due to its summary, unjust sentences, giving rise to violence)".

Another similar point is that the anticipatory interdict protection (through the provisional measure) can be granted without hearing the opposing party, when summoning them to court could harm the enforcement of the provision, or after hearing the defendant (Article 669-*sexies* of the *Codice di Procedura Civile*[11]).

As it turns out, in the Italian system the idea of urgency and provisionality is clearly expressed in the two-stage procedural construction of possessory protection – similarly to what happens in "new force actions" in Brazilian law. The Italian court first conducts the procedure to issue a temporary measure, and after issuing a temporary measure, the main procedure follows if proposed by any of the parties within a certain period (peremptory period of sixty days from the communication of the decision that decided the complaint) after the issuance of a temporary measure (Article 703, § 4º of the Italian CPC[12]).

In French law, the "*mesures d'instruction*" (instructional measures), which serve a very similar function to precautionary or anticipatory protective measures ("*les ordonnances*"), are provided for standard/common demands, not limited to possessory actions.

If there is urgency, the judge, at the request of a party or *ex officio*, can decide and order the urgent measures necessary and relevant to the facts concerning the resolution of the dispute, whether for conservation or restoration of the factual situation. Furthermore, instructional measures do not have a defined procedural moment for being granted; in other words, they can be ordered at any procedural stage (Figueira Júnior, 2013, p. 291).

It is worth noting that the procedure for possessory actions in French law was entirely abolished from the revocation of articles 1264, 1265, 1266, and 1267 of the Code de Procédure Civile by Decree No. 2.017-892 of May 6, 2017.

Vladimir Vodinelić seems to have indicated the reason for this legislative choice. According to the author, the insufficient speed of the possessory procedure led to possessory protection, in case of interference in possession, being commonly sought in the procedure for requesting interim measures (*ordonnances* or *mesures d'instruction*), and not through a properly constituted possessory claim (Vodinelić , 2013, p. 291).

In Germany, §940 of the *Zivilprozessordnung* (ZPO) allows for "the adoption of precautionary measures to regulate a provisional state concerning a disputed legal relationship, especially when it concerns permanent relationships, whenever it is necessary to prevent considerable harm or acts of force that threaten it, or for other reasons"[13], while §942 provides for the possibility of granting preliminary possession protection for urgent cases[14].

In South African law, Kleyn (2013, p. 4) explains that possession can also be protected by other remedies, such as interdicts and actions for damages, "but these cannot be considered as possessory remedies in the true sense of the word because, in these cases, the rights of the parties must be proven," thus delving into the merits of the case.

In this sense, the *mandament van spolie* is the only true "possessory remedy" in South African law, in which the plaintiff only needs to prove that they were in possession and were unjustly dispossessed. When analyzing it, the court does not

[11] *Art. 669-sexies. (Procedimento).* "Il *giudice, sentite le parti, omessa ogni formalità non essenziale al contraddittorio, procede nel modo che ritiene piu' opportuno agli atti di istruzione indispensabili in relazione ai presupposti e ai fini del provvedimento richiesto, e provvede con ordinanza all'accoglimento o al rigetto della domanda*".

[12] Art. 703. [...] "*Se richiesto da una delle parti, entro il termine perentorio di sessanta giorni decorrente dalla comunicazione del provvedimento che ha deciso sul reclamo ovvero, in difetto, del provvedimento di cui al terzo comma, il giudice fissa dinanzi a sé l'udienza per la prosecuzione del giudizio di merito. Si applica l'articolo 669-novies, terzo comma*".

[13] Section 940: "Injunctions are also admissible for the purpose of providing for a temporary status concerning a legal relationship that is in dispute, to the extent this provision is deemed to be necessary in order to avert significant disadvantages, to prevent impending force, or for other reasons, in particular in the case of legal relationships of a long-term nature existing".

[14] Section 942: "Competence of the local court in the district of which the object is located (1) In urgent cases, the local court (Amtsgericht, AG) in the district of which the object of the litigation is located may deliver an injunction that determines the period within which the petition for the summons of the opponent to the hearing regarding the legal validity of the injunction is to be filed with the court responsible for the main action".

delve into the merits of the dispute. Its basic principle is "*spoliatus ante omnia restituendus*", whose purpose is to prevent people from taking the law into their own hands (Kleyn, 2013, p. 5).

In Greece, the judge and even the court can *ex officio* determine a provisional measure in cases involving possession disputes, according to Article 733 of the Greek CPC[15].

Thus, it can be observed that many national legal systems conceive of a "summary phase" of the possessory action (e.g., Italy and Brazil) or, at least, the possibility of provisional protection (e.g., Germany, Portugal, France, Switzerland, Greece, South Africa, Spain *etc.*) regarding the maintenance or alteration of the *status quo*, determining who will remain provisionally in possession.

It is important to note that the provisionality of this initial decision should not be confused with the provisionality of the possessory judgment in relation to the petitory judgment. Vodinelić elucidates this point:

> The possessory decision is provisional compared to the petitory one, and the provisional measure is also provisional compared to the possessory decision. The possessory jurisdictional protection in a possessory action is provisional, not final in the sense that whoever loses in this proceeding (and not, when allowed, as a result of petitory challenge, absorption challenge, or petitory counterclaim) may win in the petitory process, and vice versa, the winner of that action may lose the petitory case. The achievement of such a provisional solution, which is not definitive for the protection of possession, should not be equated or confused with protection through a provisional measure since it only has effects during the duration of the possession process, i.e., until the possessory decision becomes final (Vodinelić, 2013, p. 296).

As an example of the provisional character of the initial decision regarding possession protection, the Spanish *Ley de Enjuiciamiento Civil*, in its article 447, second paragraph[16], expressly acknowledges that the judicial decision about summary possession protection (by verbal judgment) does not carry out the effects of *res judicata*, demonstrating that, in practice, this decision is just one phase of the possessory procedural process, as the measure can be naturally reversed in a judgment based on exhaustive cognition.

Therefore, it is right to say that, with regard to the judicial protection of possession in the normative system adopted by most of the national legal systems referenced in this work, there is a submission of judgments, in this ascending order of hierarchy or "binding": 1) precautionary/summary possessory judgment; 2) final possessory judgment; and 3) petitory judgment.

In this regard, Pontes de Miranda (2012, p. 517) sees the possessory process as "something intermediate between the petitory process and the precautionary process [processo cautelar]" with the following caveat: "however, one must not exaggerate the scope of the research into the definitiveness of the petitory process and the non-definitiveness of the possessory process, especially as the possessory judgment can be definitive in what it decides". From that look, the concept of non-definitiveness fades away.

It is also worth highlighting the rule of art. 557, caput, of the Brazilian Code of Civil Procedure, which prescribes that "while a possessory action is pending, both the plaintiff and the defendant are prohibited from proposing an action for recognition of ownership". The sole paragraph of the same article also prescribes that "it does not prevent the maintenance or repossession of claims of ownership or other right over the thing".

According to Maria Helena Diniz and Mariana Ribeiro Santiago (2023, p. 80), this is not about prioritizing possession to the detriment of property, as this will prevail at the end of the petition judgment. What happens is that, allowing the

[15] *Ασφαλιστικά μέτρα σε κάθε είδους υποθέσεις νομής ή κατοχής διατάσσονται από το ειρηνοδικείο*. In free translation: "precautionary measures in all types of counties or possession cases are ordered by the magistrates court".

[16] In the original text: "*No producirán efectos de cosa juzgada las sentencias que pongan fin a los juicios verbales sobre tutela sumaria de la posesión ni las que decidan sobre la pretensión de desahucio o recuperación de finca, rústica o urbana, dada en arrendamiento, por impago de la renta o alquiler o por expiración legal o contractual del plazo, y sobre otras pretensiones de tutela que esta Ley califique como sumarias*".

combination of the two actions, it is concluded that it is futile for the legislator to establish a more agile procedure for the defense of possession, as every action regarding possession would immediately end up generating judicial discussion about the property, which is a much more delicate issue and difficult to prove.

Ultimately, as stated by Antonio Carlos Marcato (2022, p. 1.122), the sole paragraph article 557 of the Brazilian CPC prohibits not the discussion about the domain of property, but rather the resolution of the petitionary issue within the possession process, given the need for the judge to observe the principle of restraint of judgment to the request (*rectius*: it will judge the possessory request, and in the respective process it is deferred to decide on the domain, under penalty of issuing an *extra petitum* sentence – and therefore invalid). However, it should be noted that:

> if both parties dispute possession based on the claim of dominance, that is, they intend to demonstrate their status as legitimate possessors on the basis of being owners of the property, then, yes, the judge must decide in favor of the party that proves ownership of the domain, that is, it will grant protective protection of ownership favorable to that party (Marcato, 2022, p. 1.122).

In addition to the prohibition of the domain exception, and for the same reasons, it is clear from the wording of art. 557, of the Code of Civil Procedure, that there is no need to bring a petitionary action while a possessory action is pending. There is no exception that it would be possible to file a petition when the discussion in the possessory concerns only the *de facto* power over the thing, as the law does not make this exception (Diniz & Santiago, 2023, p. 80).

3.4 Normative models of absolute and relative judicial protection of possession and the Brazilian Law

Clóvis Bevilaqua (1976, p. 61) stated that "possessory actions of the national law are evolutionary forms of Roman interdicts, which were orders of magistrates". More than evolutions of Roman interdicts, typical possessory actions in Brazil receive a more "guaranteeing" (and socially important) treatment when compared to actions aimed at protecting possession and their regulation in other national legal systems.

Firstly, the Brazilian system of possession protection offers much greater temporal assurance than in other countries. For example, in France (Article 1.264 of the *Code de Procédure Civile*) and in Belgium (Article 1.370 of the *Code Judiciaire*), the possessor who has suffered interference can only request possessory protection if they have possessed the thing for at least one year, unless the disturbance was caused by force or other aggressive acts.

In Portugal, if the claimant has not possessed for more than one year, they can only be maintained or reinstated in possession against someone who does not have a better possession, according to Article 1278, second paragraph, of the Portuguese Civil Code[17]. In Italy, in addition to the requirement of possessing for at least one year, the possessor must bring the interdict action within one year from the date of the disturbance (or from the knowledge of it), as provided for in Article 1.170 of the Codice Civile[18]. The same applies to the Latvian Civil Code (Article 925)[19] and the Law of Real Rights of China (Article 462)[20].

[17] "Se a posse não tiver mais de um ano, o possuidor só pode ser mantido ou restituído contra quem não tiver melhor posse".

[18] Art. 1170. *Azione di manutenzione. Chi è stato molestato nel possesso di un immobile, di un diritto reale sopra un immobile o di un'universalità di mobili può, entro l'anno dalla turbativa, chiedere la manutenzione del possesso medesimo. L'azione è data se il possesso dura da oltre un anno, continuo e non interrotto, e non è stato acquistato violentemente o clandestinamente. Qualora il possesso sia stato acquistato in modo violento o clandestino, l'azione può nondimeno esercitarsi, decorso un anno dal giorno in cui la violenza o la clandestinità è cessata. Anche colui che ha subito uno spoglio non violento o clandestino può chiedere di essere rimesso nel possesso, se ricorrono le condizioni indicate dal comma precedente*. The same rule is foreseen in art. 1.168 of the Italian Civil Code, referring to the reinstatement action (*azione di reintegrazione*).

[19] "925. The claim for disturbance or deprivation of possession may be filed within a period of one year, after which the right to claim for dispossession expires by prescription".

[20] Article 462 [...] "The possessor's right to request restitution is extinguished if that right has not been exercised within a period of one year from the date on which the transgression or conversion occurs".

The exact rule regarding the statutory period for the filing of the possessory lawsuit is also observed in the article 439, first paragraph, of the Spanish *Ley de Enjuiciamiento Civil*, which states as follows: "*no se admitirán las demandas que pretendan retener o recobrar la posesión si se interponen transcurrido el plazo de un año a contar desde el acto de la perturbación o el despojo*".

In Austria, the preclusive deadline for possessory interdicts is 30 days from the knowledge of the disturbance, according to Article 454 of the Austrian *Zivilprozessordnung*[21]. In Switzerland, prior extrajudicial notification within 14 days from the date of the disturbance is required before filing the appropriate action. In this sense, prior extrajudicial notification is a requirement for the admissibility of the interdict action, as if the claimant fails to do so, they lose the right to possessory judicial protection and can only file the action if the notification remains ineffective (Vodinelić, 2013, p. 336).

Vladimir Vodinelić (2013, p. 340) states that "there is no possessory protection of possession today that would be conceived as slow and without urgency, and the possibility of being available in the long term after interference remained an exception in history" (in the case of *actio spolii*).

However, the exception did not remain only in history. In Brazil, unlike the vast majority of European countries, there is no temporal limitation for the admissibility of a possessory interdict claim, but only a preclusive deadline (one year and one day) for the special procedural form of the "action of new force" ["ação de força nova"]. In general, the deadline for the admissibility of the possessory claim will be conditioned to the acquisition of ownership or other real right by "adverse possession" [usucapião] by the possessor who remains or has remained in possession.

Another point that distinguishes the Brazilian system of judicial possession protection from others is the adoption of the model of "absolute possessory protection", and not the model of "relative possessory protection".

Vodinelić, author of the theoretical platform of both normative models, elucidates the fundamental difference between them:

> When it comes to the absolute judicial possessory protection of possession, the basic difference is that this protection means protection achievable completely independently of the existence of the plaintiff's or defendant's right to the ownership of the thing [*jus possidendi*] and the stronger right of the defendant (absolute possessory protection of possession). On the other hand, the absence of the plaintiff's right to possession or the defendant's right to possession, as well as the stronger right of the defendant, prevent the protection of the possessor who is not the owner (relativized possessory protection) (Vodinelić, 2013, p. 339).

In this sense, there is a significant difference between the model of relative possessory protection (when protection is excluded by exception of a better right of possession, petitory exception [*absorbet possessorium*], and the possibility of petitory counterclaim, or by any of these actions) and the model of absolute possessory protection (in which none of the options above is allowed) (Vodinelić, 2014, p. 63).

For example, in Switzerland, it is allowed for the defendant to claim their ownership right in a possessory action to exercise their "stronger right" against the dispossessed or the dispossessor, as provided for in Article 927, second paragraph, of the *Zivilgesetzbuch* (ZGB)[22].

Also allow the allegation of ownership as a basis for the claim to recover the property through the possessory procedure and, in some cases, as a matter of defense (*exceptio dominii*), with some limitations: Netherlands (Article 3:125,

[21] §. 454 (1) "In proceedings concerning disturbance of the collection of goods and rights, in which the claim only aims at the protection and recomposition of the last collection and which are pending within a period of thirty days counting from the knowledge of the disturbance by the plaintiff, the following special provisions apply (§§ 455 to 460)".

[22] Art. 927 [...] *2. Wenn der Beklagte sofort sein besseres Recht nachweist und auf Grund desselben dem Kläger die Sache wieder abverlangen könnte, so kann er die Rückgabe verweigern*.

second paragraph, of the Civil Code[23]), Georgia (Article 160, in fine, of the Civil Code[24]), Turkmenistan (Article 181 of the Civil Code[25]), Moldova (Article 308 of the Civil Code[26]), Mongolia (Articles 90 to 92 of the Civil Code), among others.

There is also the binding effect of the "exception of defective possession" or "exception of deficiency" (*exceptio vitiosae possessionis*) in some national legal systems, which prevents the holder of a defective possession from seeking and obtaining judicial protection of his possession.

According to Article 917 of the Latvian Civil Code[27], a individual who has acquired possession by force or secretly has no possessory judicial protection against the person from whom they deprived (exception of deficiency). A similar rule is observed in French legislation (Article 2.263 of the French Civil Code[28]), Belgian (Article 1.370, paragraphs 5th and 6th of the *Code Judiciaire*[29]), and German (BGB, §§ 861, second paragraph[30], and 862, second paragraph).

In the Netherlands (Article 3:125, second paragraph, *in fine*, of the Dutch Civil Code[31]), if the defendant practices violence or clandestinity to acquire possession, even if they have a "better right" (*rectjus*: a real right [direito real] over the thing, which grants them *jus possidendi*) in relation to the plaintiff – such as a title of ownership – they will not have their possession judicially protected in relation to the plaintiff.

In Brazil, contrary to the aforementioned legal systems, judicial possessory protection is not denied outright to the possessor who *(i)* has a apparent "worse right" compared to the other litigant; *(ii)* has a defective possession in relation to the other party; or *(iii)* does not have a "right to possess" *(jus possidendi*), but only a "right of possession" (*jus possessionis*).

The protection of the possession, for itself (*jus possessionis*), is, therefore, unconditioned. This non-conditionality (*neuslovljenostwe*)[32] of (the granting of) the judicial protection of possession to any other factual or legal element, evident from the three points mentioned above, is what indicates the adoption, by Brazilian Law, of the absolute possessory protection model.

[23] Article 3:125 Legal actions of the possessor and keeper of an asset against third persons [...] 2. A legal claim as meant in the previous paragraph is rejected if the defendant has a better title to hold or to use the asset than the plaintiff, unless the defendant has obtained or used the asset by force or in a stealthy way.

[24] Article 160 – Demand by a bona-fide possessor to restore a thing retained illegally If a bona-fide possessor is dispossessed, he/she may recover the thing from the new possessor within a three-year period. This rule shall not apply when the new possessor has a better right to possess the thing. The right to return property may also be applied against the person having a better right to the thing if he/she has acquired it by duress or deception.

[25] Article 181. The requirement of good faith the owner about returning stuff from illegal possession if the possessor is deprived of possession, he spent three years might require the new owner to return things. This rule does not apply when the new owner has a preferential right of ownership. Demand return of ownership can be applied in respect of a person who has the right of priority, if he bought a thing through violence or fraud.

[26] Article 308. Claim by Possessor in Good Faith of Illicitly Possessed Property Where the possessor in good faith is deprived of a property, he/she may claim its restitution from the new possessor within 3 years. This rule shall not apply where the new possessor has a preferential title to possession. The claim of possession may be applied in relation to a person who has preferential title to possession, where the property has been obtained by the latter through violence or fraud.

[27] Translated: art. 917. "If the defendant proves that the plaintiff obtained possession of it unlawfully (para 909, d. 2), then the plaintiff's claim will be dismissed. But the defendant's statement that the plaintiff obtained possession unlawfully from a third party is not to be followed".

[28] "Les actes de violence ne peuvent fonder non plus une possession capable d'opérer la prescription". This is not exactly an impossibility of possessory protection, in the case of art. 2.263 of the *Code Civil*, but a kind of penalty, imposed by the French legal system on those who acquire the possession through violence.

[29] Art. 1370. Les actions possessoires ne peuvent être admises que sous les conditions suivantes:
1° qu'il s'agisse d'immeubles ou de droits immobiliers susceptibles d'être acquis par prescription; [...]
La condition indiquée au 1° n'est pas applicable lorsqu'il s'agit d'une servitude légale ou conventionnelle de passage et quand la dépossession ou le trouble a été causé par violence ou voie de fait.
Les conditions indiquées aux 2° et 3° ne sont pas requises quand la dépossession ou le trouble a été causé par violence ou voie de fait.

[30] Article 861 [...] "(2) The claim is excluded if the possession that the possessor was deprived of is defective in relation to the current possessor or his predecessors in the title and it was obtained in the last previous year deprivation of possession".

[31] Article 3:125 Legal actions of the possessor and keeper of an asset against third persons [...] 2. A legal claim as meant in the previous paragraph is rejected if the defendant has a better title to hold or to use the asset than the plaintiff, unless the defendant has obtained or used the asset by force or in a stealthy way.

[32] Term used by: Vodinelić, V. V. (2013). Čemu posesorni postupak? O razlogu posesorne zaštite državine. *Pravni Zapisi*, 274-350, p. 280.

The non-conditionality of possessory protection in the absolute model may appear to be a "more favorable" – that is to say, guaranteeing – legal treatment for the original dispossessor, insofar as he will have the right to protect himself, through possessory interdicts, against the one who, originally dispossessed, tries violently or secretly to recover the thing from which he has lost possession.

Another possible – but mistaken – conclusion is to claim that the absolute normative model does not have the criteria to assess who should remain in possession, since apparently the legal text does not present elements of distinction, for the purposes of possessory protection, between a "better possession" and a "worst possession". This second statement will be analyzed in the next topic.

The first statement is a reasonable interpretation of the Brazilian possession protection system (absolute model of judicial protection of tenure). However, it should be noted that the possibility of a "more guaranteeing" treatment given to the defendant is not the cause, but a consequence of what is protected through the possessory procedures in this normative model: the right to prevent someone from changing the state of affairs immediately found.

This refers to the aforementioned *theory of appearance* proposed by Vodinelić, which, in our view, is compatible with the absolute normative model. For this theory, the protection of possession – the factual state representing the "embodiment" of a right or an obligation – is protection of the state of affairs immediately found, which should not be changed without prior proof of the right to do so (Vodinelić, 2013, p. 799).

This reasoning is fully applicable to "typical situations" of infringement of possession, which occurs when "an unauthorized person infringes on the possessor who has the right to be a possessor and does not have an obligation to endure the infringement, *i.e*., when the person infringes by force, coercion and other means in conflict with the possessor" (Vodinelić, 2014, p. 63).

In the Brazilian legal system, the dispossessed who lost possession – that is to say, a loss that was effectively consummated, with the end of acts of violence or clandestinity – becomes illegitimate to regain possession through their own means (legitimate defense of possession or immediate effort). What will be up to him, under these conditions, is to file a possessory action and report the facts so that the judge grants him, provisionally or in the final judgment, the right to reintegrate or to remain in possession. This is what indirectly grant the one who owns without authorization from the previous possessor – or even the one who violently dispossesses another – a "more guaranteeing" treatment.

It is not possible, for example, for the dispossessed person to recover by force the initially lost possession (dispossessing the dispossessor) and, when summoned to defend himself in a possessory action brought by the original expropriator, use the e*xceptio viciosae possession* to automatically prevent the author from having the right of possessory protection, as occurs in some countries that admit such exception.

The Brazilian legal system of judicial (procedural) possession protection does not work like that. In the absolute normative model, in a possessory action (interdict), it does not matter, in principle, who has the right to possess (*jus possidendi*) or who was the legitimate possessor. Once the dispossession, turmoil or threat has been committed, the possessory protection will be effective through the return to the *status quo ante*. It means, therefore, that if the defendant owned a certain land for years, but it is proven that he practiced a violent (*vis*) or secret (*clam*) dispossession to regain possession that he had lost to someone else, the judicial provision must be granted in favor of the plaintiff, reinstating him or keeping him in possession.

That is the protection of possession – as the factual state representing the "embodiment" of rights and obligations – through the protection of the right to prevent someone from changing the state of affairs immediately found. The need of protection of this state, which should not be changed without prior proof of the right to do so, is what also justify possessory protection of the possessor which is not authorized to be a possessor.

His protection is also legitimate because the infringement of possession of such possessor also represents a change in the manifestation of rights and obligations, the immediate found state of affairs which equally cannot be unlawfully violated without a previous proof of a right to do so, whether the possessor is authorized to possession or not, whether the infringement was violent of without a conflict (Vodinelić, 2014, p. 65).

However, in certain situations, it will not be clear who effectively violated the state of affairs immediately found, that is, who violated and who was violated in possession. Here we enter the merits of the second statement, referent to the criteria for assessing the "best possession" for the purposes of possessory protection and, with that, deciding who should be kept or reinstated in possession.

3.5 The "best possession" in the Brazilian system of possessory protection

The "best possession", in the Brazilian system, will only be measured – and, therefore, protected– when *(i)* the parties find themselves in an atypical situation[33], in which it is not clear who is committing the dispossession or who is suffering a threat or nuisance; or, still, *(ii)* when the judge needs to decide on whether or not to grant provisional relief in favor of the author of the possessory action, when he will analyze the allegations in *statu assertionis* and under summary cognition (perfunctory).

An example of an atypical situation would be alienation *a non domino*, in which ownership of a property is transferred to the purchaser, but the transferor is not the owner of that particular asset. Assuming that the acquirer does not know that the transferor is not the true owner or legitimate possessor of the thing, and that the contractual instrument used to formalize the transfer is formally suitable for that purpose (just title). In this situation, there are two qualifiers for the possession of the acquirer who becomes the possessor: "unjust possession" and "good faith possession".

Unjust possession because the person that appropriates something from another and alienates it to a third party commits dispossession, whether by violence, clandestinity or precariousness. The third acquirer, whose possession derives from the one who transmitted it (since it is an acquisition derived from possession, in the *inter vivos* succession modality), also dispossesses the true owner or legitimate possessor of the thing he now possesses.

Good faith possession because the acquirer does not know that his predecessor in possession (alienator) practiced dispossession and unfairly owned the thing. That is, he ignores the defect present at the time of the original acquisition of possession, and which continues to stain his possession, qualifying it as unfair.

Supposing, now, that this alienation *a non domino* has occurred twice, in an almost identical way: the same transferor, transferring ownership of the same property, using the same contractual instrument, but to two different people (acquirers). And both enter the property, believing themselves to be the legitimate owners of the thing, and without knowing that they are practicing dispossession in the face of the legitimate possessor or true owner of the land.

If one of the acquirers files a possessory action (interdict) against the other, what should be first assessed by the judge, under these conditions, is not who altered the state of affairs immediately found – because both, in the first moment, have the right to do so –, but who has the "best right of possession" over that land, and only then, from that, decide which *status quo ante* should be restored.

Since both possessions qualify as unfair and in good faith, other legal criteria must be used to determine which possession is better. The Brazilian legal system, based on objective normative elements, allows the differentiation of

[33] Vodinelić (2014, p. 63) defines the "atypical situations" as "when the person authorized for possession infringes on an unauthorized possessor, i.e. when a person infringes on a possessor without there being a conflict between them". On the contrary sense, "typical situations" of infringement of possession occurs, accordingly to the author, when "an unauthorized person infringes on the possessor who has the right to be a possessor and does not have an obligation to endure the infringement, i.e. when the person infringes by force, coercion and other means in conflict with the possessor".

possession beyond traditional classifications, that is, fair and unfair or in good faith and in bad faith (Silvestre, 2021, p. 2.065). Luciano de Camargo Penteado (2014, p. 623) defends a qualification of possession according to its social aspect and the purposes for which it is exercised, that is, according to the characteristics of the possessory acts practiced by the possessor:

1. *labor-possession* (possession *pro labore*), which is exercised with the performance of a labor or productive activity over a thing;

2. *social-possession* (possession *pro misero*), exercised for housing or work purposes by poor people, who will receive special protection due to their socioeconomic status;

3. *housing-possession* (possession *pro morada*), for the housing of the owner and his family; It is

4. *Legitimate possession*, which results from recognition by the municipal government, via a legitimation title, and destined for land regularization and subsequent acquisition of the property.

Such categories of possession serve, each one in its legal regime, as a factual support to forms of usucapion with terms and requirements more favorable to the usucapion (Silvestre, 2021, p. 2.065). This already indicates the predilection of the Brazilian legal system for a specific way of exercising possession, namely, that way that meets the adoption of policies for regularization of urban space in municipalities, in addition to the realization of fundamental rights to housing and work (Silvestre, 2019, p. 340).

In this way, the Brazilian legal system does not only value the subjects who own the thing without vices, but, above all, for those who, in addition to being fair, own it for subsistence and housing purposes, *i.e.*, for those who functionalize possession as housing. or as a means of livelihood.

Briefly, within the scope of possessory judicial procedures, the idea of "better possession" allows the development of the following assertions:

1. a just possession shall not be precluded in favor of an unjust possession;

2. a just possession that functionalizes the legal institute of possession cannot be passed over in favor of another just possession that does not functionalize it; and

3. in the face of two just functionalized possessions, the one intended for subsistence or housing of the possessor cannot be passed over, given the priority protection of these *modes of possession* by the Brazilian legal system (arts. 9 and 10 of Law nº 10.257/2001; art. 1 of Law nº 6.969/1981; §§ 4 and 5 of article 1.228 of CC/02; and articles 183 and 191 of CRFB/88) (Silvestre & Mill, 2023).

These are the existing normative elements in the Brazilian legal system that allow determining the best possession in atypical situations, in which it is not clear who committed dispossession and/or who was dispossessed, and it is necessary to define who should remain or be reinstated in possession.

It is interesting to note that, in the model of relative protection of possession, situations like this will commonly be analyzed in the petitory judgment. In Serbian Law, the objection *petitorium absorbet possessorium* is admitted, and justified, in Vodinelić's view, by the need to relativize possession (allowing the objection of absorption) to make clear who really has the right: "competition between two identical manifestations is resolved on the basis of the better right to possess" (Vodinelić, 2014, p. 65) (*jus possidendi*), i.e., possibly who has a "better title". On the other hand, in the absolute model, as adopted in Brazil, this objection is not admitted, nor is the absorption of the possessory judgment by the petitioner. The possessory judgment, autonomous and independent, will be exhausted and, in the end, the judge will decide who should remain in possession, not based on the analysis of the right to possess (*jus possidendi*), but based on the right of possession (*jus possessionis*).

In addition to the atypical situations of transgression of possession, the "best possession" may also be subject to judicial analysis in cases of provisional measures, especially in the specific case of interim decision of evidence (Pereira, 2020,

p. 103) – or, in the opinion of some, an urgent type of interim decision, in which the *periculum in mora* is legally presumed in favor of the plaintiff (Mazzei, 2023, p. 297; Zavascki, 1997, p. 30) – provided for in art. 562 of the Civil Procedure Code of 2015, when the judge will decide based on restricted cognition.

The cognition operated by the judge can take place on two different frames: on the horizontal frame, cognition is limited by the objective elements of the process (trinomial: procedural issues, conditions of action and merit). On this frame, cognition can be *full* or *limited* (partial), according to the permitted extent. On the vertical frame, cognition can be classified, according to the degree of its depth, into *exhaustive* (complete) and *summary* (incomplete) (Watanabe, 2012, p. 75).

In turn, the verticality of cognition concerns the depth of the examination of the pretensions formulated by the plaintiff and objections presented by the defendant. In this sense, cognition in the vertical sense is intimately linked to the production of evidence necessary for in-depth (exhaustive) knowledge of the litigious object.

In situations where the judge needs to decide on a provisional measure, the effectiveness of judicial protection cannot be reconciled with the time necessary to produce certain evidence, in the same way, when the right can be evidenced immediately, although the manifest urgency is not present. Summary cognition therefore gives rise to an "appearance situation" (Figueira Júnior, 1995, p. 257).

Therefore, in cases where it must decide on the provisional protection of the art. 562 of CPC/2015, the judge may not be absolutely sure, given the limited evidence produced that prevents exhaustive cognition, about who changed, without the right to do so, the state of affairs immediately found, violating the possession of other.

Faced with the need to decide who will remain wholly or partially in possession (since, if guardianship is granted to the plaintiff, the defendant may remain in the situation he is in), the judge will be able to analyze who has the "best possession" to remain with it during the possessory procedure, until the final and definitive judgment (Simões, 2023).

Finally, a caveat must be remembered. Different from what some authors claim[34], the "best possession" will not always be analyzed and protected in possessory procedures. The object of protection of possessory procedures, as already mentioned, is the right to prevent someone from altering the state of affairs immediately found (violating the possession of another), without demonstrating the right to do so.

If "A" violently dispossesses "B" who already unjustly owned a certain land (unauthorized possession), however much "A" assigns a social destination to his possession (for example, a *pro morada* or *pro labore* possession), functionalizing it and making it a "better possession" in relation to that of "B" (which only possessed, with no specific destination), this will not be decisive for the possessory protection in an eventual possessory action filed by "B" against "A". What will be protected, in this case, the state of things that were unjustly altered by "A" when he dispossessed "B". The judicial provision will be the restoration of the *status quo ante*.

4. Results

The comparative analysis conducted on possession protection within Brazilian Law and other national legal frameworks, alongside the exploration of possessory interdicts' evolution from Roman Law to contemporary legal systems, has yielded several noteworthy findings.

Firstly, it's established that possessory court proceedings aim to safeguard the status quo by preventing third-party interference with the immediate state of possession, requiring proof of authorization for any alterations. This protection extends even to possessors lacking formal authorization, underscoring the imperative to preserve the current possession state.

[34] As an example, Cláudia Cimardi (2008, p. 331) states that "the judge, no matter how complex the case, cannot conclude by the absence of better possession". This can lead to an incorrect interpretation of the object of guardianship of possessory procedures, when it is understood that the judge must always determine who has the best possession – which will not necessarily occur.

Furthermore, the restrictive scope of issues permissible for discussion in possessory processes, exemplified by the prohibition of *exceptio dominii* as per Article 557 of the CPC/2015, stems from the differentiation between *possessorium* and *petitorium*. This delineation not only streamlines procedural matters but also underscores that possessory judgments offer temporary relief rather than definitive resolutions, emphasizing their remedial nature.

Additionally, the hierarchical structure of possessory judgments, ascending from precautionary/summary possessory judgments to final possessory judgments and petitory judgments, underscores a clear sequence of legal precedence. Moreover, Brazil's judicial protection of possession stands out for its robustness compared to other national legal systems, embodying an *ethos* of absolute protection where possessory rights are not automatically denied even in cases of apparent inferiority or flawed possession claims.

In situations where the violator of possession is unclear, the determination of "best possession" becomes pivotal, particularly in atypical scenarios or when provisional relief is sought. Therefore, the “best possession”, in the Brazilian system, will be examined when *(i)* the parties find themselves in an atypical situation, in which it is not clear who is committing the disseisin and/or who is suffering a threat or nuisance; or, still, *(ii)* when the judge needs to decide on whether or not to grant provisional relief in favor of the author of the possessory action, when he will analyze the allegations in *statu assertionis* and under summary cognition (perfunctory).

Different from what some authors claim, the “best possession” will not always be analyzed and protected in possessory procedures. The object of protection of possessory procedures, as already mentioned, is the right to prevent someone from altering the state of affairs immediately found (violating the possession of another), without demonstrating the right to do so.

5. Conclusion

The hypothesis initially suggested was confirmed during this research. Thus, it is safe to say that the judicial protection of possession in the Brazilian legal system reveals itself as an adoption of the absolute normative model of possession protection, in contrast to most European national legal systems, and establishes an independent possessory procedural protection in relation to the right to property.

This comprehensive study on the normative model of possessory protection in Brazilian Law, based on the theoretical framework of Vladimir Vodinelić, confirms the adoption of a unique system of possessory protection in Brazil. By analyzing historical developments, procedural distinctions, and the protection of possession rights, the research sheds light on the specificities of Brazilian law and underscores the importance of safeguarding possession rights within the legal framework.

The study also generated side conclusions, such as the ones presented in the topic “4. Results”, that reveal the particularities of the procedural system of possessory protection in Brazilian law.

Therefore, a propositional and inspiring thesis is presented regarding the functioning and limits of the Brazilian legal system for procedural protection of possession. We expect that this thesis shall lead to future research on the judicial protection of possession in others legal systems. For this, we hope for more comparative studies between possession protection models in different jurisdictions, in-depth analyses of the historical evolution of possessory and petitory actions, investigations into the effects of possessory procedural protection on the effectiveness of property rights, and empirical research examining the practical application of possession protection norms in Brazil, focusing on the gaps and challenges faced by legal practitioners and litigants. These approaches will contribute to advancing legal knowledge and improving policies related to possession protection.

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