

## Revisiting the prohibition of *exceptio dominii* in possessory actions of new force: substantial and procedural aspects from the perspective of the social function of possession\*

*Revisitando a proibição de exceptio dominii no juízo possessório de força nova: aspectos materiais e processuais na perspectiva da função social da posse*

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### Abstract:

**Objective:** This is an article that resulted from research aimed at analyzing the hermeneutic possibility of removing, from *lege lata*, the prohibition that prevents the defendant from a possessory action of new force to present an domain exception. **Methodology:** Adopting a qualitative and quantitative method, the research analyzed the theoretical foundations of the traditional legal literature that defends the prohibition of domain exception to oppose with the contemporary values of civilistic and proceduralistic. **Deductively,** a propositional thesis was developed to ease the historical rigor of the prohibition of *exceptio dominii*. **Results:** The majority, historical and traditional understanding is not consistent with the operability of the rule, the procedural economy, the reasonable duration of the process, the procedural effectiveness, the social pacification by the jurisdiction and the social function of the possession. Thus, the research produced a hermeneutic systematization whereby the new force possessory action can be divided into two phases, so that the domain exception can be presented in the first phase and discussed in the second. **Contributions:** The current system of the special possessory procedure brings losses to the parties, who will have to litigate in two different actions (one possessory and petition), when they could discuss the whole matter in the first action. With this hermeneutic proposal, the research elaborates a way to make only one action be proposed and, thus, reduce the risk of the parties dealing and for a longer time with a Judiciary that is not fast and efficient.

**Keywords:** Possessory actions. Petitory actions. *Jus possidendi*. Domain exception. Social function of possession.

### Resumo:

*Objetivo:* Trata-se de artigo que resultou de pesquisa destinada a analisar a possibilidade hermenêutica de afastar, de *lege lata*, a proibição que impede o réu de uma ação possessória de força nova apresentar uma exceção de domínio. *Metodologia:* A partir de um método qualiquantitativo, a pesquisa analisou os fundamentos teóricos da literatura jurídica tradicional que defende a proibição de excepcionar com o domínio para contrapor com os valores contemporâneos da civilística e da processualística. *Dedutivamente,* foi elaborada uma tese propositiva para amenizar o rigor histórico da proibição de *exceptio dominii*. *Resultados:* Constatou-se que o entendimento majoritário, histórico e tradicional não se coaduna com a operabilidade da norma, a economia processual, a duração razoável do processo, a efetividade processual, a pacificação social pela jurisdição e a função social da posse. *Assim,* a pesquisa produziu uma sistematização hermenêutica pela qual a ação possessória de força nova pode ser dividida em duas fases, de modo que a exceção de domínio

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*pode ser apresentada na primeira fase e ser discutida na segunda. Contribuições: A atual sistemática do procedimento especial possessório traz prejuízos às partes, que terão que litigar em duas ações distintas (uma possessória e petítória), quando poderiam discutir toda a matéria já na primeira ação. Com essa proposta hermenêutica, a pesquisa elabora uma forma de fazer com que somente uma ação seja proposta e, assim, diminuir o risco de as partes lidarem e por mais tempo com um Judiciário que não cêlere e eficiente.*

**Palavras-chave:** Juízo possessório. Juízo petítório. Jus possidendi. Exceção de domínio. Função social da posse.

## 1 Introduction

This article is the product of a research that analyzed the historical and traditional bases of the prohibition of § 2 of Article 1,210 of the Civil Code and the sole paragraph of Article 557 of the Code of Civil Procedure, which prevent the defendant of a possessory action of new force from responding and defending himself by means of an exception, that is, *feci dominus sum*, better known as *exceptio dominii* or *exceptio proprietatis*.

The research aimed to verify whether the traditional interpretation of § 2 of Article 1,210 and the sole paragraph of Article 557 is consistent with the current *ratio juris* of the Civil Code and the Code of Civil Procedure.

As a problem, the research found that, in the current hermeneutic model, the prohibition of *exceptio dominii* makes it necessary to file two different actions: one of a possessory nature and the other of a petitionary nature, and the caput of Article 557 of the Code of Civil Procedure prohibits the simultaneous filing of the two actions, that is, the petition action must wait for the final and unappealable judgment of the possessory action. Such a procedural system brings losses to the parties, who will have to deal "double" and for a longer time with a slow, inefficient and unreasonable Judiciary.

Therefore, as a problem, the following question was outlined: is it possible, *de lege lata*, to reinterpret § 2 of Article 1,210 of the Civil Code and the sole paragraph of Article 557 of the Code of Civil Procedure in order to enable the *exceptio dominii* in the possessory court of new force?

As a hypothesis, the research found that the answer depends on a hermeneutic systematization that stems from Article 566 of the Code of Civil Procedure. The research intends to verify whether the possessory action of new force can be divided into two phases, so that the domain exception can be presented in the first phase and be discussed in the second.

Thus, this article intends to present a propositional and inspiring thesis to carry out a contemporary rereading of the traditional prohibition of filing the *exceptio dominii*.

The investigation was developed as a qualitative-quantitative approach and the method used was deductive, seeking to establish a general reference based on the knowledge of a certain

number of general data, that is, starting from general data for the elaboration of a specific conclusion.

A literature review was carried out in order to deepen the theory. But, as the research intended to revisit the concepts and reasons for the prohibition, this article was developed as a dialogue between its authors and the ancient and traditional legal literature, which present a propositional thesis based on their impressions of the *regulis juris* of the Code of Civil Procedure and the social function of the possession of the Civil Code. For this reason, the theoretical references (literary documents) are not the most recent, since the subject is also not addressed in substance in contemporary works<sup>1</sup>.

## 2 The domain exception and its restriction in Brazilian Law

Possession, as de facto power over the thing, can be exercised by a person other than the one who is legally qualified to exercise it, that is, the person who has the *jus possidendi*, especially the owner (Aquino, 2000, p. 147). In other words, it can be exercised by someone who has no title capable of justifying it.

It is in this context that the discussion on the exception of domain – or, even, *exceptio dominii*, *exceptio proprietatis* or *exceptio feci quia dominus sum* (Savigny, 1841, p. 160 et seq.) – is inserted, which is nothing more than the (im)possibility for the defendant of a possessory action to adduce, as a matter of defense, that he is entitled to the possession of the thing because he is its owner, or, in a broader sense, holder of some right over the asset (*jus possidendi*). The purpose of the exception is to prevent the granting of guardianship of possession to the opposing party.

The idea that has become common sense for such a situation is that it is not possible to claim ownership via exception because of the absolute separation that must exist between the possessory court and the petition court. In the possessory court, only possession is discussed,

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<sup>1</sup> The exception *feci quia dominus sum* is also called *exceptio dominii*, or *exceptio proprietatis*, or even *exceptio domini*. This research did not find the Latin grammatical and vernacular reasons for sometimes spelling "*dominii*" and sometimes "*domini*". Hence, this work chose to use the phrase "*exceptio dominii*" to refer to its object of study, for two reasons. The first is that, even though "*dominii*" and "*domini*" are written in several passages, the phrase "*exceptio dominii*" was found in the legal literature, mainly in the theoretical framework of the school used in the research. The second is that to speak of "*exceptio proprietatis*" would restrict the indirect defense to the claim of the real right to property, which is not the case in practice: "*dominii*" encompasses all real and personal rights over things, and not only property ("*proprietatis*"). Curious, even, the translation found in Latin-Portuguese dictionaries and in on-line machine translators. Google Translate, for example, translates "*dominii*" into Portuguese as "property", and "*domini*" as "de". "*Domini*" would also appear as a plural of "*dominus*", or also a reference to the Lord (God), as occurs in "*anno Domini*" (Year of Our Lord Jesus Christ). Therefore, the term that – it seems – best reflects or comes close to the meaning that is intended here is "*dominii*".

and there is no need to inquire about other rights prior to it; This is a matter that should be reserved to the petitioner. Otherwise, the *jus possessionis* and *the jus possidendi would be shuffled* and, finally, the protection of possession as an autonomous right that it should be absolutely weakened.

Possession is autonomous in relation to property, that is, it is not to be confused with the real right and does not depend on it (Rezende, 2000). In fact, possession has autonomous characteristics and foundations, and it is certain that the right of possession can be exercised and defended even against the owner of the thing (Cimardi, 1997, p. 48).

According to Alves (1999, p. 25), this distinction between possession and property dates back to Roman Law, as stated in texts of the Digest, such as: *separata esse debet possessio a proprietate* (possession must be separated from property); *nihil commune habet proprietate possessione* (property has nothing in common with possession); and *nec possessio et proprietate misceri debent* (possession and property must not be confused).

In *jus possessionis*, the right to possess, as an autonomous right of the possessor, is presented as a *postjus* to the fact of possession: *possideo, quia possideo* ("I have the right to continue to possess because I have possessed until now") (Alves, 1999, p. 26). It is different when possession can be seen as one of the legal faculties that integrate the content of a subjective right (real or obligatory). It is the so-called *jus possidendi* or right to possession: "it is the faculty that a person has, because he is already the holder of a legal situation, to exercise possession over a certain thing" (Pereira, 2000, p. 21). In other words, the *jus possidendi* always depends on a pre-existing legal relationship, which gives the holder the legal faculty to possess. Unlike *jus possessionis*, which is presented as a *prius* in relation to the fact of possession: there can be possession because there is the holder of the corresponding right (Alves, 1999, p. 27).

This distinction between *jus possessionis* and *jus possidendi* resonates in the civil procedural sphere, as it has repercussions on different types of actions that aim to protect one or the other of these aspects of possession. Thus, we speak of possessory actions and petitionary actions, or even possessory court and petition court.

The possessory court is instituted for the protection of *jus possessionis*, based exclusively on possession as a factual situation. The right to possess is protected by the simple fact that a pre-existing possession has been harassed by someone practicing acts *ex propria auctoritate*, without questioning the existence of any other right that serves as a basis for possession (Farias; Rosenvald, 2015, p. 159). The right to possession arising from the possession itself as a pre-existing situation of factual power over the thing is discussed here. To obtain protection, it is

enough to be a possessor, and it is not necessary for the author to be the holder of a real or personal right, that is, he is independent of any other legal relationship capable of conferring a right over the thing.

This circumstance in which the existence of a pre-existing right other than possession itself is not investigated does not prevent the owner, for example, from defending his right of possession through possessory actions. However, in this case, the basis of his claim should be the possession he claims to exercise over the thing and not the quality of his title (Farias; Rosenvald, 2015, p. 159).

The petition court is intended for the one who holds only the *jus possidendi* – that is, the right to possession based on the pre-existence of a real or obligatory right that contains possession as one of its attributes – must seek judicial protection through a petition action. In this judgment, the plaintiff's claim is based on his (alleged) right of ownership or other correlate, from which the right to possession of the thing arises (Theodoro Júnior, 2016, p. 139).

Regarding this situation, Moreira (2005, p. 2) says that the mere invocation of ownership of the domain, or even of another real or obligatory right over the thing, cannot be understood as a sufficient argument to guarantee success in the possessory lawsuit – whose objective is the protection of the possessory situation. This is because in the possessory sphere it is essential that the possessor prove the effective injury to the fact of possession, even if it is a possession unrelated to a real right (*jus possessionis*). In other words, it is not that there cannot be some other right that confers on the holder the right to possession; it is only said that the existence or not of this right is irrelevant for the purposes of protection in the possessory court. It may happen that one proves the right, but does not obtain possession and, on the other hand, obtains possession and does not prove the right (Gil, 1980, p. 32). Thus, possession is not to be confused with property, since the possessor will achieve judicial protection based exclusively on the de facto power he exercises over the thing, regardless of the existence of any other right (*jus possessionis*).

Petitionary actions and possessory actions, *a priori*, intend the same purpose, that is, the *request* in both is the same, that is, the possession of the thing. On the other hand, they differ in *the causa petendi*: in the possessory case, the cause of action revolves around the possession itself, as a factual situation; and in the petition, the cause of action is a pre-existing legal relationship. They are, therefore, perfectly distinct actions, and there is no need to consider *res judicata* or *lis pendens* when comparing the judgment and the possessory process with the sentence and the petition process (Theodoro Júnior, 2016, p. 139).

The Brazilian legal experience has affirmed the prohibition of initiating the petition when the possessory action has already been proposed. This is a rule provided for in *the caput* of Article 557 of the Code of Civil Procedure, which reproduced the rule originally contained in Article 923 of the *Codex* of 1973.

Loureiro (2001, p. 13) points out that with this prohibition the legislator intended to prevent the owner from justifying the dispossession based on *jus possidendi*. It understood that the joint judgment of the possessory and petition actions, due to a potential connection, would be an oblique means of circumventing the prohibition of the exception of domain, keeping the discussion restricted to *jus possessionis*. Moreira (2005, p. 7) also understands that such rules should be interpreted as tending to separate, even in time, the possessory action from the petition.

The prohibition of the *caput* of Article 557 deals with the filing of another action (petition) filed autonomously in relation to the other (possessory) already proposed. The prohibition of the sole paragraph of Article 557, on the other hand, goes back to a procedural act within the only proposed (possessory) action, whose allegation substantially alters the object of the proceeding. The procedural situations are different and the prohibition of the *caput* of Article 557 does not interfere with the understanding of the prohibition of the sole paragraph of Article 557. What matters, however, is that there will be no conflict between the possessory and petition judgments. The merits of the possessory action will allow the plaintiff to remain in possession of the property, until the defendant (owner) takes it back through the petition action, observing the due process of law. There is, therefore, no reason to prevent the petition from starting while the possessory is pending.

According to Von Savigny (1803), *possessoria interdicts* would be actions in which only possession is admitted as a basis, that is, the court should be limited to ascertaining which of the parties owns the thing (Loureiro, 2005, p. 8).

The matter was dealt with in the Philippine Ordinances, which, following the Roman tradition, forcibly took possession of something that someone else possessed, even if it was the owner, determining that the dispossessed person was always reinstated in possession of the object. Once this initial stage of the conflict over possession was appeased, the Ordinances then allowed the petition to seek petition means to debate the ownership of the thing and, consequently, the right to possession (Wald, 2002, p. 92) (Theodoro Júnior, 2016, p. 86). In other words, the domain exception was prohibited, guidance at the time. The controversy on the subject arises, then, from the controversial Seat of February 16, 1786, made to interpret the

Charter of November 9, 1774.

The legal literature and the courts were divided between those who continued to understand that the exception of domain in the context of possessory actions was unfeasible, restricting the field of interpretation of the Seat to hereditary issues, which, after all, was the subject dealt with by the Permit; and, on the other hand, those who understood that, in any case, possession should not be judged in favor of the one to whom it is evidently shown that the property does not belong – which would make possible an exception based on dominion (Loureiro, 2005, p. 8).

With the advent of the Civil Code of 1916, the controversy about the viability of the domain exception in the context of possessory interdicts gained strength. This was due to the normative formulation of Article 505, *in verbis*: "Article 505. The claim of ownership does not preclude the maintenance, or reintegration in possession. One should not, however, judge possession in favor of the one to whom the domain evidently does not belong."

The normative formulation of Article 505 of the Civil Code of 1916 received criticism, especially that it was based on false premises. The first of these premises would be a misinterpretation of the Seat of 02/16/1786, in what Theodoro Júnior (2016, p. 148-150) called "a historical mistake". And the second, according to Miranda (2012, p. 316), was that the author of the Project – Clóvis Beviláqua –, at the time, believed that the *exceptio dominii* stems from the objective theory of Von Jhering (1869), with which Pontes de Miranda disagreed, because, although Jhering argued that the reason for the protection of possession is to protect the owner, he also admitted that the defense of possession, in some situations, it would end up being conferred even against the owner.

Still without going into the merits of whether or not it was a salutary option for the legislator to accept the domain exception, it should be recognized that Article 505 itself presents apparently conflicting ideas, which generated difficulties in establishing its true scope and operability. This is because, *ab initio*, the normative formulation points to the separation of the possessory and petition courts, by saying that *the claim of dominion* (*jus possidendi*) does not prevent the maintenance or reintegration in possession (*jus possessionis*). However, *in fine*, there would be a contradiction with the first part, since it makes admissible the allegation of the existence of dominion to dismiss the claim of defense of possession. Marques (1923, p. 84) called this contradiction "scandalous".

Now, if possession should not be judged in favor of the one to whom the domain evidently does not belong, it would be enough for the defendant owner of the domain to prove it to rebut

the plaintiff's claim, since, if the defendant proves that he is the owner, it would also be proven that the domain "evidently" does not belong to the plaintiff, which would lead to the dismissal of the request.

With the passage of time, seeking to reconcile the commands expressed in Article 505, it was established – and in a way pacified – that the exception of dominion would only be admitted in two hypotheses (Guimarães, 1988, p. 30-38): when both contenders litigated in the possessory court based on the right of property; and when the possession of both litigants was doubtful.

Expressly accepting the first hypothesis in the 1960s, the Federal Supreme Court issued Precedent No. 487: "Possession will be granted to the one who evidently has the domain, if it is disputed on the basis of it."

However, technically speaking, if the basis of both parties in the lawsuit is the dominion over the thing – that is, the *jus possidendi* – what we have, strictly speaking, is a petitionary lawsuit, and not possessory. Thus, if the viability of the domain exception is restricted to the summarized hypothesis, *the admissibility of this* exception in claims of a truly possessory nature would be excluded, in *ultima ratio*. Nevertheless, both the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) treated – and still treat – such actions as still possessory (Cabral; Cramer, 2015, p. 1.009) (Marinoni, 1989).

In 1973, the Code of Civil Procedure did not clarify the issue once and for all; on the contrary, it gave even more scope to the debate. In its original wording, Article 923 provided as follows:

Article 923. During the pendency of the possessory proceeding, it is forbidden for both the plaintiff and the defendant to bring an action for recognition of domain. However, the claim of dominion or other right over the object does not preclude the maintenance or repossession of the object; in which case the possession will be judged in favor of the one to whom the domain evidently belongs.

Note that the second part of the normative formulation prescribed that possession, in possessory actions, should be judged in favor of the person who belonged to the domain, a command that seems to accept the *exceptio dominii*.

The Code of Civil Procedure gave a different treatment to the subject, compared to what was contained in Article 505 of the Civil Code of 1916, although the difference is subtle. While the Civil Code of 1916 established that possession should not be judged in favor of someone who evidently did not own the domain, the Code of Civil Procedure established that it should, on the contrary, be judged in favor of the owner.

From this, discussions arose about the existence of an antinomy between Article 923 and Article 505, to be resolved by paragraph 1 of Article 2 of the Law of Introduction to the Civil Code (today the Law of Introduction to the Rules of Brazilian Law). Hence, the matter of the exception of domain came to be fully regulated by the Code of Civil Procedure of 1973, recognizing Article 505 of the Civil Code of 1916 as repealed by normative contradiction.

But Law No. 6.820/1980 changed the original wording of Article 923, suppressing its second part completely. In its new wording, the normative formulation now provides the following: "Art. 923. In the pendency of the possessory process, it is forbidden for both the plaintiff and the defendant to bring an action for recognition of domain".

Since then, it has been affirmed that there would have been the absolute suppression of the possibility of responding to the possessory action with the *exceptio domini*, based on the following reasoning: since the final part of Article 505 was repealed by Article 923 (in its original wording) – as it now provides for the application of the exception of domain – and tacit repristination is prohibited (§ 3 of Article 2 of the LICC, today LINDB), once repealed by Law No. 6.820/1980 the part of Article 923 that dealt with the *exception*, the possibility of alleging the exception in the legal system would have been definitively abolished.

To put an end to the controversy, the Civil Code of 2002 provides in paragraph 2 of Article 1,210, without reservation, that the claim of ownership or other right over the object does not prevent the maintenance or repossession of the object. The Code of Civil Procedure of 2015 repeated this same formula in the sole paragraph of Article 557. Based on this, Theodoro Júnior (2016, p. 149) concludes that "one cannot, then, handle the *exceptio proprietatis* as a matter of defense in a possessory action".

In fact, still under the Civil Code of 1916, the Brazilian legal literature proclaimed the need to give possession an effective and autonomous treatment in relation to property, absolutely separating the possessory judgment from the petition and, consequently, prohibiting the exception of domain within the scope of interdicts.

In this sense, for Altino Portugal Soares Pereira (2011, p. 1.303), the dispossessor will always be condemned to return the thing to the molested possessor, even if there is evident and notorious dominion. To carry out his claim, the dispossessor claims to be the owner must dispute ownership of the thing via competent action. Therefore, *de lege lata*, the allegation of a right to possession (*jus possidendi*) based on a pre-existing legal relationship – whether of property or even another real or obligatory right – cannot serve as a basis for the protection of possession as a factual situation within the scope of the possessory judgment. Any defense argument other

than possession *per se* (in itself) should not be considered by the court to dismiss the claim for possessory protection. So much so that Cimardi (1997, p. 149) understood the inapplicability of Precedent No. 487 of the Federal Supreme Court, since the legal foundations that supported it no longer exist.<sup>2</sup>

Fabício (1984, p. 397) points out that the content of the *exceptio dominii is not always* a property right, since the Civil Code and the Code of Civil Procedure also mention the claim of another right over the thing. Therefore, it understands that the domain exception "would be more precisely an allegation of *jus possidendi*, of which property is the main, but not the only foundation".

The prohibition on the exception of dominion does not prevent the dominial element from being raised in the possessory court as a means of proof to convince the court about the possession that the defendant exercises over the object. That is, dominion can be valid as an indication of possession, but not as a decisive basis for the resolution of the controversy of possessory actions.

For this reason, Loureiro (2005, p. 10) argues that the invocation of dominion (or other rights) as a means of proof should be understood as an exclusively possessory matter, and not a petitionary one. Dominion is relevant, in these circumstances, not to justify the owner's conduct, but only to evidence the fact of possession (*jus possessionis*). It is a simple means – as a rule, documentary – of proving ownership. After all, since Jhering's (1869) objective theory (1889), possession is seen as the appearance of property and the owner is the possessor.

There are, however, those who disagree with this orientation, arguing that even in cases of dubious possession it would not be possible to resort to the issue of domain to judge possessory actions. In these cases, the judge should decide according to the rule of judgment imposed by the burden of proof, whereby, in cases where there is insufficient proof of the alleged right, it must be decided to dismiss the action (*actore non probante reus absolvitur*), that is, the proof is incumbent on the one who alleges and not on the one who denies it (Moreira, 2005, p. 201-223).

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<sup>2</sup> However, Precedent No. 487 of the STF is still applied by the Superior Court of Justice (STJ), which continues to confer possessory character to such claims. As an example, this occurred in the judgment of the following appeals in the STJ: Regimental Interlocutory Appeal in Interlocutory Appeal No. 534.868/CE, Fourth Panel, Judge Hélio Quaglia Barbosa, judged on 08/16/2007; Special Appeal No. 931.311/GO, Fourth Panel, Judge João Otávio de Noronha, judged on 02/10/2009; Special Appeal No. 1.141.098/RS, Second Panel, Judge Mauro Campbell Marques, judged on 12/16/2010; Regimental Interlocutory Appeal in Interlocutory Appeal No. 1.351.988/PE, Fourth Panel, Judge Maria Isabel Gallotti, judged on 08/16/2012; Regimental Appeal in Special Appeal No. 471.172/SC, Fourth Panel, Judge Antonio Carlos Ferreira, Judge Maria Isabel Gallotti, judged on 06/18/2013; and Regimental Interlocutory Appeal in the Motion for Clarification of Divergence in Special Appeal No. 471.172/SC, Special Court, Rel. Min. Herman Benjamin, judged on 09/02/2014.

What would be the reasons that give rise to the prohibition of the exception of domain in possessory relief? Answering this question implies reflecting, reflexively, on the real relevance of the prohibition of *exceptio dominii*.

The common sense is that the domain exception would violate the "purity" of possessory interdicts. If so, then what is the importance of maintaining the purity of the prohibitions? Immediately, the argument that arises is the need to confer a prompt and effective protection to possession as a right independent of property (Dantas, 1981, p. 74-75). There are two categories of theories that seek to justify the foundation of possessory protection, and they are divided into the so-called *absolute* and *relative*.

Relative theories seek to justify possessory protection in elements that are external to possession. This is the case of the theses of Savigny and Jhering. For Savigny (1841) (1803) possession would be a fact transformed into a right based on the protection given to it by the legal system, especially from interdicts. For Jhering (1865) (1889), in his *theory of the complementary defense of property*, the protection of possession appears as nothing more than a necessary complement to the protection of property. Since possession is the externalization of ownership and, therefore, the possessor is presumed to be the owner of the thing, the protection of the possessor would be justified by the need to protect the owner of the domain in a faster and more effective way.

Absolute theories understand that possession is protected by itself, that is, by factors that are inherent to it. This is the case of the so-called *sociological theories of possession* (or contemporary theories), in which possession acquires its autonomy from property once and for all when they attribute to possession a socioeconomic function of its own, as defended by Silvio Perozzi, Raymond Saleilleis, Lodovico Barassi and Antonio Hernández Gil (Silvestre, 2020). For them, more than any other institute and like property, possession assumes great relevance in society, as it is what enhances the indispensable relationships between people and the things they need. In fact, possession must have its importance recognized as an autonomous institute within the scope of Law, with its own characteristics and effects (Weill, 1974), and may even override other rights (even property rights, which do not always fulfill its social function).

Theodoro Júnior (2016, p. 123) points out that, among the relative and absolute theories, the most accepted today is Savigny's. By it, legal protection grants possession to a relevant instrument for the preservation of social peace and the restraint of private justice or justice by one's own hands.

In this sense, Campos (s/a., p. 14) understands that dispossession is "a manifestation of a

rupture of the social balance and a threat to the legal order", which is why there is a state interest in its repression. Thus, for him, the possessory judgment should not be seen only from the angle of the protection of possession or property, but also from the public interest in social pacification.

Miranda (2012, p. 281) also sees the protection of possession as a legal instrument to guarantee public peace, based on the maintenance of the *status quo*: "The principle of the *status quo*, or the principle of the conservation of the fact, considered essential to legal peace, requires that each one respect the legal situations and possession of the others. *Quieta non movere!*".

In fact, Pamplona (2012, p. 100-101) argues that this principle – *quieta non movere!* – was already observed by the Romans to guide the maintenance of the factual situation existing at the time of the filing of the lawsuit.

Observe, then, that in these theoretical perspectives, possession must be protected autonomously and even against a possible owner of the property, due to the need to preserve the consolidated factual situation, maintain social peace and prevent justice from being done by one's own hands, that is, that someone who considers himself the owner of the thing to take it back with his own strength.

In this context, the prohibition of *exceptio dominii* would be justified because it is a necessary mechanism to prevent the owner from taking the thing by force, since in the possessory action promoted by the person who suffered the dispossession, he would claim his dominion and justify the defense of his title by acts outside the standards of immediate dispossession and legitimate defense of possession. There would be a stimulus of self-tutelage, which would certainly cause a shake in social peace (Moreira, 2005, p. 207). In other words, the prohibition of *exceptio dominii* aims to avoid the arbitrary exercise of force, causing the owner to be compelled to handle the procedural means provided for by law to obtain the possession he desires over the object, respecting the due process of law; he will not be able to use his title to justify, as a defense, the dispossession practiced.

Note, however, that if the dispossessed possessor also had some other right over the thing that would guarantee him possession (*jus possidendi*), the owner's claim, even if in the petition court, would not be sufficient to repossess the thing. Therefore, the issue is restricted to cases in which the dispossessed possessor has an untitled possession, that is, he has only the *jus possessionis*.

### 3 A new hermeneutic for *the exceptio dominii* based on the social function of possession and *procedural regulis juris*

The prohibition of resorting to the domain exception is ultimately based on the premise that property (*jus possidendi*) will always prevail over possession as an autonomous right (*jus possidendi*).

By this prohibition, the dispossessing owner cannot respond to the possessory claim based on his title, because if he did so (*rectius*, if such an argument could be considered by the judge in the possessory litigation) the owner would necessarily be the winner and would end up being rewarded for having committed an arbitrary act of retaking the thing *ex auctoritate propria*. Furthermore, if it were permitted, the emancipation of possession from property and its protection as an autonomous right would not occur: possession would be an inferior right that would necessarily yield to another right.

Such conclusions are also evident when it is found that the possessory litigation has an eminently provisional nature, almost precautionary, aiming to regulate the possessory situation only until the moment in which it is definitively resolved in the petition court.

To better clarify, it is not a question of a provisionality of the possessory court considered in itself, but in relation to the future, possible and hypothetical dominial solution in the petition court, in which the solution given to the former should not prevail over the right to property. The provisionality attributed to the protection of the possessory court – which, in itself, is definitive – is based on the perspective that verifies the possible change in the dominial court (Alvim Netto, 2004, p. 20 et seq.).

In the same sense, Lopes (1996, p. 188-189) understands that, when listing the differences between the petition and possessory courts, he understands that "since the petition action is based on dominion, its purpose is not transitory, but definitive; unlike the possessory action, whose effects are temporary and are only consolidated later by the result of the petition that follows it".

From this, the question arises: is the solution found to prohibit the discussion of property or other right within the scope of possessory interdicts the best alternative, from the point of view of the operability of the rule, procedural economy, reasonable duration of the process, procedural effectiveness and social pacification by the jurisdiction?

The systematic interpretation between the *ratio legis*, of the *caput* of Article 557 of the Code of Civil Procedure and of § 2 of Article 1,210 of the Civil Code and the *ratio juris* of

contemporary procedural *regulis juris* and the social function of possession, lead to a negative answer to that question.

First, even if it is true that the legal system must provide for rules that safeguard social peace and reject violence, it cannot be believed as an absolute truth that the end of the prohibition on the exception of dominion would serve as a stimulus for the owner of the thing to exercise discretion for his own reasons (private revenge or justice with his own hands), seeking the self-protection of their right even outside the permitted cases of immediate dismissal and legitimate defense of possession. This fear – very legitimate, by the way – is a mere impression, without any verification with empirical and sociological data capable of confirming it.

Furthermore, the arbitrary exercise of one's own reasons is conduct typified as a crime in Article 345 of the Penal Code. Now, the criminalization of the conduct, with the possibility of imposing a criminal sanction, already seems to be a sufficient disincentive – and much greater – than the mere civil sanction of making it impossible for the owner to have the thing until he comes to claim in the court considered as the only appropriate one, that is, the petitioner.

Secondly, if the purpose of the prohibition is then only to provide a quick and effective protection to the possessor, restoring him to the *status quo* and preserving the consolidated factual situation (*quieta non movere*) – in addition to punishing the dispossessing owner, depriving him of the asset until due process of law is respected – such objectives can all be achieved in the initial phase of the possessory procedure.

For cases of dispossession practiced for less than one year and one day, the procedure for possessory interdicts is regulated in a special way in the Code of Civil Procedure, with the possibility of issuing an unprecedented injunction *altera pars* of maintenance or repossession, provided that the plaintiff proves, in accordance with Article 561 and Article 562, its possession, the disturbance or dispossession practiced by the defendant, the date of the disturbance or dispossession and the continuation of possession, although disturbed, in the maintenance action, or the loss of possession, in the repossession action.

Note that for the granting of the injunction it is not even necessary for the plaintiff to demonstrate the existence of *periculum in mora*, which is presumed *juris et de jure* (in an absolute manner), precisely so that the objective of the prompt restoration of the *status quo ante* is achieved.

The Code of Civil Procedure grants the plaintiff two opportunities to obtain this injunction: when the judge orders the initial injunction; and at the justification hearing, to be

designated if the judge is not convinced of the conditions for granting the injunction upon receipt of the petition, at which time the plaintiff will be able to prove the authorizing requirements of the injunction.

In this initial procedural phase, the *jus possessionis* of the dispossessed plaintiff achieves maximum prestige and protection, since the defendant does not even manifest himself in this phase, and it is enough for the dispossessed party to demonstrate his possession without even resorting to any pre-existing title. In other words, the eventual owner who has committed the dispossession will be obliged to return the thing *in limine*, only being heard in the process at a later time. This circumstance fulfills the sanctioning function so aimed at with the prohibition of the exception of dominion, in addition to meeting the maxim that first of all, the dispossessor must retribute.

After this initial phase, and all objectives have been met, Article 566 of the Code of Civil Procedure prescribes that the interdital procedure then proceeds to the common procedure, and there is no longer any logical justification for exercising limited cognition (Neves, 2019).

The special procedure for possessory actions already has a procedural phase of an eminently precautionary nature, and it should not, in the end, maintain this attribute of provisionality. Once the initial phase has passed and the possessory situation has been provisionally guaranteed, the preponderant interest must be the definitive solution of the dispute with social pacification, abstracting from purely formal models – "purity of the interdicts" – which sometimes contribute little to providing an effective solution to the dispute.

The cognitive limitation, with the prohibition on the exception of property/domain already in the common procedure of possessory actions, only serves to prolong the conflict unnecessarily, which will certainly extend to another process – the petition – generating, also, an unnecessary multiplication of actions in the Judiciary and that greatly harm the proper functioning of justice, with an unreasonable duration of the process (Neves, 2019).

According to Montenegro Filho (2008, p. 160) points out that "this procedural panorama violates the principle of procedural economy, so praised today, which assumes as a philosophy the pacification of conflicts through a single procedural instrument, when possible".

The conceptual shift in process theory no longer admits purely formal models; on the contrary, it comes to see the process as an instrument to give effectiveness to the material law that underlies it – the so-called "instrumentality of forms" – and, therefore, it must be effective.

The situation is especially worrying in view of the prohibition on the simultaneity of possessory and petition actions on the same object, which makes it possible for a litigation for

possession to drag on indefinitely in the judicial process. In fact, this leads to a rhetorical question: wouldn't this be a real impulse for the party to take the law into their own hands?

Such a prohibition would only make sense, in this context, if the possessory judgment reached a final solution (with *res judicata*) in a very short period of time, which is utopian in the contemporary reality of the Brazilian forum.

Thus, the most reasonable solution would be if the prohibition on the exception of domain were restricted only to the first phase of the possessory judgment, in which there is the possibility of granting an injunction with very relaxed requirements. Since the fact proceeds to the common procedure, the most appropriate, according to the *regulis juris* of contemporary civil procedure, is to allow a broad cognition so that, in the end, in the sentence, the (only) process is able to put an end to the litigation definitively, pacifying the issue (Neves, 2019).

The prohibition of the exception of domain, seen from the theoretical perspective of the relativistic foundation of possessory protection, ends up assuming an overly instrumentalized bias that, in *ultima ratio*, is based on premises that prolong in time the solution of the dispute that, as a rule, would be favorable to the owner.

On the other hand, the absolute theories of the basis of possessory protection seem to present a more satisfactory justification for the solution of this issue of the exception of dominion, since, by admitting possession as a right that can be protected for reasons that are immanent to it and that, by itself, is capable of overriding the right to property itself – even if such controversy takes place in a petition –, it seems to make more sense to provide that "the claim of ownership or other right over the thing does not preclude the maintenance or repossession of the object" (Neves, 2019).

Furthermore, possession and property have undergone a process of socioeconomic functionalization and no longer support the idea of absolute right. In this way, possession and property are inseparable from a social function, which imposes on the possessor and the owner a series of duties and restrictions alongside the powers of use, enjoyment, disposition and claim (Cambi, 2015).

According to Didier Júnior (2011, p. 999 et seq. and 2008), not all property should be considered a fundamental right and protected as such. Only that property that functions as a guarantee of the individual's freedom is deserving of protection, since, in order to develop his potentialities and have a full life, the human being needs the appropriation of certain goods, which must, therefore, be rationally used and used in accordance with these ends, and not in a purely selfish way (Mota, 2013, p. 15).

More than any other institute, possession assumes great social relevance, as it is what enhances the indispensable relationships between people and the things they need. In fact, possession must have its importance recognized as an autonomous institute within the scope of Law, with its own characteristics and effects, and may even override other rights and even property, which does not always fulfill its social function. The legal order is concerned with protecting the possessor because possession is a *de facto* situation capable of providing the due economic and social use of things, satisfying the essential needs of the person and society: "functionality through the use and exploitation of the thing legalizes possession as an autonomous and independent right of property, removing it from that state of simple defense against dispossession, to impose himself before everyone" (Albuquerque, 2002, p. 40).

In this sense, the success of the possessor in the possessory action will only yield in the petition court when the owner of the domain demonstrates that it fulfills the social function of the property. Otherwise, if the social function is recognized in the possession of the one who is considered to be dispossessed, this possession will surpass the right to property in terms of value (Farias; Rosenvald, 2015, p. 163). Becker (1997) also thinks so, but he is more incisive: in the petitionary judgment and in the possessory judgment, the title would not be enough to prove ownership; it would also be necessary to prove the fulfillment of the social function.

According to Zavascki (2002, p. 846), he treats the clash between possession and property under the formula of the weighing of values/interests, concluding that the one that adequately fulfills the social function and meets the normative and evaluative expectations present in the legal order should prevail. In the same sense, Tepedino and Schreiber (2002, p. 91) understand.

In these cases in which the possession qualified by its social function achieves greater prestige, the possessor's duty to return the thing to that owner who defaults on the social function can be converted into an alternative payment, such as, for example, pecuniary compensation. And this possibility of converting the duty to restitute the thing into a duty to indemnify is not new, as it already has some degree of legal provision in the Civil Code, as can be seen in Article 1,255, Article 1,258, Article 1,259 and paragraphs 4 and 5 of Article 1,228.

In the always remembered case of the conflict in the Pullman Favela, in São Paulo, the discussion revolved precisely around whether or not there was a prevalence of possession with a social function over property without a social function. The Court of Justice of the State of São Paulo understood that it was, an understanding confirmed by the Superior Court of Justice in the degree of: "the *jus reclamandi* is neutralized by the constitutional principle of the social function of property. The possible claim for compensation in favor of the owners remains,

against whom they have the right" (STJ, REsp. No. 75.659/SP, Fourth Panel, Rel. Min. Aldir Guimarães Passarinho Junior, judged on 06/21/2005).

The basic idea that is revealed is that possession, even if unlinked to any other rights (*jus possessionis*), is capable of imposing itself against them, even against the right to property, and not even in a merely provisional way, but definitively.

Therefore, it is reasonable to conclude that there is the possibility of a broad cognition in the possessory court and that, in the end, it will pronounce whether it is the owner or the possessor who is entitled to the definitive possession of the thing.

Thus, once the possessory court is initiated, the owner may, in the second phase of the procedure, make an exception with his title and claim possession for himself. However, if it is demonstrated that he, as owner, remained in default with respect to the social function, then the possession must be decided in favor of the possessor who performed it in his place, leaving the former with the indemnity claim. With this, it is ensured that the entire issue can be resolved in a single process, valuing speed, procedural economy and effectiveness, always observing the due process of law and the effective adversarial process.

#### 4 Conclusion

This research was concluded with the confirmation of his hypothesis, in order to elaborate a contemporary rereading of the traditional prohibition of filing the *exceptio dominii*.

After analyzing the data obtained with the theoretical, historical, procedural and formal-procedural foundations for that prohibition, the research found that this traditional understanding is not consistent with the contemporary paradigms of interpretation and operability of the material and procedural norms of Brazilian Law, namely, the socioeconomic function of the possession of the Civil Code and the *procedural regulis juris* expressed in the Code of Civil Procedure.

Thus, as a propositional and inspiring thesis, this research systematized the special interdictory procedure in two phases: the first phase is of a precautionary nature and consists of the legitimate possessory court, in which possessory protection is granted by means of an *injunction inaudita altera pars* (*caput* of article 562 of the Code of Civil Procedure). The second is the phase resulting from the conversion of the special procedure into an ordinary procedure, when, then, a true petitionary judgment can be instituted (Article 566 of the Code of Civil Procedure).

From this, the research proposes that the prohibition of § 2 of Article 1,210 of the Civil Code and the sole paragraph of Article 557 of the Code of Civil Procedure refers only to the first phase of the possessory procedure of old force. Moreover, it is not a prohibition to present the exception, but to discuss it, if it is presented. Thus, the *exceptio dominii* can be proposed in the first phase (pure possessory) to be discussed in the second phase (petition), when the procedural legal relationship will develop in the ordinary procedure.

More than verifying the possibility of this interpretation, this research verified that it is a necessity imposed by the operability of the rule, by the procedural economy, by the reasonable duration of the process, by the procedural effectiveness and by the social pacification by the jurisdiction, values so dear to contemporary procedural law and that directly interfere in civil law.

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