

# Protecting Possession, a Question of Values? A Comparative Inquiry into the Moralization of Possession in Brazil and Canada

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Résumé de l'article

Le présent article compare la protection possessoire des immeubles en droit civil brésilien et en common law canadienne. Dans chacun de ces systèmes, la possession commande une protection et un statut particuliers, qui s'arriment au reste du droit des biens, et particulièrement celui gouvernant la prescription acquisitive, d'une manière distincte. Mais en elle-même, la protection possessoire au Canada et au Brésil fonctionne de manière objective, donc y compris au bénéfice des possesseurs de mauvaise foi. Cependant, de part et d'autre, la protection possessoire a fait l'objet d'un processus de moralisation par les juges, de façon à faire écho à des préoccupations traditionnellement associées à la prescription acquisitive, mais aussi aux droits de la personne, aux valeurs constitutionnelles et à la bonne foi. Au Brésil, cette « moralisation » est la conséquence de l'émergence d'un droit civil constitutionnel et de la fonction sociale du droit de propriété. En plusieurs instances, elle a permis le maintien de favelas localisées sur le terrain d'autrui, lorsque le propriétaire du fond était demeuré passif devant l'intrusion pendant une longue période. En Angleterre, la bonne foi du possesseur est examinée à la lumière de son intention de posséder et du critère de la jouissance future, finalement rejeté par la Cour d'appel. Au Canada, le test de l'usage inconsistant du fonds continue de jouer le même rôle : dénier le bénéfice de la possession adversative aux « squatters » et les empêcher de se prévaloir de la protection possessoire.

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## Protecting Possession, a Question of Values? A Comparative Inquiry into the Moralization of Possession in Brazil and Canada

ANNE-FRANÇOISE DEBRUCHE,\* GUSTAVO TEPEDINO\*\*  
AND PABLO RENTERIA\*\*\*

### ABSTRACT

*This paper focuses on possessory protection of immovables (or real property) in Brazilian civil law and Canadian common law. In both jurisdictions, possession enjoys a specific protection or status, which in turn relates to the rest of property law, particularly the law of acquisitive prescription, in a specific way. But in and by itself, despite these conceptual differences, possessory protection in Canada or Brazil works in an objective fashion: it is not denied to possessors in bad faith as a principle. Nonetheless, in both systems, the institutions designed to protect possession have been "moralized" by judges to echo concerns similar to those voiced in relation to acquisitive prescription, but also to emphasize human rights, constitutional values and good faith. In Brazil, this moralization process is the consequence of the emergence of a constitutionalized civil law and of the social function of the right of ownership. In several cases, it has allowed illicit buildings to remain where they are despite the owner's claim, for instance when a favela has appeared on a land neglected by its owner for years. In England, the possessor's good faith has been scrutinized through his intent to possess, and under the lenses of the future enjoyment criteria, later rejected by the Court of Appeal. In Canada, the test of the inconsistent use of the land has played the same moralizing role and continues to do so, to deny the benefit of adverse possession to squatters and to prevent them from enjoying possessory protection.*

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### KEY-WORDS :

*Property, possession, Brazil, Canada, constitutional values, good faith.*

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## RÉSUMÉ

*Le présent article compare la protection possessoire des immeubles en droit civil brésilien et en common law canadienne. Dans chacun de ces systèmes, la possession commande une protection et un statut particuliers, qui s'arriment au reste du droit des biens, et particulièrement celui gouvernant la prescription acquisitive, d'une manière distincte. Mais en elle-même, la protection possessoire au Canada et au Brésil fonctionne de manière objective, donc y compris au bénéfice des possesseurs de mauvaise foi. Cependant, de part et d'autre, la protection possessoire a fait l'objet d'un processus de moralisation par les juges, de façon à faire écho à des préoccupations traditionnellement associées à la prescription acquisitive, mais aussi aux droits de la personne, aux valeurs constitutionnelles et à la bonne foi. Au Brésil, cette « moralisation » est la conséquence de l'émergence d'un droit civil constitutionnel et de la fonction sociale du droit de propriété. En plusieurs instances, elle a permis le maintien de favelas localisées sur le terrain d'autrui, lorsque le propriétaire du fond était demeuré passif devant l'intrusion pendant une longue période. En Angleterre, la bonne foi du possesseur est examinée à la lumière de son intention de posséder et du critère de la jouissance future, finalement rejeté par la Cour d'appel. Au Canada, le test de l'usage inconsistant du fonds continue de jouer le même rôle : dénier le bénéfice de la possession adversative aux « squatters » et les empêcher de se prévaloir de la protection possessoire.*

### MOTS-CLÉS :

*Biens, possession, Brésil, Canada, valeurs constitutionnelles, bonne foi.*

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## INTRODUCTION

In 2006, the municipality owning a piece of land located in the State of Rio Grande do Sul, in southern Brazil, asked for its restitution through a possessory action from a family that had built their home illegally upon it. The Tribunal de Justiça refused to grant the order, on the basis that the family’s current possession of the land was to be protected instead of the municipality’s prior one. The judges argued that this possession insured the family’s constitutional right of habitation, while the municipality had failed to fulfil the social function of the land since nothing of value had been done with it.<sup>1</sup> Some nine year earlier, on the other side of the equator, the Ontario Court of Appeal upheld a trial court decision granting to mistaken trespassers the paper title to a portion of land originally held by the Town of Ancaster. According to Judge Laskin (as he then was), “[t]he law should protect good faith

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1. TJRS, AC 70016241440, Relator Alzir Felipe Schmitz, decided on 26 June 2006.

reliance on boundary errors or at least the settled expectations of innocent adverse possessors who have acted on the assumption that their occupation will not be disturbed. [...]. Conversely, the law has always been less generous when a knowing trespasser seeks its aid to dispossess the rightful owner.”<sup>2</sup>

Is protecting possession a question of values? In Brazil or Canada, does a possessor challenged by the *verus dominus* (true owner) need to comply with any moral or social requirement(s) in addition to the technical conditions set by traditional property law? How sensitive to moral standards are the law protecting possessors in civil law systems (such as Brazil) or common law ones (as in Canada)? These are the questions we seek to answer in the present paper. Their originality is highlighted by comparison. Interestingly, a brief perusal of French or Quebec civil law shows that possessory protection and moral values are not necessarily associated as a rule: there, the outcome of a possessory action is always independent of the good or bad faith of the possessor. And the best use of the land is never considered.<sup>3</sup> For reasons connected to public order (interferences with land possession should be discouraged) and practical considerations (possession often coincides with the ownership), possession is to be protected for its own sake through remedies impervious to questions of values, morals, or policy. This does not mean that the Quebec or French possessor can necessarily keep the land permanently away from the true owner. But the issue pertaining to the right of ownership will be decided in a distinct judicial process, called a “petitory” action to set it apart from the “possessory” one where only possession is at stake.

Possessory protection is often associated with acquisitive prescription, but it nonetheless enjoys a specific existence and must be distinguished from the latter institution. In a nutshell, possessory protection helps possessors on the basis of their sole possession, putting an end to any interference with it. On the other hand, acquisitive prescription (resulting from adverse possession and statutory limitations in the common law) strengthens the possessory title by turning it into a civil law right of ownership or a common law paper-title. Thus, while possessory protection and acquisitive prescription are both grounded in the concept of possession, their aim differs. Much has been written

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2. *Teis v Corporation of the Town of Ancaster* (1997), 35 OR (3d) 216 at 226 (Ont CA) [*Teis*].

3. Although to be protected, possession needs to exhibit certain “qualities”: to be peaceful, non-equivocal, public and continuous.

about the “morality” or policies supposed to justify (or to contradict) the institution of acquisitive prescription of land. Legislation allowing the possessors of some land to become owners (in civil law) or to defeat the claim of the paper-title owner (in common law), although of long standing, is constantly questioned and challenged by authors and judges. Among other critics, many argue that the legal institution that enables, sometimes, “squatters” to evict the true owner is immoral because it does not take into account the good or bad faith of the possessor. In short, the operation of prescriptive acquisition (or adverse possession coupled with statutory limitations) is often criticized because it seemingly lacks morals: it would be too mechanical to be sensitive to the value of good faith.

While this paper focuses on possessory protection rather than acquisitive prescription, it will reflect the same preoccupation with values. In Brazilian civil law as in Canadian common law, we will show how the institutions designed to protect possession have been “moralized” by judges to echo concerns similar to those voiced in relation to acquisitive prescription, but also to emphasize human rights. It will also give us the opportunity to compare and contrast possessory protection in a civil law and a common law system, as well as to explain the ties between the protection of possession and acquisitive prescription in both systems. Although we wish to concentrate on Canadian common law, English law will have to be referred to since the parallel developments of the pertinent judge-made law share a common root. And we will occasionally mention the differences between Brazilian property law, based on the German tradition, and the civil law system best known to Canadian, that is, Quebec civil law, inspired by a French rather than German influence.

In a first part, we shall seek to define and compare how possession is protected in a civil law system (Brazil) and a common law system (Canada). We will show that possession enjoys a specific protection or status and explain how these relate to the rest of property law, particularly the law of acquisitive prescription. In a second part, we will explore the growing moralization of possessory protection through the influence of constitutional values, human rights concerns and the impact of good faith. Since no such moralization may be observed in connection with the possessory protection of movables, or chattels, the latter will be left outside our comparative frame in the first part, and this paper will focus on the possessory protection granted to immovable, or real property.

## I. THE MECHANICS OF POSSESSORY PROTECTION WITHIN PROPERTY LAW

In civil law as in common law systems, possession enjoys a protection of its own. This protection takes the shape of possessory actions in a civil law system such as Brazil (A), and of adverse possession in common law systems such as Canada (B). While possessory actions are broader in scope than the common law possessory title associated with adverse possession, the protection they offer is also more fragile over time.

### A. A protection possibly limited in time: possessory actions in Brazilian civil law

Brazilian possessory actions, just like their French or Quebec counterparts, are specific real actions designed to offer possession a unique protection, including against the owner of the disputed thing (1). But this protection may be undone by another type of real action introduced later by the “true owner,” called a petitory action (2).

#### 1. *The specificity of possessory actions in a dual framework*

From a theoretical perspective, the Brazilian law pertaining to possession and possessory actions would seem surprising to any jurist trained in Quebec or French civil law. Where the latter emphasize the importance of the possessor’s state of mind and intention to possess as the owner (*animus domini*), the former prefers to define possession in a more “objective” fashion in order to make possessory actions available to as many persons as possible (a). In any of these civil law systems, nonetheless, the non-joinder rule represents an essential condition to guarantee the efficiency of possessory actions (b).

#### a. *Possessory actions as a key to define possession*

Possessory actions date back to Roman law. They were also very popular in medieval customary law, although focusing then on the feudal notion of “seisin” rather than possession itself. Thus, for instance, French customary law knew a possessory action in “*complainte en cas de saisine et de nouvelleté*,”<sup>4</sup> while English common law developed a

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4. It is still known today in French, Belgian or Quebec property law as the “*action en complainte*,” which is the most common type of possessory action.

possessory action of “*novel disseisin*” at the end of the 12th century.<sup>5</sup> Brazilian civil law, although acknowledging the improvements brought about by French customary law in relation to possessory proceedings, preferred to focus on Roman law and German doctrine in order to define both possession and possessory actions.

Based on an extensive and meticulous study of Roman law, two leading German authors attempted to define and systematize the concept of possession in the 19th century: Friedrich Carl von Savigny, and Rudolf von Ihering. For both, the principal challenge was to set the boundary between possession and the neighbouring concept of “detention”: since only possession entailed specific legal consequences (including the protection offered by possessory actions), it was important to distinguish it from mere “detention.”<sup>6</sup> But more generally, they also had to clarify the nature of the connection between possession and the right of ownership. On the one hand, Savigny chose to define possession as the combination of a material element, the *corpus* (corresponding to the material control over a thing) and the *animus* (referring to the mental state of the possessor, who had to demonstrate the intent to possess “as the owner,” or “*animus domini*”). Thus, according to Savigny’s theory, the connection between possession and the right of ownership lay in the intentional element, the *animus domini*. As for the demarcation between possession and detention, it also rested with the *animus*. The material element of possession alone characterized only a detention, and the *animus domini* was required to qualify the factual control as a possession able to generate special legal effects. Accordingly, someone who had control over something belonging to somebody else, while being conscious and respectful of that other person’s right of ownership, did not amount to being a possessor because the intentional element of possession, the *animus*, was missing. And for that reason, because this person was only a “detentor,” not a possessor, possessory actions were not available to him. A good example would be the situation of the mandatory or the tenant. Savigny’s theory of possession is called “subjective” because it sees

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5. The *petty assize of novel disseisin* was thought to have been introduced by the assize of Clarendon in 1166 under Henry II, but this affirmation is debated: for a summary of the controversy, see Donald W Sutherland, *The Assize of Novel Disseisin* (Oxford: Clarendon Press, 1973) at 6, and the discussion in Janet Loengard, “The Assize of Nuisance: Origins of an Action at Common Law” (1978) 37:1 Cambridge LJ 144 at 153-57.

6. Arnaldo Wald, *Direito civil – Direito das Coisas*, 12th ed, vol 4 (São Paulo: Saraiva, 2009) at 33, and TJRS, AC 70026683425, Relator Paulo Sérgio Scarparo, decided on 12 March 2009.



the intention to possess as an owner as a necessary element of possession. Ihering, on the other hand, favoured an objective approach when defining possession and rejected the requirement of the *animus domini*. In this perspective, possession is defined as a power of fact corresponding to the exercise of any of the powers inherent in the right of ownership.<sup>7</sup> The relationship between possession and ownership is thus a very close one. Ihering's possession is seen at the outset as a real right *sui generis*, not a mere fact coalescing in a right through the legal protection granted to it (as in Savigny's theory).<sup>8</sup> What matters is the possible use of the thing, its economic utility. Thus, it is the right to possession that contributes to the actual value of the right of ownership: the owner may use the thing himself or grant a right to possession to a third party, for example by concluding a contract of mandate. In turn, because Ihering's concept of possession is much wider than Savigny's, it implies that possessory actions are open to a wider number of persons: all those who would lack the *animus domini* according to Savigny's theory. This extension of possessory protection is justified by the very nature of possession in Ihering's theory, because it is viewed as the "exteriorisation" of the right of ownership: "the protection of possession, [conceived] as the exteriorisation of ownership, is a necessary complement to the protection of ownership, [through] a simplification of the evidence required in favour of the owner, which inevitably benefits also the non-owner."<sup>9</sup>

These rival theories of Savigny and Ihering explain the varying shapes of possession and possessory actions in civil law countries today. The French Civil Code, as well as the Quebec one, have followed Savigny and define possession as the reunion of the *corpus* and the *animus*. As a result, possessory protection is not granted there as a rule to mere "detentors." But Brazilian civil law chose to ground its notion

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7. For a presentation of these rival theories, see for instance Orlando Gomes, *Direitos reais*, 20th ed (Rio de Janeiro: Forense: 2010) at 31-39 [Gomes, *Direitos reais*]; Wald, *supra* note 6 at 35-43.

8. The nature of possession (real right or mere legal fact) remains debated in Brazilian law today, particularly in relation to the real or personal nature of actions protecting possession it implies. For a summary, see Gustavo Tepedino et al, *Código civil interpretado: Conforme a Constituição da República*, vol 3 (Rio de Janeiro: Renovar, 2011) at 441 [Tepedino et al, *Código civil*]; Darcy Bessone, *Da posse* (São Paulo: Saraiva, 1996) at 9-35 [Bessone, *Da posse*], who deems the debate to be now devoid of practical incidence (*ibid* at 67).

9. Rudolf von Ihering, *O Fundamento dos Interditos Possessórios*, 2d ed (Rio de Janeiro: Franciso Alves, 1908) at 71 [translated by the authors].

of possession mostly in the works of Ihering,<sup>10</sup> the current Civil Code defining the possessor as one “having in fact the exercise, fully or not, of any of the powers inherent to ownership.”<sup>11</sup> Authors today remark that one practical advantage of this choice is to extend possessory protection to more people in a greater number of cases.<sup>12</sup> This was Ihering’s preoccupation as well, in order to serve efficiently the economic interests associated with the right of ownership. Thus, the concept of possession is defined while keeping the scope of possessory protection in mind. Admittedly, this makes no difference with the Savignian concept of possession in the case of dismembered real rights such as usufruct: the usufructuary would enjoy the said protection according to both theories, either because he has a real right of possession over the thing (Ihering) or because he possesses his dismembered real right of usufruct (Savigny). But Ihering’s notion of possession extends to personal rights holders such as depositaries, mandatories, carriers, etc.<sup>13</sup> Brazilian authors have even taken Ihering’s theory a step further when stating that possession can be “partitioned” in various degrees (this is called the *bipartição da posse*), thus supporting the idea, well accepted today in Brazilian civil law, that several persons can enjoy a different type of possession at the same time on the same thing.<sup>14</sup> In this fashion, possession translates into a special protection against whoever does not have a better right on the thing.<sup>15</sup> To illustrate this *desdobramento* (the “splitting in two”) or “spiritualization” of possession, in a contract of lease (*locação*), both the lessor (the owner) and the lessee are considered to be possessors: one has a “direct” possession (the lessee) and the other an “indirect” one (the lessor).<sup>16</sup> As a result, both may use possessory actions, called “interdicts” as in Roman times, if they are troubled in their possession. The lessor may use a possessory action against any third party interfering with the thing, as well as against the lessee if he uses the thing in contravention with the

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10. Traces of Savigny’s subjective conception remains in the Brazilian Civil Code, particularly in connection with prescriptive acquisition, where the possessor is required to possess the movable or immovable “as his own”: see arts 1.238, 1.239-1.240, 1.242, 1.260 Civil Code of Brazil [C civ], and Arnaldo Rizzardo, *Direito das coisas*, 5th ed (Rio de Janeiro: Forense, 2011) at 25-26.

11. Art 1.196 C civ: “*Considera-se possuidor todo aquele que tem de fato o exercício, pleno ou não, de algum dos poderes inerentes à propriedade.*”

12. Gomes, *Direitos reais*, *supra* note 7 at 38-39.

13. Tepedino et al, *Código civil*, *supra* note 8 at 447.

14. Rizzardo, *supra* note 10 at 48-51; Wald, *supra* note 6 at 65-67.

15. Gomes, *Direitos reais*, *supra* note 7 at 34.

16. Both types of possession are defined in the Brazilian Civil Code: art 1.197 C civ.

contract (for instance if he refuses to return the apartment at the legal time set to do so). As for the lessee, he can initiate a possessory interdict against any third party, but also against the lessor if he troubles him in his possession.<sup>17</sup> As a comparison to illustrate the wide ranging availability of possessory actions in Brazil, in Quebec civil law, only the lessor would have a possessory action, because the Civil Code states explicitly that one can possess through another (art 921 CCQ). In a true Savigny perspective, the lessor would lack the *corpus* (but this is remedied by art 921 CCQ) and the lessee the *animus*.<sup>18</sup> By contrast, the scope of Brazilian possessory protection is very broad due to a conception of possession that can be “split” at various degrees: a sub-lessee would have a sufficient degree of possession to use possessory actions, in addition to those granted to the owner (lessor) and lessee.<sup>19</sup>

#### *b. The non-joinder rule as an efficiency requirement*

In any civil law system, and apart from the availability of summary proceedings, the efficiency of possessory protection rests principally on what is called the non-joinder rule. At its core, this rule implies that in a possessory action, the argumentation of both parties must rest solely on questions of possession. The reason behind this limitation is to make the proceedings speedy (and thus less costly), because the right of ownership, in particular, may be quite difficult to prove.<sup>20</sup> But the precise extent of the non-joinder rule depends upon the civil law system considered.

In countries such as France or Quebec, where possession is conceived according to the theory of Savigny, the scope of the non-joinder rule is very broad. It means that the rights of the parties may not be discussed at all: the plaintiff has only to demonstrate that he was in possession of the immovable prior to the disruption (or

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17. Art 1.197 C civ *in fine* and in general Sílvio de Salvo Venosa, *Direito civil*, 12th ed, vol 5 (São Paulo: Atlas, 2012) at 53-59. In this case of course, the lessee will have a choice between the possessory action and the contractual remedy based on his lease contract: Wald, *supra* note 6 at 66. See also Tepedino et al, *Código civil*, *supra* note 8 at 447-48, and TJRJ, AC 2006.001.15881, Relator Luiz Fernando de Carvalho, decided on 10 October 2006.

18. In the case of dismembered real rights though, both systems would end up granting possessory protection to both owner and the dismembered real right holder, for example the usufructuary: in Brazil because the bare owner has an indirect possession and the usufructuary the direct one; in Quebec because both parties possess their own real right.

19. And besides this extended concept of possessor, Brazilian law of course knows of detentors as well (art 1.198 C civ).

20. See title 2 “The possibility of a successful petitory action as a sword of Damocles,” below.

"possessory interference") by the defendant. The plaintiff will not win a possessory action by arguing, for instance, that he is the owner, or has a right of usufruct on the immovable. Petitory arguments, i.e. pertaining to rights, whether they are real or personal, are foreign to possessory actions because these actions are concerned only with possession, and because possession there is conceived as a fact: the meeting of the *corpus* and the *animus*.<sup>21</sup>

In Brazil, under Ihering's influence, it has been noted that several persons may possess the same thing at the same time at different "degrees." This *desdobramento* of possession may naturally lead to discussions around the personal or real rights of the parties in order to ascertain the possession of the plaintiff. Thus, in an action, or "interdict," introduced by a direct possessor (for example a lessee) against an indirect one (for example the owner of the rented apartment), the lessee will have to explain how the lessor is disturbing his possession and to this end, mention his personal right of lease.<sup>22</sup> Therefore, in Brazil, the non-joinder rule does not necessarily imply the exclusion of any argumentation bearing on the respective rights of the parties.<sup>23</sup> Furthermore, the defendant may invoke prescriptive acquisition to defeat the possessory claim of the plaintiff.<sup>24</sup> While this is undoubtedly a petitory argument, it also demonstrates that the possession of the defendant is better than that of the plaintiff.<sup>25</sup> As a result, the Brazilian non-joinder rule focuses instead on the exclusion of what is called the "*exceptio domini*" in possessory actions: even if the defendant thinks he could prove his right of ownership, he cannot oppose it to the right of possession of the plaintiff. In other words, the defendant's right of

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21. See in general Gérard Cornu, *Droit civil: Les biens*, 13th ed (Paris: Montchrestien, 2007) at 290-91.

22. de Salvo Venosa, *supra* note 17 at 57.

23. When there is no indirect possessor involved, the rule is phrased in the same way as in France or Quebec: Tepedino et al, *Código civil*, *supra* note 8 at 470-71, and for instance TJMG, AC 10000002687044, Relator Hyparco Immesi, decided on 2 October 2003.

24. See the Súmula nº 237 of the *Supremo Tribunal Federal*, for example, online: <[http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula&pagina=sumula\\_201\\_300](http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula&pagina=sumula_201_300)>, which does not distinguish between petitory and possessory actions, and has been consistently interpreted by Brazilian courts to apply to both types. See for example TJMG, AC 1.0701.07.196693-4/001, Relatora Heloisa Combat, decided on 31 March 2009; TJSP, AC 0023230-15.2000-8-26.0053, Relator Ferraz de Arruda, decided on 8 February 2012; TJPR, AI 643929-6, Relator Francisco Jorge, decided on 30 March 2011.

25. This explanation may be found in the jurisprudence of the TJRS: AC 70046370144, Relator Liege Puricelli Pires, decided on 10 May 2012.

ownership is excluded from the argumentation in possessory actions.<sup>26</sup> Technically therefore, all that the possessor-claimant needs to prove to succeed is a peaceful possession prior to the interference.<sup>27</sup>

But whatever its extent, the non-joinder rule is fundamental to the efficiency of possessory protection. In Quebec, where the rule may well have disappeared,<sup>28</sup> possessory actions have lost most of their appeal since they would now take as long as a regular petitory action designed to adjudicate the rights of the parties.

## 2. *The possibility of a successful petitory action as a sword of Damocles*

Thanks to the non-joinder rule, possessory actions are relatively speedy and the proceedings are not impaired by questions of title. But does this imply that the possessor can hold on to the disputed thing indefinitely after securing possessory protection?

The Brazilian possessory interdicts are designed as remedies targeting possession, not the right of ownership itself. They function as an independent forum to decide questions of possession. In the words of Ihering, the autonomy of possessory protection rests on the idea that possession is only an exteriorisation of ownership: protecting that outer use associated with the right of ownership is just another way to protect efficiently ownership itself. But in some cases, possession is dissociated from ownership and the interdicts end up protecting possessors to the detriment of owners.<sup>29</sup>

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26. The matter has now been settled by art 1.210 §2 of the new Civil Code: Caio Mário da Silva Pereira, *Instituições de direito civil*, 20th ed, vol 4 (Rio de Janeiro: Forense, 2009) at 58, and for example STJ, RESP 327214/PR, Relator Ministro Sálvio de Figueiredo Teixeira, 4 September 2003; STJ, RESP 885.930/MT, Relator Ministro Humberto Gomes de Barros, 27 March 2008. Before that, the contradictory wording of art 505 of the 1916 Civil Code had led to many doubts and to a confusing jurisprudence in cases where the defendant's right of ownership was clearly established: for a summary, see Silvio Rodrigues, *Direito civil*, 27th ed (São Paulo: Saraiva, 2007) at 56-59.

27. *Ibid* at 55.

28. The rule did not find its way in the new Quebec Civil Code that came into force in 1994. But some authors argue that it nonetheless still forms part of Quebec civil law: Denis Vincelette, *En possession du Code civil du Québec* (Montréal: Wilson & Lafleur, 2004) at paras°377-81, and Pierre Pratte, "L'action possessoire est-elle moins protégée sous le Code civil du Québec?" (1995) 55 R du B 403.

29. This is the price to pay to protect ownership as efficiently as possible, as stated before: Rodrigues, *supra* note 26 at 55.

When this happens, the remedy available to the owner defeated in a possessory judgment is to initiate another type of real action: a petitory action. Petitory actions bear on questions of ownership, or title, where possessory actions concern themselves only with questions of possession.<sup>30</sup> If the right of ownership is established in a petitory action, called an action in revendication, after the owner lost in a possessory procedure, the possessor will have to hand back the thing to the owner. In other words, the petitory action may put an end to the benefit of a possessory judgment, even though it will have to wait for the end of the possessory proceedings to be formally introduced.<sup>31</sup>

Why then use possessory interdicts if the benefit may only be temporary? Mainly because where possessory actions are speedy and relatively easy in terms of evidence, petitory actions are the opposite. The proceedings are long and costly.<sup>32</sup> The plaintiff has to prove positively the existence of his right of ownership, a legal feat often quite complicated to achieve.<sup>33</sup> This conundrum is common to many civil law countries, where deeds registration is the rule. Registering a deed of sale does not “prove” the right of ownership, and does not erase flaws which might affect the sale. Thus, for an example, if the seller was not the owner, or if he was under some incapacity to contract, the sale will be void, notwithstanding the fact that it has been duly registered. In Brazil as in Quebec, in this regard, registration only translates into a rebuttable presumption that the registered buyer is the owner—no more. In Belgium or France, such a presumption does not even exist. In that respect, proving ownership in civil law systems is a challenge amounting to a “*probatio diabolica*,” a “diabolic proof.”<sup>34</sup> Acquisitive prescription, also called by its Latin name *usucapio*, is thus often called to the rescue, because it helps to establish the existence of the alleged right of ownership in another way. But if acquisitive prescription helps owners to prove their right, it may also side with possessors against owners if they possessed long enough in the manner required: fifteen years for what is called “extraordinary *usucapio*,” in the absence of good faith and “just title,” and both are then presumed, ten years

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30. For the principle, de Salvo Venosa, *supra* note 17 at 36-38.

31. Rodrigues, *supra* note 26 at 55-56 and art 923 CPC.

32. de Salvo Venosa, *supra* note 17 at 38.

33. Darcy Bessone, *Direitos reais* (São Paulo: Saraiva, 1988) at 250.

34. Gomes, *Direitos reais*, *supra* note 7 at 98.

otherwise for ordinary *usucapio*.<sup>35</sup> Good faith in this context may be defined, in short, as the ignorance, by the possessor, of the legal flaw having been an obstacle to the acquisition of the thing.<sup>36</sup> It is presumed in any case when there is a “just title,” which refers in turn to the legal cause of the possessory relationship, the act that justifies the acquisition of the thing through a mode legally apt to confer a right on it.<sup>37</sup>

In addition to the “classic” law of *usucapio* briefly sketched above, two noteworthy Brazilian innovations contribute to make the issue of petitory revendication unpredictable when used by passive landowners against favela dwellers. The first set has a legislative origin. In the context of urban and rural regularization of real property, a new type of “special” *usucapion* has been created. It requires a possession of five years, aiming at private housing, with no reference to good faith, and can be claimed through an administrative rather than judicial process.<sup>38</sup> A collective version of the same also exists, available when the individual constructions occupied by low-income possessors are impossible to distinguish.<sup>39</sup> In practice, when political authorities are willing, the individual *usucapion* works relatively well, while the collective form appears more difficult to wield.<sup>40</sup> Compared to the traditional form of *usucapion*, this particular form boasts a shorter prescription

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35. Art 1.238 C civ. There is also a possibility to reduce the required time to five years in art 1242 C civ. See in general Rizzardo, *supra* note 10 at 247-97; Tepedino et al, *Código civil*, *supra* note 8 at 518-35.

36. Art 1.201 C civ and for the notion, Gomes, *Direitos reais*, *supra* note 7 at 51.

37. Art 1.201 C civ and Tepedino et al, *Código civil*, *supra* note 8 at 454-56.

38. See arts 183 of the Federal Constitution, 1.240 C civ and 9 of the *Estatuto da Cidade*, federal statute n° 10.257, promulgated on 10 July 2001. The land concerned must not exceed 250 m<sup>2</sup>, and the remedy can only be used once by the claimant in his or her lifetime. Art 1239 C civ sets up the rural version of the same. See for instance Daniel Queiroz Pereira, “O usucapião especial urbano e a efetivação da função social da propriedade” in Mauricio Jorge Pereira da Mota & Marcos Alcino de Azevedo Torres, eds, *Transformações do direito de propriedade privada* (Rio de Janeiro: Elsevier: Campus Jurídico, 2009) 275, as well as TJDFT, AC 2011 01 0 196242-8, Relator Waldir Leôncio Lopes Júnior, decided on 22 January 2013; TJRJ, AC 0010770-73.2005.8.19.0066, Relator Juarez Fernandes Folhes, decided on 27 April 2012; TJSP, AC 9194450-09.2008.8.26.0000, Relator Tasso Duarte de Melo, decided on 13 June 2012.

39. The proceedings are judicial only in this case: arts 10-14 of the *Estatuto da Cidade*, federal statute n° 10.257, promulgated 10 July 2001. Among many references, see for example Marcio Kammer de Lima, *Usucapião coletivo e desapropriação judicial: instrumentos de atuação da função social da propriedade* (Rio de Janeiro: GZ Editora, 2009).

40. See for example, for an ongoing regularization process in two Rio de Janeiro favelas, Renata Leite, “Treze mil famílias de Rocinha e Vidigal receberão títulos de posse de seus imóveis,” *O Globo* (27 November 2011) online: *O Globo* <<http://oglobo.globo.com/rio/treze-mil-familias-de-rocinha-vidigal-receberao-titulos-de-posse-de-seus-imoveis-3336634>>.

period and quicker proceedings. But it applies only to private land.<sup>41</sup> As for public immovable, a special right of use for housing purposes can be claimed through an administrative process under similar conditions, but the five years of possession had to be accomplished by June 30th, 2001. The purpose of this temporal restriction is to avoid encouraging new illegal occupations, but it also explains the limited scope of the remedy.<sup>42</sup> The other type of creative legal thinking apt to hamper a petitory action was devised by judges. It consists in declaring that by sitting by and allowing his land to be gradually turned into a favela, in the light of the social function imparted to ownership by the Constitution, which we will discuss below,<sup>43</sup> the owner has simply abandoned his right.<sup>44</sup> While unorthodox,<sup>45</sup> this controversial mode of rejecting a petitory action may also occasionally help some possessors in need.

Thus, the length of the petitory proceedings and the difficulty to prove ownership, coupled with the possibility for long-term possessors to successfully invoke a special form of acquisitive prescription or even abandonment, explain why petitory actions are not a sure and perfect remedy. These features also explain why owners also favour possessory interdicts, which they see as a convenient remedy to protect their right.

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41. According to art 102 C civ and art 183 § 3 of the 1988 Federal Constitution, public lands are excluded from the operation of *usucapio*.

42. This *sui generis* real right originates in an executive order by the federal president: *Medida provisória* n° 2220 of 4 September 2001. See for instance Fernanda Lousada Cardoso, "Comentários à Medida provisória n° 2.220/2001: Concessão especial de uso para fins de moradia e autorização de uso para fins comerciais" (2007) 10 *Revista Magister de direito ambiental e urbanístico* 83, and for example TJRJ, AC 0047012-66.2009.8.19.0001, Relator Azevedo Pinto, decided on 13 December 2006; TJMG, AC 1.0701.07.196693-4/001, Relatora Heloísa Combat, decided on 31 March 2009, and especially at the TJSP, where such grants are more numerous, AC 012785-36.2008.8.26.0053, Relator Evaristo dos Santos, decided on 26 November 2012.

43. *Constitution of the Federative Republic of Brazil*, (1988) s 5, XXIII and see title 2 "A new possessory protection attuned to objective and collective values," above, for more on this topic.

44. See the "leading case" of the favela Pullmann in São Paulo: TJSP, AC 212.726-1-8, Relator José Osório, 16 December 1994, confirmed by STJ, RE 75.659-SP, Relator Ministro Aldir Passarinho Júnior, 21 June 2005; Maurício Pereira da Mota & Marcos Alcino de Azevedo Torres, "A função social da posse no Código civil" in Pereira da Mota & Alcino de Azevedo, *supra* note 38, 3 at 47-54, as well as Tepedino et al, *Código civil*, *supra* note 8 at 574-75. See also TJSP, AC 014.042-4/3, Relator Fernando Horta, 19 February 1998; TJRS, AC 70013925441, Relatora Elaine Harzheim Macedo, 16 March 2006; TJRJ, AC 0005425-33.2010.8.19.0202, Relator Marcos Alcino Torres, decided on 9 October 2012.

45. Because the intent to abandon should never be presumed (except when land taxes are unpaid during three years, where there is an absolute presumption: art 1.276 §2 C civ), and in any case the ownership would then pass to the State, not the squatters, unless they claimed it through *usucapio*: Rizzardo, *supra* note 10 at 386-88.



But for a possessor who is not the owner, petitory actions mean that a possessory victory might only be temporary, albeit for some period of time.

## B. A protection possibly limited in target: adverse possession in Canadian common law

According to classic real property law in common law countries such as Canada or England, possession also commands a specific type of protection. Through what is called possessory title, a possessor may defend his real property against many intruders—but not all. The strength of this particular title depends on the very structure of the common law of property and its relativity of title (1). But a possessory title may be made stronger through adverse possession and statutory limitations, which approaches the acquisitive prescription found in civil law (2).

### 1. *The value of possessory title in a relative framework*

The common law of property no longer recognizes the distinction between possessory and petitory actions (a). Nonetheless, it continues to refer to possession when ascertaining the existence and value of a person's right on real property (b). But this possessory title is only one among many possible titles, and has to be ascertained on a specific, adverse basis according to the principle of relativity of title (c).

#### *a. The disappearance of specific possessory actions from the common law*

The story of the law pertaining to real property in England is first and foremost a story of available actions, themselves flowing from the existing writs enabling a plaintiff to sue before a royal court of common law. "Remedies precede rights" describes the development of medieval property law, while the idea that an action is merely "a right in a state of war"<sup>46</sup> aptly characterizes French civil law after the 1804 Civil Code. The common law of real property evolved through the emergence and decline of different "real" actions, thus called because their process guaranteed the restitution of the disputed thing to the plaintiff if he

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46. Charles Demolombe, *Cours de code Napoléon*, vol 9 (Paris: 1854) at paras 338-43.

won his case. Conversely, so-called personal actions did not guarantee such restitution *in specie*.<sup>47</sup>

The first real actions developed in partnership by the Court of Common Pleas and the Chancery (that issued the original writ) were essentially petitory actions: they aimed at establishing the real right of the plaintiff on some land.<sup>48</sup> All these petitory actions were gradually replaced by possessory actions endowed with more efficient proceedings: the petty assizes, among which the assize of *novel disseisin* (when a tenant had been, “unjustly and without judgment,” disseized of his freehold). At the outset, part of what made the petty assizes more attractive to litigants than the old *præcipe* actions was their possessory nature. In an action of novel disseisin, for example, what was debated was not the parties’ title to the land, but the dispossession and the previous seisin of the plaintiff. “Seisin” meaning simply “possession” in a feudal perspective, what the plaintiff had to establish was that he had been seized of the freehold several years before the dispossession took place. He could do this, for instance, by proving that the land had been harvested a few times before the defendant took it from him.<sup>49</sup> Petty assizes replaced older petitory actions by the turn of the 15th century.<sup>50</sup> But this did not mean that possessory actions were by then the norm in property law. Gradually, questions of title were allowed in the petty assizes proceedings and transformed these proceedings into a mix of possessory and petitory actions, depending on which aspect litigants insisted upon in their argumentation.<sup>51</sup>

In turn, the petty assizes were replaced by several actions rooted in the writ of trespass: the action of ejectment (when someone has been evicted from his land), the action of trespass to land (when someone has intruded, in any manner, on the land of the plaintiff) and the action

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47. In turn, the qualification of actions gave rise to the distinction of personal and real property according to the type of action protecting it: Anne-Françoise Debruche, “La common law des biens” in Aline Grenon & Louise Bélanger-Hardy, eds, *Éléments de common law canadienne: comparaison avec le droit civil québécois* (Toronto: Thomson-Carswell, 2008) 101 at 103-04 [Debruche, “La common law des biens”].

48. John H Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) at 57.

49. John H Baker & Stroud Francis Charles Milsom, *Sources of English Legal History: Private Law to 1750* (London: Butterworths, 1986) at 32-33.

50. Unless of course the assize was not available: Baker, *supra* note 48 at 236.

51. The transformation of *novel disseisin* is commented, among others, by Sutherland, *supra* note 5 at 77-125. The writ itself made it possible since it referred to a plaintiff “unjustly” disseized of his tenement.

of nuisance.<sup>52</sup> These three actions represent the framework of actions available to defend real property in Canadian or English common law today. Based on the idea of trespass (i.e. the fact of transgressing a limit, of doing something illicit), they pertain to the domain of torts (quasi-delicts, or extra-contractual liability) rather than to property law itself. This is especially true of the actions of trespass to land and nuisance, since the action of ejectment (or in recovery of land) is still technically attached to property law.

What are the implications of this last transformation of the forms of actions connected to the protection of real property? First, as to their possessory or petitory nature, the trend observed in relation to the petty assizes has been maintained: although rather possessory at the start, thanks to their affiliation with the notion of trespass, they have now acquired a petitory dimension as well. Any argument, possessory or petitory, may be used in an action of ejectment, nuisance or trespass to land. This is particularly striking when looking at the actions of ejectment and trespass to land. At first glance, one might have thought that ejectment would deal with questions of title (when there is a debate as to title)<sup>53</sup> and trespass to land, with matters of possession (when there is a “mere” interference with possession of land, and when title is not an issue). But in practice, both actions have a dual nature and may showcase questions of title as well as possessory trouble. The plaintiff may proceed in any of them by relying on his qualified possession of the land (or possessory title, as we shall see below), but the defendant may always argue that he has a better title than the plaintiff—thus, a possessory action at the start may turn into a petitory one, depending on the argumentation favoured by the parties.

Therefore, it may be safely said that the common law today entertains no formal distinction between petitory and possessory actions, and did not do so for long in the past. The key civil law distinction among actions has no echo in the current common law. But as a second consequence of the replacement of the old real actions by actions derived from trespass, we may also point out that the actions protecting real property can now be classified according to another *summa divisio*: either they are real actions insuring restitution in case

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52. For the reasons behind the success of the actions founded on trespass, and for an explanation of the replacement process, see Anne-Françoise Debruche, *Équité du juge et territoires du droit privé* (Bruxelles, Cowansville, Que; Bruylant, Yvon Blais, 2008) at 439-46 [Debruche, *Équité du juge*].

53. See below for the notion of title in the common law of real property.

of success, or they are personal actions granting only monetary compensation for sure. The action in recovery of land belongs to the first category, the actions of trespass to land and nuisance to the second. As a real action, the action in recovery of land should as a rule lead to the victorious party getting his land back.<sup>54</sup> But with actions in trespass to land or nuisance, the tortious perspective bequeathed by their affiliation to trespass implies that compensation only will be ensured—not restitution. In an action in trespass to land successfully directed against an encroachment for instance, the destruction of an illegal construction can only be obtained through an injunction which, being an equitable remedy, is always granted according to the exercise of judicial discretion and not “as of course.”<sup>55</sup> Admittedly, the demarcation line between the real action in recovery of land and the personal action in trespass to land is not necessarily easy to draw.<sup>56</sup> Nonetheless, their difference in outcome highlights the major distinction between actions designed to protect real property today in Canada or England, while their similar nature (and the type of argumentation it commands) points to the absence of “true” possessory actions in contemporary common law.

### *b. Possessory title and adverse possession*

Despite the fact that the actions in recovery of land, trespass to land and nuisance are not possessory actions, as opposed to petitory ones, the party in possession of some real property may invoke a “possessory title” against the other party in order to sustain his claim. This possessory title rests on a type of possession called “adverse,” which implies a possession vested with certain qualities rather than a possession lasting during a certain time.

Possession itself is defined in the common law of real property according to the theory of Savigny described above, as the conjunction

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54. This special feature was added to the action of ejectment in 1500, despite the fact that it evolved from the writ of trespass, as a reason of the growing importance of the term of years, the real interest protected by the action: *Gernes v Smyth* (1499) CP 40-948, and in general William S Holdsworth, *A History of English Law* (London: Sweet & Maxwell, 1908) at 10-23.

55. For an extensive study of the use of the injunction in actions of trespass to land and nuisance, and the measure of the judicial discretion associated with it, see Debruche, *Équité du juge*, *supra* note 52 at 360-05.

56. Since the formal disappearance of the forms of actions, which means that the parties do not have to name the type of action they use, it is up to judges to qualify the true nature of the action before them: Debruche, *Équité du juge*, *ibid* at 448-50.

between a material element (*corpus*) and an intentional one (*animus possidendi*).<sup>57</sup> In a somewhat redundant fashion, some Canadian courts add the dispossession of the paper title holder to these two key elements.<sup>58</sup> In any case, contrarily to Brazilian law, it excludes detentors from possessory protection. In some cases, the material element may be “constructed” from a defective grant covering the whole land even though actual possession only concerns part of it.<sup>59</sup> As for the *animus conundrum*, in practice it often blends with the one pertaining to the adverse nature of the possession since the latter implies the qualities of exclusivity (the intention to possess for oneself only, to the exclusion of others)<sup>60</sup> and non-equivocity (the possessor is not allowed or tolerated on the land by the “true” owner).<sup>61</sup> In addition, adverse possession also requires two other qualities to exist and be effective: continuity<sup>62</sup> (it must not occur on and off) and notoriety<sup>63</sup> (it should be enjoyed in the open, in a public fashion).<sup>64</sup> All in all, in a nutshell, the adverse possessor must behave as if he was the “true” owner and retain control over the land. In Canada, some additional criteria may be added to the enumeration above, such as the peaceful character of

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57. *JA Pye (Oxford) Ltd v Graham*, [2000] Ch 676 [*JA Pye 2000*] and also *Littledale v Liverpool College*, [1900] 1 Ch 19; *Powell v McFarlane* (1979), 38 P & CR 452; *Buckinghamshire County Council v Moran*, [1990] Ch 623 (CA) [*Buckinghamshire*]; Bruce H Ziff, *Principles of Property Law*, 5th ed (Toronto: Thomson Carswell, 2010) at 132 [Ziff, *Principles*]; Ben McFarlane, Nicholas Hopkins & Sarah Nield, *Land Law: Text, Cases and Materials*, 2d ed (Oxford: Oxford University Press, 2012) at 256-61. See also Oliver Radley-Gardner, “Civilized Squatting” (2005) 25 *Oxford J Legal Stud* 727 for a reflexion over the influence of Savigny’s doctrine over the English common law in this respect.

58. *Ewing v Goth*, 2010 ONSC 2141 [*Ewing*]; *Cantera v Leah Eller*, (2007) 56 RPR (4th) 39 (Ont SCJ), quoting *Fletcher v Storoschuk et al* (1982), 35 OR (2d) 722 (Ont CA) [*Fletcher*]. See also *Bellini Custom Cabinets v Delight Textiles Limited*, 2007 ONCA 413 and Michael Lubetsky, “Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law” (2009) 47 *Osgoode Hall LJ* 497 at 506.

59. *Re Matchless Group Inc*, (2002) 4 RPR (4th) 202 (Nfld CA), and in general Bruce H Ziff, *Principles of Property Law*, 4th ed (Toronto: Thomson Carswell, 2006) at 127, n 53.

60. *JA Pye 2000*, *supra* note 57; Mark Wonnacott, *Possession of Land* (Cambridge: Cambridge University Press, 2006) at 129.

61. Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed (Oxford: Oxford University Press, 2009) at 1181-83.

62. See for example *Sherren v Pearson*, [1887] 14 SCR 581 at 586; Gray & Gray, *supra* note 61 at 156, 1178 (continuity is often presumed).

63. This criterion is rarely discussed specifically, but see nonetheless *Rains v Buxton* (1880), 14 Ch D 537; *Axler v Chisholm* (1977), 79 DLR (3d) 97 (Ont HC); *Lundrigans Ltd v Prosper* (1982), 132 DLR (3d) 727; 38 Nfld & PEIR 10 (Nfld CA); *Newfoundland v Collingwood* (1996), 1 RPR (3d) 233 (Nfld CA); Ziff, *Principles*, *supra* note 57 at 143; Gray & Gray, *supra* note 61 at 1182; Nicholas Hopkins, *The Informal Acquisition of Rights in Land* (London: Sweet & Maxwell, 2000) at 226.

64. In general, for the sometimes redundant enunciation of criteria, see *Ewing*, *supra* note 58 at 97; Lubetsky, *supra* note 58 at 506-07.

possession, or its actual nature.<sup>65</sup> This relative state of flux stems from the fact that the criteria composing adverse possession have been isolated and defined by a continuous stream of cases, not set out once and for all by the legislator as in a civil code.<sup>66</sup>

### c. *Relativity of title and the colours of "ownership"*

What is the value, or practical strength in a property law case, of a possessory title? As a rule, such a title may be opposed to any non-possessor, but remains inferior in rank to the paper title(s) possibly held by one or several other persons.<sup>67</sup> This cryptic affirmation (characteristic of many rules governing property law) may, in turn, be explained in the following fashion.

In its original state (that is, unaltered by statutory law), the common law of real property rests on the principle of "relativity of title": no right on land is ever declared the best once and for all against anyone, but can only be established on an adverse basis against another individual claim.<sup>68</sup> The notion of "title" itself refers to the proof or to the mode of acquisition, of the alleged real right. According to the type of title involved, it thus points to a bundle of facts and/or juridical acts on the basis of which some right (also called "interest") on real property may be established legally.<sup>69</sup> There are thus as many titles as there are ways

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65. Which represents only, as we just observed, a problematic associated with the *corpus*.

66. In England, statutes have taken up some of those criteria, but this relay does not dry out the creative power associated with the common law. Thus, for example, the public nature of possession and its continuity have been inserted in the *Limitations Act 1980* (UK), c 58, s 32 (publicity) and Sched 1, s 8 (continuity) [*Limitations Act 1980* (UK)].

67. Harry Dell Anger et al, *Anger & Honsberger Law of Real Property*, 2d ed, vol 2 (Aurora, Ont: Canada Law Book, 1985) at 1484-85; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 74-76; *Asher v Whitlock* (1865), LR 1 QB 1; *Perry v Clissold*, [1907] AC 73 (PC); *Bea v Robinson* (1977), 18 OR (2d) 12 (Ont HC).

68. Anthony D Hargreaves, "Terminology and Title in Ejectment" (1940) 56 Law Q Rev 376 and the precisions in W S Holdsworth, "Terminology and Title in Ejectment: A Reply" (1940) 56 Law Q Rev 479; Sukhninder Panesar, *General Principles of Property Law* (Harlow, UK: Longman, 2001) at 140-42; Oliver Radley-Gardner & Charles Harpum, "Adverse Possession and the Intention to Possess: A Reply" (2001) Conveyancer and Property Lawyer 155.

69. The notion of title is defined by Panesar, *supra* note 68 at 139-45, along with those of ownership and possession, as well as by Alain Pottage, "Evidencing Ownership" in Susan Bright & John Dewar, eds, *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) at 129-50. The right itself, that is validly held according to the title, is referred to in terms of "estate," a word passed down from English feudal past: Nick Curwen, "The Squatter's Interest at Common Law" [2000] Conveyancer and Property Lawyer 528.

to acquire a common law property interest<sup>70</sup>: title by will, title by conveyance, title by possession, title by estoppel, etc.<sup>71</sup> Admittedly, the principle of relativity of title sometimes yields to a title called “absolute,” particularly when a Torrens style title registration system has been put in place.<sup>72</sup> But otherwise, relativity of title remains the rule and adverse possession, by itself, is unable to make a real interest “absolute,” i.e. best against anyone at all times.

## 2. *The strengthening of possessory title through the limitation of actions*

We saw that in Brazilian civil law, in the aftermath of a successful possessory action used against the true owner, a petitory action initiated by the latter may fail because in the meanwhile, possession has been strengthened into a right of ownership thanks to the mechanism of acquisitive prescription. A similar mechanism may serve the holder of a possessory title on real property in Canadian or English common law, but it will require the junction of two distinct legal institutions: adverse possession during a certain time, and statutory limitation of actions.

The principle of barring legal actions after the lapse of a certain time, called in civil law “extinctive prescription,” appears in English statutes as early as the 16th century.<sup>73</sup> Nowadays, the real action in recovery of land for example is endowed with a longer limitation period than the action in trespass to land or nuisance grounded in torts.<sup>74</sup> In Canada,

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70. Contrarily to the notion of estate or ownership, “title” seems limited to the common law domain. If the idea of an equitable title is not theoretically incorrect, it does not really suit the reality of equity where possession only plays a negligible part in the acquisition of rights on land: Panesar, *supra* note 68 at 144-45.

71. This is the classification systematically adopted by Anger et al, *supra* note 67 at 1261-1485.

72. The registered title then becomes “indefeasible”: see Debruche, *Équité du juge*, *supra* note 52 at 220-24 for a comparison of deeds registration systems (such as the one used in Brazil or Quebec) and Torrens style, or title registration systems.

73. *Act of Limitation with Proviso* (1540) (UK), 32 Hen VIII, c 2, and in general the references compiled by Susan Petersson, “Something for Nothing: The Law of Adverse Possession in Alberta” (1992) 30 Alta L Rev 1291 at 1296-99, based on Jeremy S Williams, *Acquisition of Title to Land by Adverse Possession* (PhD Sheffield: 1968) at 16-19, summed up by the author in his later monograph, *Limitation of Actions in Canada*, 2d ed (Toronto: Butterworths, 1980) at 24-27.

74. For actions in tort, the time frame is six years in England (*Limitation Act 1980* (UK), *supra* note 66, s 2) and in most Canadian provinces (*Limitation of Actions Act*, CCSM c L-150, s 2(1)(f)) [*Limitation of Actions Act* (Man)]; *Limitation of Actions Act*, RSY 2002, c 139, s 2(1)(e)) [*Limitation of Actions Act* (Yt)], but it may be extended indefinitely (*Limitation Act*, SBC 2012, c 13, s 3 (1) (b)) [*Limitation Act* (BC)].

it is barred after a period of ten years in most of the provinces and territories having adopted a title registration system,<sup>75</sup> and after twenty years in most maritime provinces.<sup>76</sup> In British Columbia and Saskatchewan as in England however, the principle of indefeasibility of the registered title explains that the period of limitation has been altogether suppressed for the action in recovery of land.<sup>77</sup>

How do statutory limitations help strengthen the case of an adverse possessor against the paper title holder? The effect of barring an action in recovery of land or in trespass to land will be, at least, to paralyze this action and to leave the paper title holder without a remedy against the possessor. This improves the situation of the possessor, since the title that was superior to his (the paper title) can no longer be upheld in court: in this sense, possession may well be called the "root of title."<sup>78</sup> But Canadian and English legislators did not stop there. Binding together closely adverse possession and statutory limitations, they have enacted that with the limitation of the action protecting the paper title, the title itself is extinguished if a valid possessory title had been claimed in the meanwhile on the disputed land.<sup>79</sup> In England, at the

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75. *Real Property Limitations Act*, RSO 1990, c L-15, s 4 [*Real Property Limitations Act* (Ont)]; *Limitation of Actions Act* (Man), *supra* note 74, s 25; *Limitations Act*, RSA 2000, c L-12, ss 3(1)(a) and (4) [*Limitations Act* (Alb)]; *Limitation of Actions Act* (Yt), *supra* note 74, s 17; *Limitation of Actions Act*, RSNWT 1988, c L-8, s 18 [*Limitation of Actions Act* (NWT)].

76. *Statute of Limitations*, RSPEI 1988, c S-7, s 16 [*Statute of Limitations* (PEI)]; *Limitation of Actions Act*, RSNB 1989, c 258, s 10 [*Limitation of Actions Act* (NS)]. In Newfoundland and Labrador, it has been brought down to ten years (*Limitations Act*, SNL 1995, c L-16.1, s 7(1)(g)) [*Limitations Act* (NL)] and in New Brunswick, to fifteen years (*Limitation of Actions Act*, SNB 2009, c L-8.5, s 8.1(2)(a)) [*Limitation of Actions Act* (NB)].

77. *Limitation Act* (BC), *supra* note 74, s 3(1)(b), and *Land Titles Act*, SS 2000, c L-5.1, s 13(1)(b)(iii). As for England, see the *Land Registration Act 2002* (UK), c 9, s 96(1) [*Land Registration Act 2002* (UK)]. But it must be kept in mind that in England, registration of title is not completed yet. Thus, the old period of limitation of twelve years still apply to actions in recovery of land directed against any land not yet participating in the registration system: *Limitations Act 1980* (UK), *supra* note 66 at s 15.

78. Edward H Burn & GC Cheshire, *Cheshire and Burn's Modern Law of Real Property*, 15th ed (London: Butterworths, 1994) at 28-29, and in general Panesar, *supra* note 68 at 181. This is still the case for adverse possession applying to unregistered land in England: Martin Dixon, *Modern Land Law*, 8th ed (Oxon: Routledge, 2012) at 449-50.

79. For the extinction of title with the limitation of the action: *Real Property Limitations Act* (Ont), *supra* note 75, s 15; *Limitation of Actions Act* (Man), *supra* note 74, s 53; *Limitation of Actions Act* (Yt), *supra* note 74, s 44; *Limitation of Actions Act* (NWT), *supra* note 75, s 43; *Statute of Limitations* (PEI), *supra* note 76, s 47; *Limitation of Actions Act* (NB), *supra* note 76, s 8.1(6); *Limitation of Actions Act* (NS), *supra* note 76, s 22; *Limitations Act* (NL), *supra* note 76, s 17(1). The requirement of a continuous possession is implied from the dispossession of the paper owner which initiates the limitation period: *Real Property Limitations Act* (Ont), *ibid*, s 5; *Limitation of Actions Act* (Man), *ibid*, s 26; *Limitation of Actions Act* (Yt), *ibid*, s 18; *Limitation of Actions Act* (NWT), *ibid*, s 19; *Statute*



expiration of the limitation period, the possessor holds a beneficiary interest on the land and the paper-title owner becomes its trustee. As a consequence, the possessor can ask to be registered as the new "owner."<sup>80</sup> As for public land, similar to the situation mentioned in Brazil, federal Crown land is not concerned by the symbiosis between limitations and adverse possession, since a 1950 Canadian statute excludes the application of adverse possession to it.<sup>81</sup> The same is true, in Canada, of lands belonging to municipal corporations when used in the public interest.<sup>82</sup>

This brief presentation would not be complete without at least mentioning the difficult coexistence of the traditional common law doctrine of adverse possession, coupled with statutory limitations, with the growing application of title registration systems in Canada as well as in England. Acquisitive prescription at common law works well alongside a deeds registration system. While the former aims at establishing title, the latter deals with the opposability of real rights between subsequent purchasers, or towards successors in title. But acquisitive prescription and title registration systems (also called "Torrens systems" in reference to their original designer) share the same goal: both claims to prove title. Thus, adverse possession and

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of *Limitations* (PEI), *ibid*, s 18; *Limitation of Actions Act*, RSNB 1973, c R-1.5, s 31; *Limitation of Actions Act* (NS), *ibid*, s 11(a); *Limitations Act* (NL), *ibid*, s 19(1)(a). In Alberta, there is no indication to that effect: *Limitations Act* (Alb), *supra* note 75. See also Petersson, *supra* note 73 at 1303-09; James C Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988) at 52-53; Michel Bastarache & Andréa Boudreau-Ouellet, *Précis du droit des biens réels*, 2d ed (Cowansville, Que: Yvon Blais, 2001) at 255-56. In the absence of adverse possession, the paper owner would retain constructive possession: *Bentley v Peppard* (1903), 33 SCR 444; *Anger et al*, *supra* note 67 at 1513.

80. *Land Registration Act 1925*, c 21, s 75(1), (2) [*Land Registration Act 1925*], and for example Elizabeth Cooke, "Adverse Possession – Problems of Title in Registered Land" (1994) 14 LS 1, as well as Hopkins, *supra* note 63 at 240-41. This does not apply to unregistered land, where the possessory title simply becomes the best title so far, since the paper title owner is statute-barred from bringing an action against the possessor. It does not apply anymore to claims brought after October 12th, 2003 regarding registered land: here, the quasi-ousting of adverse possession under the new registration scheme comes into full effect (*Land Registration Act 2002* (UK), *supra* note 77, s 96).

81. *Federal Real Property and Federal Immovables Act*, SC 1991, c 50, s 14, and the old *Public Lands Grants Act*, LRC 1985, c P-30, s 5; Ministère de la Justice du Canada, *La Couronne en droit canadien* (Cowansville, Que: Yvon Blais, 1992) at 314-15. The federal Crown is not concerned by the provincial statutes listed above, that could not restrict its prerogatives: Patrice Garant, *Droit administratif*, 6th ed (Cowansville, Que: Yvon Blais, 2010) at 78-79.

82. *Hamilton v Morrison* (1868), 18 UCCP 228 (Ont CA); *Hackett v Colchester South*, [1928] SCR 255, and for example the *Alberta Municipal Government Act*, RSA 2000, c M-26, s 609 as well as Ian MacFee Rogers, *The Law of Canadian Municipal Corporations*, 2d ed (Toronto: Carswell, 2001) loose-leaf (consulted on 7 October 2014) at para 212.5.

limitations are perceived as unwanted informal guests in the alternative registration frame that is being implemented (or has been already) in Canadian provinces and in England. The solution is often to oust adverse possession entirely in connection with lands when the title on them has been registered under the new frame, but not necessarily: England, Nova Scotia and Alberta have kept it alive nonetheless.<sup>83</sup> We shall say a few words of this new state of things in England in the second part of this paper, but on the whole, it is sufficient for now to stress that the law on adverse possession and limitations described here is becoming less pertinent everyday as a direct result of the progression of title registration, replacing the older system of deeds registration in Canada and England.<sup>84</sup>

Possession as an object of study has “a delightful habit of revealing, for the benefit of litigants and other enthusiasts, the arcane foundations of English land law.”<sup>85</sup> It also shows how apparently impervious these rules are, in terms of result (protecting possession for its own sake), to values such as the good or bad faith of the possessor, the best use of the land or social concerns such as the right to housing. But judges have attempted to change this in Canada as well as in Brazil.

## II. THE GROWING MORALIZATION OF POSSESSORY PROTECTION

Increasingly, possessory protection has become sensitive to a set of diverse values brought from beyond the borders of classic property law. In Brazil, this percolation takes the form of a more general “constitutionalization” of civil law, infusing constitutional rights and concerns into seemingly unchanging legal institutions such as possessory

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83. See respectively *Land Registration Act 2002* (UK), *supra* note 77, s 97; *Land Registration Act, SNS 2001*, c 6, s 75(1), (2) [*Land Registration Act* (NS)]; *Land Titles Act, RSA 2000*, c L-4, s 74 [*Land Titles Act* (Alb)]. But note that the surviving application of adverse possession and limitations is rather narrow in England and Nova Scotia, as will be discussed below in the second part.

84. A comment also made in Lubetsky, *supra* note 58 at 508. For a comparative presentation of both deeds registration systems and title registration systems, see for example Debruche, “La common law des biens,” *supra* note 47 at 162-67. And on the Torrens system in particular, S Rowton Simpson, *Land Law and Registration* (Cambridge: Cambridge University Press, 1976); Alain Pottage, “The Originality of Registration” (1995) 15:3 *Oxford J Legal Stud* 371; Victor Di Castri, *Registration of Title to Land*, ed, loose-leaf (consulted on 7 October 2014) (Toronto: Carswell, 1987).

85. Martin Dockray, “Adverse Possession of a Driveway: A Route to the Roots?” (1983) *Conveyancer and Property Lawyer* 398.

protection (A). Before that, in Canada and England, judges had been adapting the common law of adverse possession to what they saw as a need for more good faith in the protection of possession (B).

## A. The percolation of constitutional values in possessory litigation in Brazil

The interpretation and application of Brazilian civil law is increasingly influenced by the rights and values enshrined in the Federal Constitution of 1988, up to a point where authors are now evoking the existence of a “constitutional” civil law (1). As a result, possessory protection in Brazil also should now be conceived and granted according to this new frame of analysis, echoing constitutional values and rights (2).

### 1. *The emergence of a “constitutionalized” civil law*

As aptly summarized by Paulo Lôbo,

The constitutionalization of civil law, in Brazil, is a doctrinal phenomenon that took shape mainly since the last decade of the twentieth century, between jurists concerned by the revitalization of civil law and by its harmony with the values enshrined in the 1988 Constitution, as expressions of social transformation.<sup>86</sup>

The idea that private law must echo the values upheld in the constitution of the land may sound trite to Canadian ears, where the impact of the 1982 *Charter* on many areas of criminal, civil or administrative law is still expanding as we write, and taken for granted by authors and judges as well. The same is true of European countries and the *European Convention on Human Rights*. But Brazilian constitutional civil law is a different story.

The first Brazilian Civil Code, adopted in 1916, was perceived first as a “constitution of private law,” designed to organize all patrimonial relationships and protect them from unwanted interferences, particularly from the State. Following 19th century codification ideals, legal certainty and completeness were its trademarks. But soon, with the rise of industrialization and State intervention, specific statutes were

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86. Paulo Luiz Netto Lôbo, “A constitucionalização do direito civil brasileiro” in Gustavo Tepedino, ed, *Direito civil contemporâneo: Novos problemas à luz da legalidade constitucional* (São Paulo: Atlas, 2008) 18 at 18-19 [translated by the authors] [Tepedino, *Contemporâneo*].

required to give shape to a piecemeal legislation which stood beside the Civil Code and only increased in time, coming to rule such private law concerns as children,<sup>87</sup> landlord and tenants,<sup>88</sup> or consumers' relations<sup>89</sup> in a multidisciplinary perspective.<sup>90</sup> As a result, less and less of the applicable civil law was found in the Code, and the systematic unity of civil law was lost in this fragmentation process, leading some to evoke the new "microsystems" operating independently of a merely residual Civil Code.<sup>91</sup> In this context, the adoption, in 1988, of a federal Constitution incorporating a substantial number of provisions dealing with private law, as well as promoting fundamental rights and values such as substantial equality or the dignity of the human person, was seen by others as a tool to unify the legal system as a whole (private law included) and to energize the Civil Code, tuning it to the current realities of Brazilian society. The latter was to be done through interpreting the Civil Code in the light of the Constitution, and by directly applying fundamental rights and constitutional principles to private relationships.<sup>92</sup> Particularly influenced by Italian civil constitutional law,<sup>93</sup> these authors advocated that

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87. *Estatuto da Criança e do Adolescente*, federal statute n° 8.069, promulgated on 13 July 1990.

88. Or more precisely, since this is a civil law system, the personal right of *locação*: *Lei de Locações*, federal statute n° 8.245, promulgated on 18 October 1991.

89. *Código de Defesa do Consumidor* (CDC), federal statute n° 8.078, promulgated on 11 September 1990.

90. On this evolution, see Gustavo Tepedino, "Premissas metodológicas para a constitucionalização do direito civil" in Gustavo Tepedino, *Temas de Direito Civil*, 4th ed (Rio de Janeiro: Renovar, 2008) 1 at 2-12 [Tepedino, "Premissas metodológicas"]. The author remarks that these thematic, all-encompassing statutes also evidence a legislative style different from the 1916 Civil Code, such as the enunciation of practical goals, the use of general concepts, a less technical legal language, the use of incentives (and not only interdiction), and the imposition of extra-patrimonial duties. As for the multidisciplinary perspective, it flows from the fact that such statutes contain not only rules pertaining to civil law, but also to administrative law, civil proceeding, criminal law, etc.

91. See in particular Gustavo Tepedino, "O Código civil, os chamados microsistemas e Constituição: premissas para uma reforma legislativa" in Gustavo Tepedino, ed, *Problemas de direito civil* (Rio de Janeiro: Renovar, 2001) 1.

92. Netto Lôbo, *supra* note 86 at 21. See also, on the direct application of constitutional norms to the private sphere, Gustavo Tepedino, "Normas constitucionais e relações de Direito Civil na experiência brasileira" in Gustavo Tepedino, *Temas de Direito Civil*, t 2 (Rio de Janeiro: Renovar, 2006) 21 at 21-46; Daniel Sarmento, *Direitos fundamentais e relações privadas*, 2d ed (Rio de Janeiro: Lumen Juris, 2006).

93. In particular by the works of Pietro Perlingieri, translated in Brazil by Maria Cristina de Cicco, such as *Perfis do direito civil: introdução ao direito civil constitucional*, 3d ed (Rio de Janeiro: Renovar, 2007), and *O direito civil na legalidade constitucional* (Rio de Janeiro: Renovar, 2008). See Leonardo Brandelli, "Constitucionalização do direito civil: a experiência italiana" (2008) 35 *Revista trimestrial de direito civil* 153.

the perspective of civil constitutional interpretation allows the revitalization of civil law institutions, many of which are not in tune with contemporary reality and therefore doomed to oblivion and inefficiency, by reenergizing them and thus making them compatible with the social and economic demands of today's society.<sup>94</sup>

Just like the earth orbiting a constitutional sun, the Civil Code would then strive to reflect higher democratic ideals and values, such as the construction of a "free, just and united society" or the reduction of social inequalities,<sup>95</sup> as opposed to patrimonial and individualist preoccupations inherited from 19th century European traditions.<sup>96</sup> It should also be centred on the dignity of the human person as a cardinal principle,<sup>97</sup> because "[t]he principle of the dignity of the human person represents the axiologic epicenter of the constitutional order, irradiating its effects on the whole legal order."<sup>98</sup>

Accordingly, the goal is rather an idealistic one, but in a country fraught with inequalities of all types, privatists must do what they can at their own level: "Brazil is a social State from the civil constitutional point of view, but still a mere project in the field of social justice, considering the exclusion of the greatest part of its population."<sup>99</sup>

Despite this commendable ideal, the civil constitutional movement met with resistance at first, particularly from civil law professors defending the traditional, dualist view of a private law sphere separated from

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94. Tepedino, "Premissas metodológicas," *supra* note 90 at 22 [translated by the authors]. See also de Maria Celina Bodin de Moraes, "A caminho de um direito civil constitucional" (1991) 1 *Revista Estado e Sociedade* – Departamento de Ciências Jurídicas da PUC-Rio 59.

95. See art 3, I and III of the Constitution.

96. Orlando Gomes, *Raízes históricas e sociológicas do Código civil brasileiro* (São Paulo: Martins Fontes, 2003) at 19-22.

97. Art 1, III of the 1988 Constitution, and in general, Ana Paula de Barcellos, *A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana*, 2d ed (Rio de Janeiro: Renovar, 2008), as well as Ingo Wolfgang Sarlet, *Dignidade da pessoa humana e direitos fundamentais na Constituição federal de 1988*, 7th ed (Porto Alegre: Livraria do Advogado, 2009); Luiz Edson Fachin, "Direito civil e dignidade da pessoa humana: um diálogo constitucional contemporâneo" (2006) 385 *Revista Forense* 113, and Maria Celina Bodin de Moraes, "O conceito de dignidade humana: substrato axiológico e conteúdo normativo" in Ingo Wolfgang Sarlet, ed, *Constituição, direitos fundamentais e direito privado* (Porto Alegre: Livraria do Advogado, 2002) 105.

98. Daniel Sarmiento, *A ponderação de interesses na Constituição federal* (Rio de Janeiro: Renovar, 2002) at 59-60 [translated by the authors] [Sarmiento, *A ponderação*].

99. Netto Lôbo, *supra* note 86 at 26, but see also the discussion at 20-23 [translated by the authors].

the public one.<sup>100</sup> The Constitution, pertaining to the latter, by nature contained vague, programmatic norms that only the ordinary, infra-constitutional legislator could put in practice through more detailed statutes.<sup>101</sup> They also feared that allowing the Constitution to inform the interpretation of private law would distort venerable civil law concepts handed down from Roman times, not to mention reduce the importance of private law in the Brazilian legal landscape. Finally, they argued that such an interpretation would be complicated from a methodological standpoint; also, it would leave too much power in the hands of judges and consequently, lead to much uncertainty in practice.<sup>102</sup>

But these objections were, for the most part, met by civil constitutionalists, who recalled that the Constitution contains many rules pertaining directly to private law (and was thus not merely a political charter), that the general concepts favoured in these rules are no different and imprecise than others used in the Civil Code or the *Código de Defesa do Consumidor* (for example, the notion of fault or objective good faith),<sup>103</sup> and that the traditional distinction between public law and private law has become blurred in current Brazilian law, where in practice there is often a State component in the relations between individuals.<sup>104</sup> As for the difficulty of interpreting the Civil Code in the light of constitutional principles, civil constitutionalists admit that it is no easy feat, each interpretation being “a microcosm of the daunting task to create a free, just and united society,”<sup>105</sup> but they have been attempting to define a specific methodology to this end ever since.<sup>106</sup>

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100. *Ibid* at 19.

101. Tepedino, “Premissas metodológicas,” *supra* note 90 at 18-19.

102. Netto Lôbo, *supra* note 86 at 19, 23, 25.

103. Tepedino, “Premissas metodológicas,” *supra* note 90 at 19-20. See also Fátima Nancy Andrighi, “Cláusulas gerais e proteção da pessoa” in Tepedino, *Contemporâneo*, *supra* note 86 at 289.

104. *Ibid* at 20-21.

105. Netto Lôbo, *supra* note 86 at 23.

106. See in particular Tepedino, “Premissas metodológicas,” *supra* note 90 at 1; Ingo Wolfgang Sarlet, ed, *Constituição, direitos fundamentais e direito privado*, *supra* note 97; Ingo Wolfgang Sarlet, *A eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional*, 10th ed (Porto Alegre: Livraria do Advogado, 2009); Claudio Pereira de Souza Neto & Daniel Sarmento, ed, *A constitucionalização do direito: fundamentos teóricos e aplicações específicas* (Rio de Janeiro: Lumen Juris, 2007).

One of the most challenging questions is indeed: what happens if two constitutional values or principles clash in one case, such as the protection of ownership and its social function? The authorized answer is that there is no hierarchy among constitutional principles, and that the solution must be found on a case-to-case basis.<sup>107</sup> This is what we shall discuss below in connection with possessory actions and collective values. And finally, the fear of judicial discretion and the ensuing legal uncertainty amounts to setting an old wolf coat on just another sheep: civil law general concepts and judicial creativity, ever on the rise as the 1916 Civil Code grew out-dated, have not been less disturbing to those concerned with traditions than their constitutional counterpart could possibly be.

Today, the opposition has gradually abated,<sup>108</sup> and civil constitutionalism is predominant among private law professors in Brazil. Interestingly, the coming into force of a new Civil Code in 2003 did not fundamentally alter this state of things. Although hailed again, at first, by traditionalists as the new pillar of private law, thus dispensing with oddities such as civil constitutionalism, the 2002 Civil Code was not as innovative as expected.<sup>109</sup> It was actually the result of a project written in the 1970s (at the demand of the military dictatorship then in place), on the basis of previous drafts written in the 1940s and the 1960s,<sup>110</sup>

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107. Netto Lôbo, *supra* note 86 at 28. See also Sarmento, *A ponderação, supra* note 98.

108. A sort of "irreducible minority" remains, especially at the Universidade de São Paulo, in the steps of the late Antonio Junqueira de Azevedo (for example "O direito, ontem e hoje. Crítica ao neopositivismo constitucional. Insuficiência dos direitos humanos" (2008) 99 *Revista do Advogado* 7), but see also Luciano Benetti Timm, "Descodificação, constitucionalização e descentralização no direito privado: o Código civil ainda é útil?" (2006) 27 *Revista de direito privado* 223 (who prefers the law and economics perspective). But opposition may be found in the ranks of publicists as well: Virgílio Afonso da Silva, *A constitucionalização do direito* (São Paulo: Malheiros, 2008).

109. "De realmente novo pouco tem": Anderson Schreiber, *A proibição de comportamento contraditório: Tutela da confiança e venire contra factum proprium*, 2d ed (Rio de Janeiro: Renovar, 2007) at 72.

110. The first initiative took place in 1941, with a project on the law of obligations. In 1963, two other projects were written: a project of Civil Code by Orlando Gomes, and another on the law of obligations by a group of jurists including Orosimbo Nonato and Caio Mário da Silva Pereira. Both met with resistance, and in 1969, another commission was created to prepare a Civil Code, which was then presented to the legislative assembly in 1975. But this commission relied on the previous projects mentioned, online: <<http://www2.senado.leg.br/bdsf/item/id/70319>>.

barely rethought and hardly discussed within the legal community at the time of its adoption. Inspired by older foreign models, such as the German BGB, the Italian Civil Code of 1942 and the 1966 Portuguese Code,<sup>111</sup> it was “born old” and has been duly criticized by the doctrine ever since.<sup>112</sup> Civil constitutionalists, especially, found that it did not build enough bridges with the 1988 federal Constitution, a natural consequence, of course, of the new Code writing process.<sup>113</sup> The urge to use the Constitution to bring this falsely “new” Civil Code up to speed with contemporary social realities has thus only grown stronger since, and now involves all areas of private law. From the law of contracts<sup>114</sup> to civil extra-contractual liability,<sup>115</sup> from privacy to family law,<sup>116</sup> adoption,<sup>117</sup> succession and biotechnologies,<sup>118</sup> from the law of seizures<sup>119</sup> to medical law,<sup>120</sup> all private law domains are apt to be reviewed under the light of constitutional civil law.

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111. Instead of using newer ones such as the 1992 Quebec Civil Code or the Dutch Civil Code, deeply reformed in 1992 as well.

112. See for example Antonio Junqueira de Azevedo, “Insuficiências, deficiências e desatualização do Código civil na questão da boa-fé objetiva nos contratos” (2000) 89 *Revista dos tribunais* 11.

113. Gustavo Tepedino, “O novo Código civil: duro golpe na recente experiência constitucional brasileira” (2001) 7 *Revista trimestrial de direito civil*, editorial (deeming the new Code “retrograde” and “demagogical”), and “Crise de fontes normativas e técnica legislativa na parte geral do Código civil de 2002” (2002) 98 *Revista Forense* 113; Luiz Edson Fachin & Carlos Eduardo Pianovski Ruzyk, “Um projeto de Código civil na contramão da Constituição” (2000) 4 *Revista trimestrial de direito civil* 243.

114. For instance Teresa Negreiros, *Fundamentos para uma interpretação constitucional do princípio da boa-fé* (Rio de Janeiro: Renovar, 1998).

115. As in Maria Celina Bodin de Moraes, *Danos à pessoa humana: uma leitura civil-constitucional dos danos morais* (Rio de Janeiro: Renovar, 2003).

116. See for example Maria Celina Bodin de Moraes, “Perspectivas a partir do direito civil-constitucional” in Tepedino, *Contemporâneo*, *supra* note 86, 29.

117. Rose Melo Vencelau, “Status de filho e direito ao conhecimento da origem biológica” in Gustavo Tepedino, ed., *Diálogos sobre direito civil: construindo uma racionalidade contemporânea* (Rio de Janeiro: Renovar, 2002) 379 [Tepedino, *Diálogos*].

118. Giselda Maria Hironaka, “As inovações biotecnológicas e o direito das sucessões” in Tepedino, *Contemporâneo*, *supra* note 86, 311.

119. Anderson Schreiber, “Direito à moradia como fundamento para impenhorabilidade do imóvel residencial do devedor solteiro” in Tepedino, *Diálogos*, *supra* note 117, 77.

120. Jussara de Meirelles & Eduardo Didonet Teixeira, “Consentimento livre, dignidade e saúde pública: o paciente hipossuficiente” in Tepedino, *Diálogos*, *ibid*, 347.



## 2. *A new possessory protection attuned to objective and collective values*

As explained in the first part of the present paper, possessory protection is conceived in an autonomous fashion in civil law systems such as Brazil, France or Quebec. In other words, possession is protected for its own sake, without reference to the right of ownership: the possessor may well succeed in a possessory action against the owner himself, even though he possesses in bad faith. Later, the owner might vindicate his right in a petitory action, but possessory protection operates independently of the question of ownership and who has it.

In Brazil, this autonomy has been reinforced through the increasing application of civil constitutional methodology to possessory litigation, thanks to the new focus placed on the social function of ownership by the 1988 Constitution.<sup>121</sup> The principle that ownership must attend to its social function already existed in previous Brazilian constitutions, but only in connection with the social and (especially) economic order.<sup>122</sup> Therefore, moving the social function of ownership to the title bearing on fundamental rights in the 1988 Constitution was taken to imply a greater limitation on the scope of the owner's powers,<sup>123</sup> and those new boundaries would flow from the way the owner used his right to give substance to other constitutional values such as the right to decent housing, the right to a balanced environment, the right to work, the right to the dignity of the human person, as well as the principles of social solidarity and substantial equality.<sup>124</sup> Other technical hints as to how the social function of ownership could be fulfilled were suggested by articles 182 and 186 of the

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121. For the affirmation that ownership must attend to its social function, see art 5, XXIII of the Constitution. The right of ownership itself is guaranteed in the previous subsection of the same (art 5, XXII). Art 1228 §1 of the 2002 C Civ later reaffirmed the principle of the social function of ownership, although in a more florid fashion.

122. See for example art 115 of the 1934 Constitution and art 160 of the 1969 Constitution: André Osório Gondinho, "Função social da propriedade" in Gustavo Tepedino, ed, *Problemas de direito civil constitucional* (Rio de Janeiro: Renovar, 2000) 397 at 406-12 [Tepedino, *Civil constitucional*]; Daniel Fernandes Claro, "A evolução histórica do princípio da função social da propriedade (urbana)" (2009) 403 *Revista Forense* 109 at 114-34 for a national and comparative overview.

123. Jéferson Albuquerque Farias, "Função social da posse no direito brasileiro" (2010) 67 *Revista sintese de direito civil e processual civil* 20 at 21, and TJRS, AI 7003434388, Relator Carlos Rafael dos Santos Junior, 6 November 2001.

124. Tepedino et al, *Código civil*, *supra* note 8 at 499-500. See arts 1, III; 3 and 6 of the 1988 Constitution.

1988 Constitution itself,<sup>125</sup> along with sanctions available to public authorities in case of non-compliance.<sup>126</sup>

At first, echoing the objection opposed to the new civil constitutional methodology mentioned above, the principle of the social function of ownership was treated by many as a mere programmatic norm: the general and imprecise character of the constitutional principle entailed a limited efficacy in practice.<sup>127</sup> Others still argue that the social function of ownership should be limited to applications specifically provided for by the legislator.<sup>128</sup> But through the civil constitutional lenses, the social function of ownership is increasingly perceived as a tool of many trades, a “broad and multi-faceted” notion receptive to concerns of social fairness such as the inadequate distribution of land in contemporary Brazil.<sup>129</sup> In the language of property law, this translates into recognizing a new dimension to the right of ownership, called “functional.” Property law has always emphasized the structural aspect of ownership, which encompasses the powers inherent to the right itself (right to use, to take the fruits, to dispose of, to oppose

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125. Thus, the fulfilment of the social function of rural ownership can be ascertained through parameters such as a rational and adequate enjoyment of the property, the adequate use of available natural resources and the preservation of the environment, the compliance with labour law and an exploitation favouring the well-being of owners and workers (art 186). As for urban ownership, art 182 §2 only refers to compliance with the land use plan implemented by the municipality: Ricardo Pereira Lira, “A questão urbano-ambiental” in Tepedino, *Contemporâneo*, *supra* note 86, 154 at 166-67; Gustavo Tepedino, “A nova propriedade: O seu conteúdo mínimo, entre o Código civil, a legislação ordinária e a Constituição” (1989) 306 *Revista Forense* 73 at 76.

126. In urban areas for example, those sanctions range from compulsory development to progressive land tax (IPTU) increase, culminating in the deprivation of property as an extreme punitive measure: art 182 of the 1988 Constitution, and Osório Gondinho, *supra* note 122 at 417; Marcos Alcino de Azevedo Torres, “Instrumentos urbanísticos e a propriedade urbana imóvel” in Tepedino, *Civil Constitucional*, *supra* note 122, 467 at 513.

127. “A comparatist observer will find strange—and even shocking or weird—the initial insensitivity of civilists in front of a test so innovative, inspired by a collective outlook and permeated by non-patrimonial values”: Gustavo Tepedino, “Contornos constitucionais da propriedade privada” in Tepedino, “Premissas metodológicas,” *supra* note 90, 321 at 331-32 [translated by the authors]. The right of ownership was still conceived as absolute: STJ, RESP 32.222/PR, Relator Ministro Garcia Vieira, decided on 17 May 1993, and Renan Lotufo, “A função social da propriedade na jurisprudência brasileira” in Tepedino, *Contemporâneo*, *supra* note 86, 336 at 337.

128. Be it constitutional, in arts 182-186 referred to above, or infra-constitutional, such as art 1228 §§ 4-5 C civ (organizing the transfer of ownership from a negligent land owner to numerous possessors in good faith for more than five years): Rizzardo, *supra* note 10 at 55-56.

129. Melhim Namen Chalhub, “Função social da propriedade” (2003) 24 *Revista da EMERJ* 301 at 305, 313 [translated by the authors]. See also, on the history of land distribution in Brazil, Marcos Alcino de Azevedo Torres, *A propriedade e a posse: um confronto em torno da função social* (Rio de Janeiro: Lumen Juris, 2007) at 3-111 [Alcino de Azevedo Torres, *A propriedade*].

intrusions, etc.) and corresponds to a static vision of ownership.<sup>130</sup> But the functional aspect of ownership is more dynamic: it is a direct consequence of its social function and promotes collective (constitutional) values instead of selfish, purely materialistic ones.<sup>131</sup> As a result, the right of ownership will only deserve protection in so far as it is used to achieve worthy goals in view of constitutional rights and values, producing “fruits of a social nature which will in turn create benefits for all.”<sup>132</sup> Thus adequately fulfilling its social function.<sup>133</sup> Public lands are subjected to this requirement as well.<sup>134</sup>

How is possession affected by the social function of ownership, given that the 1988 Constitution only refers to the right of ownership and not to possession? Civil constitutionalists were quick to point out that like ownership, possession enjoys a functional side as well, leading them to affirm that its protection will be as conditional as the one bestowed upon ownership: “In the light of civil constitutional legality, possession will only deserve protection if (and only if) it is used in conformity with constitutional values.”<sup>135</sup>

After all, since possession is usually viewed as the “exteriorisation of ownership” and possessory protection, as a key to the protection of ownership itself,<sup>136</sup> such a symbiotic relationship between the two leads, in practice, to assigning a social function to possession as well.<sup>137</sup>

130. The structure of ownership thus involves an internal element (the right to use, take the fruits and dispose of the thing) and an external one (the right to exclude third parties): Osório Gondinho, *supra* note 122 at 404-05.

131. Luiz Edson Fachin, *A função social da posse e a propriedade contemporânea* (Porto Alegre: S Fabris, 1988) at 19-20 [Fachin, *A função social*]. On the functional aspect of ownership, see for instance Tepedino et al, *Código civil*, *supra* note 8 at 499-502; Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 210-20; TJRS, AI 7003434388, Relator Carlos Rafael dos Santos Junior, decided on 6 November 2001, vote of Judge Mário José Gomes.

132. TJDF, AC 2011 07 1 024488-6, Relator Alfeu Machado, decided on 27 February 2013.

133. Tepedino et al, *Código civil*, *supra* note 8 at 501.

134. TJRS, AC 70031324817, Relatora Liége Puricelli Pires, decided on 3 December 2009; TJDF, AC 2009 03 10 32040-3, Relator Mario-Zam Belmiro, decided on 6 February 2013; Lotufo, *supra* note 127 at 349-50; Pereira da Mota & Alcino de Azevedo Torres, *supra* note 44 at 72-73. But see, for the opposite view, TJRS, AC 70030115778, Relator Glênio José Wasserstein Hekman, decided on 18 November 2009; TJRS, AC 70021727615, Relator José Aquino Florês Camargo, decided on 21 May 2008.

135. Tepedino et al, *Código civil*, *supra* note 8 at 445 [translated by the authors]; Lotufo, *supra* note 127 at 344. On the functional dimension of protection, see also Namen Chalhub, *supra* note 129 at 302-03.

136. von Ihering, *supra* note 9 at 71; see “Introduction,” above.

137. In Minas Gerais, it was held that the social function of ownership could not be examined in possessory actions until very recently: see TJMG, AI 1.0079.12.072599-3/001, Relator Rogério

"The protection of possession itself, when it rests on the valorisation of the human person, seeks to balance the concretization of constitutional core values, such as the reduction of social inequalities, and the emergence of a fairer and more egalitarian society."<sup>138</sup>

But this "functionalization of subjective rights"<sup>139</sup> may then end up in a direct confrontation between possession and ownership,<sup>140</sup> or in a collision between possession and other constitutional rights (such as the right to a wholesome environment,<sup>141</sup> etc.). In the former case, when an owner decides to use a possessory action to oust squatters, his possession before the intrusion (here the true exteriorisation of his right of ownership) will be ascertained against the squatters' current possession. And it will be up to the social function of possession to indicate to the court which possession should prevail in the case:

The possessory question discussed here exceeds the boundaries of the trial and reaches a collectivity of persons who shared possession of the disputed land, raising their cattle and tilling the earth. The social repercussion of the suit could not be greater, putting in focus the dignity of persons residing on and economically exploiting the land. Possession, here, is not only aimed at some property, or at the satisfaction of some material interest, but at a means of survival, of maintaining not one, but various families; not of one, but of various generations. [...]. Currently, the concept of the social function already goes further than the sphere of ownership and reaches possession as

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Mêdeiros, decided on 10 May 2013, and before that, in a long stream of consistent opposite decisions, TJMG, AI 2.0000.00.425429-9/000, Relator Alberto Vilas Boas, decided on 25 November 2003; TJMG, AI 1.0024.12.108829-8/002, Relator Elias Camilo, decided on 27 September 2012.

138. TJDF, AC 2009 03 10 32040-3, Relator Mario-Zam Belmiro, decided on 6 February 2013. See also TJDF, AC 2007 10 1 010780-6, Relator Alfeu Machado, decided on 30 November 2011; TJRJ, AC 0013019-58.2007.8.19.0023, Relator Custodio Tostes, decided on 20 March 2012; TJMG, AI 1.0024.11.193012-9/001, Relator Edivaldo George dos Santos, decided on 13 April 2012.

139. João Carlos Leal Júnior, "Da função social da posse" (2010) 67 *Revista Sintese de direito civil e processual civil* 33 at 45.

140. "[...] the possessory interdicts can be used by the possessor independently of ownership, sometimes without the consent of the owner, and not unfrequently against the very interest of the same": Gustavo Tepedino, "Direito das Coisas (art 1.196 a 1.276)" in Antonio Junqueira de Azevedo, ed, *Comentários ao Código Civil*, vol 14 (São Paulo: Saraiva, 2011) 57 at 57-58 [translated by the authors] [Tepedino, "Direito das Coisas"].

141. See in particular TJDF AC 2011 01 1 196242-8, Relator Waldir Leôncio Lopes Júnior, decided on 22 January 2013 (prevalence of the right to a wholesome environment); TJRJ, AC 0003050-11.2009.8.19.0003, Relator Carlos Santos de Oliveira, decided on 30 April 2013 (possession prevailed).

well, in such a way that one can now talk about the social function of possession. In my understanding, we can already investigate into the social function of possession when, as in the present case, a collectivity of people enjoys economic improvement, exploitation of natural resources, sustainment and work as a result of possessing land.<sup>142</sup>

The autonomy of possessory protection thus means “the creation of a human and social counterpoint to a concentrated and depersonalized right of ownership,”<sup>143</sup> in that possessory actions are adjudicated regardless of who is the owner and that possession<sup>144</sup> must fulfil a social function, just like ownership.

In other words, possessory protection comes to be seen through the prism of social legitimacy and the key question then becomes: which of the parties is using the land in the best way according to constitutional values?<sup>145</sup> In this light, when an owner is using a possessory action to oust favela dwellers, he might well be defeated because these possessors use the land in a fashion that arguably better meets constitutional values.<sup>146</sup> In a 2003 judgment in the State of São Paulo, a possessory action had been introduced by the owner of a parcel of land covering roughly 20,000 m<sup>2</sup> to evict the thousands of persons who had built their homes there over the years. These “roofless” (*sem teto*) people could not find a place to live anywhere else and were occupying the land for want of a better solution. The usual property law frame of analysis in such a possessory action would have been: was the plaintiff in possession when the disturbance occurred? But the Tribunal of São Paulo reasoned differently. Judges argued that the possession of the defendants, who did not have anywhere else to live

142. TJMG, AC 2.0000.00.492967-3/000, Relator Alberto Vilas Boas, decided on 13 December 2005, quoted in Tepedino et al, *Código civil*, *supra* note 8 at 446 [translated by the authors].

143. Fachin, *A função social*, *supra* note 131 at 21.

144. Tepedino, “Direito das Coisas,” *supra* note 140 at 57-58; Pereira da Mota & Alcino de Azevedo Torres, *supra* note 44 at 56-73.

145. See in particular TJDF, AC 2011 07 1 024488-6, Relator Alfeu Machado, decided on 27 February 2013; TJDF, AC 2009 03 10 32040-3, Relator Mario-Zam Belmiro, decided on 6 February 2013.

146. Luiz Edson Fachin, *O Estatuto Constitucional da Proteção Possessória* in Cristiano Chaves de Farias, ed, *Leituras complementares de direito civil: o direito civil-constitucional em concreto* (Salvador: Jus Podivm, 2007) at 271 [translated by the authors]:

[...] the constitutionalization of collective possessory conflicts does not allow any other conclusion: a rural or urban immovable which does not fulfill its social function does not deserve possessory protection. The judge adjudicating land disputes is not the judge of the old Civil Code any more, but the judge of the Constitution.

decently, deserved protection rather than the owner's, because these people had used the land to build a home and enjoy their constitutional right to housing.<sup>147</sup>

It would be deceptively easy to adjudicate the technical, legal content of the present case; however, the social crisis which would ensue would remain unsolved [...]. The judicial function is not only to apply the letter of the law, but also to materialize social peace and to ensure the effectivity of constitutional guarantees.<sup>148</sup>

Such a line of reasoning can also be found at the interlocutory level, to reject an anticipatory restitution of the occupied land asked by the owner.<sup>149</sup>

Under this constitutional spotlight, possessory actions involving collective conflicts (such as those associated with urban favelas, but this could also apply in a rural area) become a forum where the social function of property will be evaluated indirectly, through the social function of possession, and where possession will be protected only if the possessor attempted to use the land according to constitutional

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147. 1<sup>o</sup> TAC SP, EI 9115410-27.1998.8.26.0000, Relator João Carlos Garcia, decided on 11 March 2003. Interestingly, this decision by the São Paulo Court of Appeal is not representative of the traditional jurisprudence of this particular State, where usually, possessory protection is granted as of course to owners against favela dwellers, and the social function of ownership does not seem to weigh much: see for example, among many others, AI 0001002-54.2013.8.26.0000, Relator Ricardo Negrão, decided on 27 May 2013; AC 0152535-26.1991.8.26.0002, Relator Silveira Paulilo, decided on 17 October 2011; AC 9179640-63.2007.8.26.0000, Relator Itamar Gaino, decided on 20 February 2008 ("it is not up to poor people to decide what the social function of ownership means").

148. TJSP, AC 9192414-96.2005.8.26.0000, Relatora Maria Lúcia Pizzotti, decided on 18 July 2011, another atypical São Paulo judgment rejecting the possessory action. For other illustrations, see in particular TJSP, AC 0010201-92.2000.8.26.0053, Relator Ferraz de Arruda, decided on 17 August 2011; TJSP, AC 9071965-75.2006.8.26.0000, Relator Ademir Benedito, decided on 17 June 2009; TJRJ, AC 0000691-76.2010.8.19.0028, Relator Marcos Alcino de Azevedo Torres, decided on 21 May 2013; TJRJ, AC 0013019-58.2007.8.19.0023, Relator Custodio Tostes, decided on 20 March 2012; TJRJ, AC 0002430-04.8.19.0058, Relator Siro Darlan de Oliveira, decided on 26 September 2006; TJMG, AC 1.0701.03.025138-6/001, Relatora Vanessa Verdolim Hudson Andrade, decided on 14 December 2004; TJRS, AC 70037206752, Relatora Liége Puricelli Pires, decided on 26 August 2010; TJRS, AC 70031324817, Relatora Liége Puricelli Pires, decided on 3 December 2009; TJRS, AC 70016898884, Relator Carlos Cini Marchianotti, decided on 14 March 2007; TJRS, AC 70004913729, Relator Guinther Spode, decided on 15 April 2003; TJPR, AC 917511-7, Relator Marcelo Gobbo Dalla Dea, decided on 30 January 2013.

149. As in TJRJ, AI 0051885-34.2012.8.19.0000, Relator Antonio Saldanha Palheiro, decided on 15 January 2013; TJMG, AI 1.0079.12.072599-3/001, Relator Rogério Mèdeiros, decided on 10 May 2013; TJRS, AI 70038524013, Relatora Mylene Maria Michel, decided on 28 June 2011; TJSP, AI 0058131-71.2000.8.26.000, Relator José Telles Corrêa, decided on 12 February 2001.

values. In this “arbitration of possessions,”<sup>150</sup> the previous possessor (and owner) will benefit from protection only if the current possessors (“squatters”) are not now fulfilling the social function of possession better than the owner had done before. This does not necessarily mean that the owner has to put the land to some use, or occupy it himself, in order to enjoy possessory protection.<sup>151</sup> An actual project to use it in some practical fashion would be sufficient,<sup>152</sup> but continuing inertia is perilous,<sup>153</sup> as is the fact that squatters are paying taxes and hydro bills, and not the owner.<sup>154</sup> But does it mean that the plaintiff should attempt to prove that he satisfied the social function at the outset of the possessory litigation? Some answer positively,<sup>155</sup> but others deem that this would place on the owner an additional, unfair burden given the nature of possessory actions, as well as bring to the fore questions too complex for the judges to deal with in such faster-paced proceedings.<sup>156</sup>

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150. Fairly common, in the federal district of Brasília, between two individual possessors on public land: see for instance TJDF, AC 2005 08 1 005972-2, Relatora Carmelita Brasil, decided on 8 November 2006; TJDF, AC 2009 03 10 320 40-3, Relator Mario-Zam Belmiro, decided on 6 February 2013; TJDF, AC 2010 05 1 010913-9, Relator Teófilo Caetano, decided on 12 September 2012.

151. TJRJ, AC 0008650-94.2006.8.19.0204, Relatora Norma Suely, decided on 26 May 2009; TJRJ, AC 0100528-35.2003.8.19.0001, Relator Reinaldo P. Alberto Filho, decided on 29 November 2005.

152. TJSP, AC 0152535-26.1991.8.26.0002, Relator Silveira Paulilo, decided on 17 October 2011.

153. TJSP, AC 9071965-75.2006.8.26.0000, Relator Ademir Benedito, decided on 17 June 2009; TJSP, AI 9049059-28.2005.8.26.0000, Relator Testa Marchi, decided on 23 June 2005; TJRS, AC 700013925441, Relatora Elaine Harzheim Macedo, 13 March 2006; Tepedino et al, *Código civil*, *supra* note 8 at 501-02.

154. 1<sup>ª</sup> Tribunal de Alçada Civil (TAC) SP, AC 841816-0, Relator Juiz Campos Mello, 18 December 2001; Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 343. But it can only be that taxes are unpaid by the owner: TJRS, AI 7003434388, Relator Carlos Rafael dos Santos Junior, 6 November 2001.

155. Fredie Didier Junior, “A função social da propriedade e a tutela processual da posse” in Mário Luiz Delgado & Jones Figueiredo Alves, ed, *Questões controvertidas: Direito das coisas* (São Paulo: Gen. Método, 2008) 93 at 102; Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 342-43; Albuquerque Farias, *supra* note 123 at 29; TJRS, AI 7003434388, Relator Carlos Rafael dos Santos Junior, decided on 6 November 2001.

156. The virtual fusion between ownership and possession of land, in view of the evaluation of the social function, when a dispossessed owner initiates a possessory action, hints for some at a violation of the non-joinder rule:

The discussion bearing on the social function of ownership is not adequate in the possessory context [...]. The procedural requirement that the possessor troubled in his possession prove, in a possessory action, its social destination is illegal and arbitrary, because it transfers on him a burden which is not his responsibility. The social function is the exclusive attribute of the right of ownership and, because of this, cannot be used in the realm of possessory actions.

Obviously, using the social function of possession/ownership as a compass to decide possessory actions imparts, in turn, an evaluation on a case-to-case basis in order to ascertain the actual limitations of the right in each set of particular circumstances. Therefore, the parallel constitutionalization of possessory protection (i.e. its re-evaluation according to constitutional values) moves in the same direction and operates on the same axis as the reshaping of ownership through its social function.<sup>157</sup> But in this conflict of interests between ownership and possession, a balance must be found. On the one hand, it is true that access to land in Brazil is a major social and economic problem, because ownership remains concentrated in the hands of a few, and that legislative change is slow and not always efficient in practice.<sup>158</sup> Given that state of things, some feel that civil constitutional law is the key to judicial action, or even activism if this view is taken to the extreme, in order to bring law closer to life. For some authors, the judgment then becomes “the source of the revelation of a new right,”<sup>159</sup> because “possession qualified by social function deserves a special protection, different from the one currently granted by the system, firstly because it sets in where ownership does not fulfil its social function, secondly because it encourages fundamental social rights such as housing and work.”<sup>160</sup>

On the other hand, the social function of both ownership and possession does not mean that spoliations should be encouraged and made licit by the systematic rejection of possessory actions. This would threaten all the laws and principles that rule possession and its

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TJRS, AI 7003434388, Relator Carlos Rafael dos Santos Junior, decided on 6 November 2001, dissenting vote of Judge Luis Augusto Coelho Braga [translated by the authors]. See Albuquerque Farias, *supra* note 123 at 30.

157. A petitory action might also be rejected because the owner/plaintiff did not attend to the land's social function, especially in connection with an extended notion of abandonment of ownership: see title 2, “The possibility of a successful petitory action as a sword of Damocles” and n 47, above.

158. See for instance Juelino José Strozake, ed, *A questão agrária e a justiça* (São Paulo: Editora Revista dos Tribunais, 2000); Ricardo Lira, *Campo e cidade no ordenamento jurídico brasileiro* (Rio de Janeiro: Riex Editora SA, 1991).

159. Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 404 [translated by the authors].

160. *Ibid* at 403 [translated by the authors]. The author, himself a judge at the TJRJ, advocates for more judicial activism to tackle the deep economic and social inequalities in Brazil. But it should be pointed out that upholding a duality of possessions (one ordinary and the other functionalized), although well-meant in a perspective of social justice, contradicts the principle that any subjective right of a patrimonial character should be functionalized as a whole according to constitutional values.



protection in Brazilian law, as well as ownership itself, a fundamental right protected by the 1988 Constitution.<sup>161</sup> In addition, it would also create “an equivocal situation, social instability and legal uncertainty.”<sup>162</sup> Both underlying values (promoting social justice and preserving the coherence of the legal system) are worthy of protection, but when they collide, only judges can decide which one must prevail in each case given the circumstances.<sup>163</sup>

conflicts between possession and ownership can't be resolved *a priori*. In such cases, the judicial victory should belong to the party who proves its use of the land according to constitutional provisions: the social function of ownership, according to the definition of art. 5, XXIII, of the Constitution of the Republic, and the social function of possession, ascertained through the identity between the possessory enjoyment and legal interests protected by the Constitution in the context of fundamental rights, such as work, housing and health, all expressing the dignity of the human person.<sup>164</sup>

When the “favelisation” of a private land is in part the result of the passivity and negligence of public authorities, an interesting solution

161. Roberta Mauro, “A propriedade na Constituição de 1988 e o problema do acesso aos bens” in Delgado & Figueiredo Alves, *supra* note 155 at 42-46; Rizzardo, *supra* note 10 at 55-56. See also TJRJ, AC 2006.001.03024, Relator Marco Antonio Ibrahim, decided on 5 April 2006, and in general, STF ADI-MC 2213/DF, Relator Ministro Celso de Mello, decided on 4 April 2002.

162. TJDF, AI 2012 00 2 017198-3, Relator João Egmont, decided on 26 September 2012, and also, expressing similar concerns, STJ, RE 154.906/MG, Relator Ministro Barros Monteiro, decided on 4 May 2004; TJDF, AC 2007 01 1 031831-0, Relator Alfeu Machado, decided on 8 February 2012; TJDF, AC 2005 03 1 012135-0, Relator Jair Soares, decided on 3 October 2007; TJSP, AI 0001002-54.2013.8.26.0000, Ricardo Negrão, decided on 27 May 2013; TJSP, AC 9194450-09.2008.8.26.0000, Relator Tasso Duarte de Melo, decided on 13 June 2012; TJSP, AC 9075115-40.2001.8.26.0000, Relator Aloísio de Toledo César, decided on 2 February 2006; TJRJ, AC 0000279-46.2003.8.19.0011, Relator Marco Antonio Ibrahim, decided on 5 April 2006. In Minas Gerais, where the “Sem Terra” (Landless) movement of rural workers regularly invades rural areas belonging to private owners, this concern is paramount: among many decisions, see TJMG, AI 1.0024.12.108829-8/002, Relator Elias Camilo, decided on 27 September 2012; TJMG, AC 1.0024.06.987003-8/003, Relator Nicolau Masselli, decided on 15 July 2010. In the southern State of Rio Grande do Sul, the concern is the same, although expressed more comprehensively and sometimes philosophically/theoretically: TJRS, AI 70052984036, Relator Carlos Cini Marchianotti, decided on 10 July 2013; TJRS, AI 70028305506, Relator Pedro Celso Dal Pra, decided on 30 April 2009; TJSP, AI 70005770664, Relator Icaro Carvalho de Bem Osório, decided on 30 January 2003.

163. Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 228.

164. Tepedino, “Direito das Coisas,” *supra* note 140 at 58-59 [translated by the authors]. See also Alcino de Azevedo Torres, *A propriedade*, *supra* note 129 at 438 [translated by the authors], as well as at 409-19, and the discussion in TJRS, AC 70016898884, Relator Carlos Cini Marchianotti, decided on 14 March 2007.

is to treat the rejection of the possessory action (in the name of the social function of ownership/possession) as an indirect expropriation, thus compelling the State or municipality to compensate the owner for the loss of his land.<sup>165</sup> At the very least, in such cases, the owner should be exempted from paying land taxes (IPTU).<sup>166</sup>

## B. The intrusion of good faith in the evaluation of adverse possession in Canada

Traditionally, according to classic property law rules, we have seen that the symbiosis of adverse possession and statutory limitations leaves no room in its “mechanical” operation for considerations of good or bad faith on the part of the possessor. But in Canada as in England, common law jurists have been increasingly reluctant to let this soulless game play in favour of possessors in bad faith, the so-called, and disparagingly so, “squatters” (1). In practice, this reluctance has translated into reshaping the criteria of adverse possession in order to limit the benefit of statutory limitations for such “tortious” possessors (2).

### 1. *The reluctance towards “squatters” interests*

We mentioned in our introduction that acquisitive prescription sparks rather heated debates in various respects. In relation to economic efficiency and ecology, it may seem to encourage land exploitation for its own sake to the detriment of environmental preservation. In relation to the growing certainties generated by the spread of title registration systems, it appears as an informal mode of acquiring a real interest that defeats the expected “indefeasibility” of title.<sup>167</sup> In relation

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165. A solution adopted by 1 TAC SP, AC 9115410-27.1998.8.26.0000, Relator José Luiz Gavião de Almeida, decided on 20 August 2002, and TJRS, EI 70003749710, Relator Clarindo Favretto, decided on 20 December 2002, on the basis of art 182 §4 III of the Federal Constitution. Once, it was the victorious possessor who was ordered to compensate the owner: TJRS, AC 70038653671, Relatora Bernadete Coutinho Friedrich, decided on 12 May 2011.

166. See STJ, RE 1144982/PR, Relator Ministro Mauro Campbell Marquis, decided on 15 October 2009; TJSP, AC 0042777-36.1995.8.26.0564, Relator Wilson Julio Zanluqui, decided on 15 August 2008; TJSP, EI 115904-5, Relator Toledo Silva, decided on 16 February 2000.

167. On this subject, see title c, “Relativity of title and the colors of ‘ownership,’” above, and for instance the preoccupations of the English Law Commission expressed in “Land Registration for the Twenty-First Century: A Conveyancing Revolution,” 271 Law Com (London: H.M.S.O., 2001) at paras 2.70-2.71 and 14.1-14.3 [English Law Commission, “A Conveyancing Revolution”], quoting the same opinion by Neuberger J in *JA Pye 2000*, *supra* note 57 at 709-10.

to the protection of real property against private expropriation, it seems to orchestrate such an expropriation without compensation.<sup>168</sup> Finally, because it operates in favour of any adverse possessor, whether acting in good or bad faith, it may sometimes lead to dispossessing a “rightful” owner to the benefit of a “thief.”<sup>169</sup> This in turn seems to mock the difficulties felt by native people in Canada when they attempt to establish their aboriginal title on land, within a *sui generis* legal frame that appears far more restrictive than the one applicable to the fraudulent adverse possessor.<sup>170</sup> In practice though, adverse possession may help quieting titles, even in relation to registered “indefeasible” ones within a Torrens frame.<sup>171</sup> It also generally benefits possessors in good faith and owners rather than possessors in bad faith, particularly in deeds registration systems such as the one in Brazil or the ones still in operation in many common law jurisdictions where the implementation of a title registration system is not completed yet.<sup>172</sup> Moreover, from an economic standpoint, adverse possession coupled with limitations may help ensure that title on land goes to the person actually

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168. Thus amounting to a “theft of land” in the eyes of the English Law Commission, “Land Registration for the Twenty-First Century: A Consultative Document” (1998) 254 Law Com at para 10.5 [English Law Commission, “A Consultative Document”]. It was precisely on the basis of a violation, by the law of adverse possession as it applies to registered land, of the first article of the First Protocol additional to the European Convention of Human Rights (which protects the right of any person to the respect of his or her property) that England was condemned by a chamber of the European Court of Human Rights in 2005: *JA Pye (Oxford) v U.K.*, ECHR, 15th of November 2005. But this first judgment was overturned by a later one given by the whole court: *JA Pye (Oxford) v The United Kingdom*, No 44302/02, [2007] III ECHR.

169. Gerard McCormack, “Adverse Possession: The Future Enjoyment Fallacy” (1989) Conveyancer and Property Lawyer 211 [McCormack, “Fallacy”], and also, by the English Law Commission, “A Consultative Document,” *supra* note 168 at para 10.5.

170. Brian Donovan, “The Evolution and Present Status of Common Law Aboriginal Title in Canada: The Law’s Crooked Path and the Hollow Promise of *Delgamuukw*” (2001) 35:1 UBC L Rev 43.

171. Particularly in connection with boundary disputes. This is the reason why it was kept (or reintroduced) in some common law jurisdictions despite the choice of a title registration system: *Land Registration Act 2002* (UK), *supra* note 77, s 97, Sch 6; *Land Registration Act* (NS), *supra* note 83, ss 73(1), 74, 75(1), (2); *Land Titles Act* (Alb), *supra* note 83, s 74. See for instance Gray & Gray, *supra* note 61 at 1163. Australia, home of the Torrens system, has nonetheless kept or reintroduced adverse possession in connection to registered lands: Neil Cobb & Lorna Fox, “Living Outside the System? The (Im)morality of Urban Squatting After the Land Registration Act 2002” (2007) 27 Legal Studies 236 at 240.

172. See title 2, “The possibility of a successful petitory action as a sword of Damocles,” above, for the “*probatio diabolica*” in civil law systems, text accompanying note 37. See in particular Gray & Gray, *supra* note 61 at 1163, who think too much focus has been put on the “evil squatter” at the detriment of the utility of adverse possession as a whole. As for common law systems where the deeds registration still cohabits with the new title registration method, we may mention for instance England, New Brunswick and Nova Scotia.

prepared to improve it and put it to use.<sup>173</sup> In that way, adverse possession is seen as actively promoting ownership, not unlike the need for possessory protection put forward by Ihering and by Brazilian civil law.<sup>174</sup> Furthermore, from a social perspective and given the housing shortage in many cities, an urban squatter may be the “right” party to hold title on land unused and unsupervised by its paper-title owner<sup>175</sup>—again, an argument reminiscent of Brazilian concerns with the social function of ownership, and which party fulfils it best. But it is the “neutral” value of adverse possession, in relation to fraud and bad faith,<sup>176</sup> which irks its detractors.

The judicial, and sometimes doctrinal reluctance to let adverse possession and statutory limitations work in favour of possessors in bad faith, or “squatters,”<sup>177</sup> affects the way in which possession is protected in Canadian and English common law.<sup>178</sup> This reluctance must be seen as the general background for the reshaping of adverse possession in order to tune it to better moral values.

## 2. *The reshaping of adverse possession to foster subjective and individual values*

In England, the attempt towards moralization took the form of the development of a new constitutive criteria of this common law, case-law based creature that is adverse possession: the future enjoyment criteria (a). This attempt was eventually thwarted by the legislature and

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173. See the argument developed by Larissa M Katz, “The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law” (2010) 55 McGill LJ 47, and also Gray & Gray, *supra* note 61 at 1164.

174. *Ibid* and for Brazilian possessory protection, see title a, “Possessory actions as a key to define possession,” above, for more on this topic.

175. Cobb & Fox, *supra* note 171 at 248. See also, for connected judgments upholding the possessory rights of urban squatters, *Lambeth London Borough Council v Blackburn*, (2001) 82 P & CR 494; *Lambeth London Borough Council v Bigden*, (2001) 33 HLR 43; *Lambeth London Borough Council v Archangel*, [2002] 1 P & CR 18. In *Purbrick v Hackney London Borough Council*, [2003] EWHC 1871, it was even found the paper-title owner had not fulfilled his “duty of stewardship,” compelling him to supervise and control his land. See also Lorna Fox O’Mahoney & Neil Cobb, “Taxonomies of Squatting: Unlawful Occupation in a New Legal Order” (2008) 71:6 Mod L Rev 878 at 890.

176. For an acknowledgment, see Gray & Gray, *supra* note 61 at 1185–86.

177. Curwen, *supra* note 69.

178. Fox O’Mahoney & Cobb, *supra* note 175 at 889; Owain Rhys, “Adverse Possession, Human Rights and Judicial Heresy” (2002) Conveyancer and Property Lawyer 470.

the highest courts, but it survives in Canada under a dual evaluation of the intention to possess (b).

*a. The rise and fall of the future enjoyment criteria in England*

Traditionally, as we noted earlier, the “adverse” nature of possession referred to a possession both exclusive and non-ambiguous, meaning that the possessor had to have the intention to possess for himself, at the exclusion of others, and not by virtue of a mere permission granted by the paper title owner. The “adverse” element in possession was thus closely connected to the intention to possess (*animus possidendi*).<sup>179</sup> But in order to restrict the operation of adverse possession, perceived as an immoral legal tool at the hands of thieves,<sup>180</sup> English courts gradually revisited the “adverse” criterion to make it more stringent and thus, harder to meet in practice. They could do so all the more easily because the law of adverse possession is mostly found in case law, not in statutes: all it required was a little creative interpretation of past judicial decisions.

All started in 1879 with *Leigh v Jack*, where Judge Bramwell specified that the adverse nature of possession was demonstrated through acts “inconsistent with the enjoyment of the soil for the purposes for which [the paper owner] intended to use it.”<sup>181</sup> As a precedent, this statement had a limited character given the particularity of the facts of the case: it staged a problem of equivocal, or ambiguous possession, that this refinement of the “adverse” element deemed to clarify *in casu*.<sup>182</sup> But progressively, the *dictum* of Judge Bramwell was read disregarding its factual context and ended up, along the stream of cases interpreting it, in a quasi-denial of the adverse possession doctrine.<sup>183</sup> In *Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex and B.P. Ltd* (1975), Lord Denning stated based on *Leigh v Jack* that when the

179. See title b, “Possessory title and adverse possession,” above.

180. In softer words, see for example *JA Pye (Oxford) Ltd. v Graham*, [2003] 1 AC 419 (House of Lords) at para 2 [*JA Pye 2003*] per Lord Bingham of Cornhill (“a legal rule which compels such an apparently unjust result”).

181. *Leigh v Jack* (1879), 5 Ex D 264 at 273.

182. It should thus have been confined to cases involving similar problems of ambiguous possession: McCormack, “Fallacy,” *supra* note 169 at 212-13, and Gerard McCormack, “Adverse Possession and Future Enjoyment” (1986) *Conveyancer and Property Lawyer* 434 [McCormack, “Adverse Possession”], as well as Martin Dockray, “Adverse Possession and Intention” (1982) *Conveyancer and Property Lawyer* 350.

183. For example *Williams Brothers Direct Supply Ltd v Raftery*, [1958] 1 QB 159.

"true owner" of a land intends to put it to some particular use in the future, the fact that he left it unused in the meantime did not make him lose his title on it (by application of adverse possession and the limitations of actions) merely because someone is occupying the land temporarily. This occupier is then presumed to have possession of the land only by way of an implied licence granted by the paper owner, which renders his possession equivocal or ambiguous.<sup>184</sup>

*Wallis's* sparked scholarly protests on the basis that it virtually denied not only the doctrine of adverse possession but also, through it, the principle of statutory limitations operating in synergy with it.<sup>185</sup> Unduly restricting the former, the judgment implicitly condemned the latter. The English legislature reacted by amending its new *Limitations Act* in order to expressly contradict what was perceived as an unreasonable judicial interpretation of the "adverse" nature of possession. The amendment intended to prevent the abusive reference to the future enjoyment of the land by the paper owner and the excessive deduction of implied licences on the basis of this purported future enjoyment, as well as to reserve the possibility for judges to discover such licences when they did in fact exist.<sup>186</sup> Nevertheless, as explicit as the legislature attempted to be, the traditional ping pong game played by the law-making powers in relation to changes made by statute to the common law implied that this legislative intervention still needed to receive the "*imprimatur*," or approval by the courts, in order to become truly effective.<sup>187</sup> This role fell to the Court of Appeal after a little less than ten years' uncertainty, when this Court revised its previous position on

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184. *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B.P. Ltd*, [1975] 1 QB 94, 103 per Denning, LJ (CA), reaffirmed in *Treloar v Nute*, [1977] 1 All ER 230 (CA).

185. D MacIntyre, "Adverse Possession of Land" (1975) 34:1 Cambridge LJ 32; McCormack, "Fallacy," *supra* note 169; McCormack, "Adverse Possession," *supra* note 182; Andrew Gore, *Notes of Cases* (1975) 38:3 Mod L Rev 354; Dockray, *supra* note 182.

186. *Limitations Act 1980* (UK), *supra* note 66, Schedule 1, s 8(4):

For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land. This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

187. In the meanwhile existed "a certain amount of doubt" (McCormack, "Fallacy," *supra* note 169 at 213, and in the same way, Dockray, *supra* note 182 at 351).

the future enjoyment criterion and confirmed the statutory definition of the “adverse” nature of possession.<sup>188</sup>

But the intervention of the Court of Appeal did not put a final stop to the matter. The test of the future enjoyment reappeared under the guise of ascertaining the *animus possidendi*, leading to a fresh rejection by the House of Lords in 2002. Lord Browne-Wilkinson stated curtly that evaluating the *animus* “on the intention not of the squatter but of the true owner is heretical and wrong,”<sup>189</sup> and added that the *animus* is implied by the *corpus* in case of squatting.<sup>190</sup> Again, while the door was closed to the restrictive interpretation of adverse possession, this did not prevent a window from being slightly reopened: if the possessor actually knew of the paper owner’s intent as to a specific future use and himself used the land without contradicting this future use, his possession could not be qualified as adverse.<sup>191</sup>

Thus, the attempts to curtail the doctrine of adverse possession in England through the future enjoyment criterion have been steadily repressed by the legislature and the highest courts. But the suggestions by the English Law Commission regarding the improvements to be made in the law of adverse possession again tended to make it more receptive to subjective considerations of fairness.<sup>192</sup> The legal doctrine was said to cause “considerable public disquiet,”<sup>193</sup> as evidenced by some popular headlines declaring “swat the squatters,” calling for the public to be protected from “home hijackers.”<sup>194</sup> The

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188. *Buckinghamshire*, *supra* note 57, commented by McCormack, “Fallacy,” *supra* note 169 at 214-15.

189. *JA Pye 2003*, *supra* note 180 at para 45, also quoted by Ziff, *Principles*, *supra* note 57 at 146.

190. *JA Pye 2003*, *supra* note 180 at para 40, and Gray & Gray, *supra* note 61 at 163.

191. *JA Pye 2003*, *supra* note 180 at para 45 and Ziff, *Principles*, *supra* note 57 at 147. The criteria of the inconsistent use were resurrected again in 2006 under the guise of complying with art 1 of the First Additional Protocol to the European Convention on Human Rights, that had been dealt with already in *Pye* by the House of Lords (*Beaulane v Palmer*, [2006] Ch 79), but this attempt was thwarted in *Ofulue & Anor v Bossert*, [2008] EWCA Civ 7 by the Court of Appeal: DM Fox, “Adverse Possession Under the Land Registration Act 1925” (2008) 67:3 Cambridge LJ 474.

192. The first report was English Law Commission, “A Consultative Document,” *supra* note 168 at para 10.50, commented by Hopkins, *supra* note 63 at 241-42. About the Law Commission works in relation to limitations, see Neil H Andrews, “Reform of Limitation of Actions: The Quest for Sound Policy” (1998) 57 Cambridge LJ 589. It then led to another, English Law Commission, “A Conveyancing Revolution,” *supra* note 167, particularly at paras 2.69-2.74 and 14.

193. *Ibid* at para 14.4.

194. Both from a *Daily Mail* headline on 2 September 1998, quoted by the English Law Commission, “A Conveyancing Revolution,” *supra* note 167 at para 14.4, n 16.

doctrine was viewed as “tantamount to sanctioning a theft of land,”<sup>195</sup> and “based upon wrongdoing.”<sup>196</sup> According to the Law Commission, adverse possession and limitations applied to registered land was mostly a way to reward wilful wrongdoers (i.e. squatters) and to deprive honest landholders of their legal right.<sup>197</sup>

As a result of these proposals, the new *Land Registration Act 2002* aiming to speed up the progressive replacement of the deeds registration system by a title registration system in England severely curtailed the application of adverse possession and limitations to registered lands.<sup>198</sup> The 2002 Act, which has been described as operating the “emasculat[i]on of adverse possession in relation to registered land,” and “signall[ing] [...] the end of adverse possession as a threat to the security of registered title,”<sup>199</sup> reduces the required possession period from twelve to ten years. The squatter must apply to the Land Registry to be registered as the title owner, but the registered owner must be notified of this application and has two years to oppose it.<sup>200</sup> This is meant to protect innocent homeowners unaware of the possession from the deviousness of squatters in bad faith, thus moralizing the adverse possession game.<sup>201</sup> The exceptions allowing the latter to be played notwithstanding also deal with morals when they reserve the application of (proprietary) estoppel in hard cases, an equitable

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195. English Law Commission, “A Consultative Document,” *supra* note 168 at para 10.5.

196. *Ibid* at para 5.23.

197. See for instance English Law Commission, “A Conveyancing Revolution,” *supra* note 167 at paras 2.70-2.71, quoting the same opinion by Neuberger J in *JA Pye 2000*, *supra* note 57 at 709-10.

198. *Land Registration Act 2002* (UK), *supra* note 77, ss 96-98 and Schedule 6. The registration system in England today is particularly complex because three regimes coexist side by side: unregistered lands concerned only by a land charges register (the oldest regime); registered lands according to the 1925 scheme, which maintained adverse possession (*Land Registration Act 1925*, *supra* note 80), and registered lands according to the 2002 scheme, which almost oust adverse possession as described below (*Land Registration Act 2002* (UK), *supra* note 77). Over time, the 2002 scheme is deemed to become the only existing one: for a systematic description, see Dixon, *supra* note 78 at 449-57. Deeds registration systems, as opposed to title registration systems, have been briefly discussed previously at title 2, “The strengthening of possessory title through the limitation of actions.”

199. Fox O’Mahoney & Cobb, *supra* note 175 at 891.

200. *Land Registration Act 2002* (UK), *supra* note 77, ss 1-2. For a description, see Gray & Gray, *supra* note 61 at 1169-75, or Dixon, *supra* note 78 at 459-60.

201. A preoccupation registered for instance in English Law Commission, “A Conveyancing Revolution,” *supra* note 167 at paras 2.70-2.71, quoting Neuberger J in *JA Pye 2000*, *supra* note 57 at 709-10.



doctrine attuned to the conscience of the parties.<sup>202</sup> Thus, in England, the growing moralization of adverse possession has found another field of influence—land registration—and is not confined anymore to the proof of an “adverse” possession and the intention to possess.<sup>203</sup>

*b. The persistent dual evaluation of the intention to possess in Canada*

Canadian law on the same subject is very interesting because not only did it retain the criterion of future enjoyment, here called “test of the inconsistent use,” it also managed to use it in a discriminatory fashion according to the good or bad faith of the possessor. The same happens with the evaluation of the intention to possess (*animus*). Thus, the Canadian evolution may be read as an open attempt to moralize the operation of adverse possession and render it receptive to the state of mind of the party trying to benefit from it.<sup>204</sup> Echoing the English doctrinal reactions to *Wallis’s*, Professor B. Ziff from the University of Alberta calls this test “the most controversial and perplexing feature of the modern law” of adverse possession.<sup>205</sup>

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202. *Land Registration Act 2002* (UK), *supra* note 77, s 5(2)(a) “it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant” and (b) “the circumstances are such that the applicant ought to be registered as the proprietor.” On the subject of proprietary estoppel, which is the main type of estoppel concerned here, see for instance Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (London: Sweet & Maxwell, 1996). Other exceptions deal with rights based on some other title than possession, and with the delimitation of boundaries between lands: *Land Registration Act 2002* (UK), *supra* note 77, s 5(3), (4).

203. About 85% of lands in England have had their title registered, the rest being held by collectivities such as churches, or administrative bodies such as the Crown or municipalities. Since these lands are not likely to be sold (and thus subject to compulsory first registration), the possibility of a squatter claiming adverse possession is a powerful incitation to register: Dixon, *supra* note 78 at 29, 443.

204. For other lectures on the possible purpose/use of the test of the inconsistent use, see Katz, *supra* note 173 (who advocates that it can promote a more efficient use of land by the party who is the most interested in it, i.e. the possessor, and thus reinforce the purpose of ownership), and Lubetsky, *supra* note 58 (who argues that the test represents an attempt by the Ontario courts to develop a functional equivalent to the civil law principle of introversion of title). The latter doubts that the test should be viewed as a tool to sanction possessors in bad faith, but actually the test itself literally favours them while being detrimental to “innocent” possessors. We shall see that the Canadian courts tried to amend the test for this very reason by developing exceptions to it.

205. Ziff, *Principles*, *supra* note 57 at 145.

In Canada, the *animus possidendi* is conceived in a traditional fashion, as the intention to exclude the paper title holder.<sup>206</sup> But logically, this would mean that a possessor in good faith, ignoring that the land is not actually his own, could never benefit from adverse possession since he could not possibly wish to exclude the “true owner.” Nonetheless, in their desire to protect “honest” parties, Canadian courts have found that such *animus* may be found in cases where a possessor in good faith has made a mistake as to the limits of his land and occupies by mistake part of the neighbouring land.<sup>207</sup> Other courts, especially in Ontario, do not require such possessors to prove their *animus* when their claims are unequivocal.<sup>208</sup>

But this logical conundrum is also to be found at the heart of test of the inconsistent use developed in Canada,<sup>209</sup> and particularly in Ontario,<sup>210</sup> following the English lead in the matter of the now extinct future enjoyment criterion.<sup>211</sup> Despite some judges’ repeated misgivings,<sup>212</sup> the test is still causing some havoc in the Ontarian law

206. *Pflug v Collins*, [1952] OR 519; [1952] 3 DLR 681 (Ont SC); aff [1953] 1 DLR 841 (Ont CA); *Keefer v Arillotta* (1976), 13 OR (2d) 680 (Ont CA) [*Keefer*]; *Fletcher*, *supra* note 58; *Madison Investments Ltd v Ham* (1984), 45 OR (2d) 563 (Ont CA) [*Madison*]; *Arnprior v Coady*, [2001] OJ N° 1131 (QL) (Ont SC) [*Arnprior*]. It has not been discussed as such by authors like in England.

207. *Martin v Weld* (1860), 19 UCQB 631 (Ont CA); *Nourse v Clark*, [1936] OWN 563 (Ont CA); *McGugan v Turner*, [1948] 2 DLR 338; [1948] OR 216 (Ont HC); *Lewis v Romita* (1980), 13 RPR 188 (Ont HC); *Bristow v Mathers* (1990), 13 RPR (2d) 316 [Ont CJ]; *Whitney v Livey*, [1997] OJ N° 2327 (QL) (Ont CJ); *Gould v Edmonds*, [2001] NSJ N° 533 (QL) (NS CA) [*Gould*]; Bastarache & Boudreau-Ouellet, *supra* note 79 at 255-56; Michael J Goodman, “Adverse Possession of Land – Morality and Motive” (1970) 33:3 Mod L Rev 281 at 287-88.

208. *Beaudouin v Aubin* (1981), 33 OR (2d) 604 (Ont SC), referred to by Lubetsky, *supra* note 58 at 507.

209. The test of the inconsistent use was rejected in Alberta (*Lehr v St. Mary River Irrigation District*, [1993] AJ N° 1411 (QL) (Alta QB)) and in Newfoundland and Labrador (*Maher v Bussey*, (2006) 256 Nfld & PEIR 308 (Nfld CA), in accordance with *Fitzpatrick’s Body Shop Ltd v Kirby*, (1992) 99 Nfld & PEIR 42 (Nfld SCTD) for which inconsistent use is just one factor among others). But it was adopted in Nova Scotia (*Board of Trustees of Common Lands v Tanner*, 2005 NSSC 245) and in Prince Edward Island (*Re Squires*, (1999) 182 Nfld & PEIR 318 (PEI SC), and *Re MacKinnon*, (2003) 226 Nfld & PEIR 293 (PEI SC)), as well as in New Brunswick in the 1980’s, but it waned with the spread of the Torrens registration system in the province: Lubetsky, *supra* note 58 at 514.

210. With three landmark decisions by the Court of Appeal: *Keefer*, *supra* note 206; *Fletcher*, *supra* note 58; *Madison*, *supra* note 206. They have been confirmed by a more recent one: *MacKinnon Estate v MacKinnon*, (2010) 91 RPR (4th) 1 (Ont CA).

211. For a systematic review of Ontarian cases in connection with the test of the inconsistent use, see Lubetsky, *supra* note 58.

212. See in particular *Galati v Tassone*, [1986] OJ N° 698 (Ont SC.J); *Georgco Diversified Inc v Lakeburn Land Capital Corp*, (1993) 31 RPR (2d) 185 (Ont Ct.J) [*Georgco*]; *Bradford Investments (1963) Ltd v Fama*, [2005] 77 OR (3d) 127 (Ont SC.J) [*Bradford*], as well as Lubetsky, *supra* note 58 at 523-25.

of adverse possession,<sup>213</sup> justifying Professor Ziff's comment as to the controversial nature of this aspect of the common law. Originally designed, in England, to restrict and control the operation of adverse possession and, as a consequence, statutory limitations, the criterion of the inconsistent use frequently backfires, in practice, against those very possessors the courts would like to help: the "innocent" ones, those who did not willingly plot to dispossess paper title owners. In cases involving a mistake shared by neighbours on the location of the dividing line between their contiguous lands, for example, judges felt that

[i]t makes no sense to apply the test of inconsistent use when both the paper title holder and the claimant are mistaken about their respective rights. The application of the test would defeat adverse possession claims in cases of mutual mistake, yet permit such claims to succeed in cases of knowing trespass. Thus applied, the test would reward the deliberate squatter and punish the innocent trespasser. Policy considerations support a contrary conclusion. The law should protect good faith reliance on boundary errors or at least the settled expectations of innocent adverse possessors who have acted on the assumption that their occupation will not be disturbed. Conversely, the law has always been less generous when a knowing trespasser seeks its aid to dispossess the rightful owner.<sup>214</sup>

Indeed, the good or bad faith of the possessor is a key element in applying the test of inconsistent use, which is perceived as closely connected to the evaluation of the *animus possidendi*.<sup>215</sup> As a general trend, faced with a possessor in good faith, courts will tend to interpret the test in a narrow fashion so as to grant him as much possessory

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213. For a recent application, see for instance *Ewing*, *supra* note 58.

214. *Teis*, *supra* note 2 at 226 per Laskin, JA (Ont CA) commented by Brian Bucknall, "Teis v. Ancaster: Knowledge, the Lack of Knowledge and the Running of the Possessory Title Period" (1997) 13 RPR (3d) 68. And for a similar open moralization of adverse possession, see *Marotta v Creative Investments Ltd*, (2008) 69 RPR (4th) 44 (Ont SCJ) [*Marotta*]; *Mueller v Lee*, (2007) 59 RPR (4th) 199 (Ont SC); *Bradford*, *supra* note 212; *Fletcher*, *supra* note 58; *Keefer*, *supra* note 206.

215. Exactly how they connect, though, is disputed: sometimes presented as part of the evaluation of the *animus* (as in *Gorman v Gorman*, (1998) 110 OAC 87, or *Langille v Schwisberg*, [2010] OJ 5812 (Ont SCJ)) [*Langille*], the test of the inconsistent use is at other times perceived as a question of exclusion only (see for instance *Penwest Development Corporation Ltd v Youthdale Ltd*, (2005) 46 RPR (4th) 124 (Ont CtJ)) or as an element involving both of them (as in *Marotta*, *supra* note 214); *Lubetsky*, *supra* note 58 at 514.

protection as they can.<sup>216</sup> But the same test will be given a wide scope to thwart the fraudulent attempts by a possessor in bad faith to take land away from the paper title owner,<sup>217</sup> thus moralizing the operation of adverse possession to no small degree.

This general picture may be easy to grasp, but the technicalities of the inconsistent use test are not. Various exceptions were judicially created, especially in Ontario, to prevent the test of the inconsistent use from putting adverse possession and limitations out of reach of possessors in good faith. But since all those adjustments have been devised in a haphazard fashion, the test itself has become blurred and its operation uncertain. A systematic research into case law by M. Lubetsky has highlighted three types of situations concerned by these exceptions and the resulting uncertainty,<sup>218</sup> as expected, they all point to cases often involving possessors in good faith. The first set of factual situations concern mistakes over the boundary line shared by the two neighbours: obviously, the possessor could hardly pretend to oppose the intentions of the paper title holder concerning the use of a strip of land the former honestly believes to be his, and that the latter has no idea he has title on. To allow such possessor in good faith to take advantage of adverse possession, some courts imputed some intent to the paper title owner,<sup>219</sup> but most judges simply discarded cases of mutual mistake from the test of the inconsistent use,<sup>220</sup> an explanation taken over by the Ontario Court of Appeal.<sup>221</sup> Some courts openly claimed that the test only applied to possessors in bad faith, not to “innocent” ones,<sup>222</sup> a dichotomy also emphasized by the same Court of Appeal.<sup>223</sup> The second

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216. *Logan v Smith* (1984), 64 NSR (2d) 234 (NS SC); *Hamson v Jones* (1988), 65 OR (2d) 304 (Ont HC); *Skoropad v 726950 Ontario Ltd* (1990), 12 RPR (2d) 225 (Ont CJ); *Wood v Gateway of Uxbridge Properties Ltd* (1990), 75 OR (2d) 769 (Ont CJ) [Wood]; *Georgco*, *supra* note 212; *Arnprior*, *supra* note 206; *Gould*, *supra* note 207, and in general Ziff, *Principles*, *supra* note 57 at 145-46.

217. *Ibid* at 145-146 and for instance *Shennan v Szewczyk*, 2010 ONCA 679; *Elliott v Woodstock Agricultural Society*, 2008 ONCA 648.

218. Lubetsky, *supra* note 58.

219. See for instance *Murdoch v Kenehan*, (2003) 8 RPR (4th) 257 (Ont SC) and *Hoffele v Bernier*, [1992] OJ N° 1231 (Ont CJ) (QL), and in general Lubetsky, *supra* note 58 at 516-17. But the intent to exclude may also be imputed on the possessor's side: *Hanchiruk v Oliveira*, 2010 ONSC 4675.

220. Giving various reasons for this exclusion: Lubetsky, *supra* note 58 at 517. See also, more recently, *Cruickshank v Hutchinson*, (2009) 79 RPR (4th) 144 (Ont SCJ); *Chen v Stafford*, 2012 ONSC 3802; *Williamson v Williamson*, 2012 ONSC 3462 (Ont SCJ).

221. *Teis*, *supra* note 2.

222. As in *Langille*, *supra* note 215; *Cunningham v Zebarth Estate*, (1998) 18 RPR (3d) 299 (Ont CJ); *Wood*, *supra* note 216.

223. *Teis*, *supra* note 2.

group of problematic situations refer to what are called “unilateral honest mistake cases,” thus involving a single possessor acting in good faith, often in relation to the location of a boundary line. There, Ontario courts developed another exception in favour of “good faith enclosure unopposed by the absent neighbour,” thus moralizing the adverse possession game one step further.<sup>224</sup> Finally, the third group of exceptions apply in cases where the paper title holder has himself been negligent or is attempting to invoke the test of the inconsistent use in bad faith against a possessor in good faith. There, Ontario courts often impute various intents to paper title holders in order to allow the claim based on adverse possession to succeed, using no less than six theories in the process.<sup>225</sup> In the meanwhile, “[n]o coherent framework has arisen to explain when an imputation is justifiable and when it is not.”<sup>226</sup>

As a result, in Canada, adverse possession is now applied by the courts according to a global perspective, as a “matter of fact depending on all the particular circumstances of the case”<sup>227</sup> rather than on the reunion of a bundle of technical elements. Good or bad faith generally weights heavily in the balancing act, with the test of the inconsistent use perceived by some judges as a burden in what they feel is the fair, or “moral,” outcome of the case.<sup>228</sup>

## CONCLUSION

But the moralization of possession through an on-going re-evaluation of adverse possession means that in Canada or England, possession is very much perceived and protected through its active role, in connection with establishing title on the land. The idea of a separate, distinct possessory protection, such as the one flowing from Brazilian possessory interdicts, has become unthinkable in those common law countries due to the rise of real actions mixing possessory and petitory arguments, such as the action in trespass or the action for recovery of

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224. For example *Murray Township Farms Ltd v Quinte West (City)* (2006), 50 RPR (4th) 266 (Ont SC), and in general Lubetsky, *supra* note 58 at 518-20.

225. Identified, with corresponding references, by Lubetsky, *ibid* at 521-23. For an illustration, see *Vaz v Jong*, [2000] OJ N° 1632 (QL) (Ont SC).

226. Lubetsky, *supra* note 58 at 523.

227. *Re St. Clair Beach Estates Ltd. v MacDonald* (1974), 50 DLR (3d) 650 at 651 per Pennell, J. (Ont DC); Bastarache & Boudreau-Ouellet, *supra* note 79 at 256.

228. See especially *Jeffbrett Enterprises Ltd v Marsh Bros Tractors Inc* (1996), OTC 161 (Ont CJ), and Lubetsky, *supra* note 58 at 523-24.

land. By contrast, in Brazil, possessory protection entails specific, speedy remedies (the possessory interdicts), set apart from petitory immovable actions thanks to the non-joinder rule. The moralization of possession occurring in this special forum tends to be as unpredictable in its results as the common law correlative phenomenon, but its starting point is different. At the outset, in Brazil, the social function of ownership/possession clearly favours the possessor who has used the land best according to collective, constitutional values and principles. Exactly which of the parties is doing so in a particular case rests on judicial discretion. But common law criteria such as the future enjoyment or the inconsistent use test were devised initially to restrict adverse possession in general, perceived as an “immoral” mode of acquiring ownership, and ended up doing the opposite at an individual level, that is by withdrawing this protecting mechanism from “honest” possessors, thus pushing judges to twist the criteria even further to prevent what they felt were unfair outcomes. In all three systems, the moralization of possession means that possessors might have less right (either to enjoy specific possessory protection or to claim the benefit of adverse possession), but it also means, in Brazil, that the current possessor who put the land to some social use might enjoy a greater possession over the paper title owner, whereas in England or Canada—or more precisely, Ontario where the inconsistent use of the test is still predominant—it will be the reverse.