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Are non-formalized cohabiting relationship a title that justifies the occupation of the occupant? An approach from the judgements of the Supreme Court

¿Son las relaciones de convivencia no formalizadas un título que justifique la tenencia del ocupante? Una aproximación desde las sentencias de la Corte Suprema

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Abstract

Even against the opinion of the national authors, the Supreme Court considers the non-formalized cohabiting relationship as an opposable title against actions of precarious. To justify his position, he uses at least two criteria: the existence of children in common and the authorizations of the owners. The idea behind this work is that these criteria do not prove to be adequate since they do not allow the existence of an obligation of the owner to tolerate the use of his thing the defendant does. Consequently, cohabiting relationships do not constitute an opposable title in the face of precarious claims under article 2195, paragraph 2°.

Keywords: *Precarious; cohabiting relationship; opposability; family; permission.*

Resumen

Aún contra la opinión de los autores nacionales, la Corte Suprema considera las relaciones de convivencia no formalizadas como un título oponible frente a acciones de precario. Para justificar su postura, emplea al menos dos criterios: la existencia de hijos en común y las autorizaciones de los propietarios. La idea que defiende este trabajo es que dichos criterios no son adecuados, pues no permiten argumentar correctamente la existencia de una obligación del dueño de tolerar el uso que de su cosa hace el demandado. En consecuencia, las relaciones de convivencia no constituyen un título oponible frente a demandas de precario del inciso 2° del artículo 2195.

Palabras claves: *Precario; relaciones de convivencia; oponibilidad; familia; autorización.*

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I. INTRODUCTION

Recently, two theses has been proposed that, despite being incompatible, have determined the decisions of the Supreme Court regarding claims based on precarious possession under the second paragraph of Article 2195 of the Civil Code (in what follows, CC).[1]

According to the first thesis, since precarious possession is a factual situation, any contract that, in theory, justifies the defendant's corporeal possession[2] would suffice to render the precarious possession action inadmissible. According to the second thesis, however, not just any contract is sufficient, as it must concretely limit the owner's property by imposing the obligation to respect the occupant's corporeal possession.[3]

The issue, albeit nuanced, can be presented in similar terms when it comes to cohabitation relationships.[4] Thus, according to the first stance, a relationship of this kind alone is sufficient to defeat an action of precarious possession; on the other hand, under the second position, not just any cohabitation relationship suffices, but rather it must be capable of limiting the owner's dominion, obligating the latter to respect the corporal possession that the defendant exercises over the thing.

This work is, in a certain way, dependent on others,[5] as it adopts as correct only one of those lines of jurisprudence, namely the one where the title must impose on the owner the obligation to respect the defendant's occupation.[6]

Therefore, the purpose of this work is to demonstrate that cohabitation relationships—those informal unions not formalized under a civil union agreement—are not a valid title against precarious possession actions under the second paragraph of Article 2195 of the CC.

However, this position does not appear to be the most frequent in the judgements of the Supreme Court, since even though some sectors of the doctrine seem to be against considering cohabitation as a suitable title to justify the occupant's corporal possession,[7] a look at the Court's judgments reveals a tendency to reject the precarious possession action when the invoked title is a cohabitation relationship.

Given this situation, two questions arise. The first is under what circumstances the Supreme Court has understood that a cohabitation relationship is a sufficient title to justify the defendant's

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[1] DE LA MAZA (2022), pp. 15-44 and DE LA MAZA and LOAYZA (2023), pp. 353-396. DE LA MAZA (in print, A) and DE LA MAZA (in print, B).

[2] Translator's Note: in this context, "corporeal possession" means "tenencia", meaning the corporal detention of a thing recognizing the ownership of another person.

[3] DE LA MAZA and LOAYZA (2023), p. 378-380.

[4] In a paper presented at the XIV National Conference on Civil Law (*XIV Jornadas Nacionales de Derecho Civil*), Leonor Etcheberry discusses a similar situation; however, she does so in general terms regarding family relationships, rather than specifically focusing on cohabitation relationships (or concubinage), in: ETCHEBERRY (2016), pp. 73-86. In the same vein, see: LUCAVECHE y ROJAS (2019), p. 69; DE LA MAZA (in print, B).

[5] This research has benefited from the development and results of the following works: DE LA MAZA (2022), pp. 15-44 and DE LA MAZA and LOAYZA (2023), pp. 353-396. However, its justification lies in the fact that it addresses concubinage relationships in greater detail than previous ones that came before it.

[6] DE LA MAZA (2022), pp. 34-40 and DE LA MAZA and LOAYZA (2023), pp. 388-392. In other words, if we consider that precarious possession seeks to resolve the tension between the interests of the owner and the precarious occupant, which favors the occupant only when he has a *sufficiently* powerful justification, it is found that the "justification" –relationships in this work, concerning cohabitation– cannot be derived solely from a literal reading of Article 2195 subsection 2 of the CC, but must be harmonized with the rules of the national legal system.

[7] Mainly, HALABÍ and SAFFIRIO (1996), p. 78 and CORRAL (2021).

corporal possession. The second, meanwhile, is whether these circumstances are accurate or if the decisions of the Supreme Court overlook something.

The order in which this article progresses is as follows. First, cohabitation relationships are examined as a justifying title for occupation (II). Second, the criteria employed by the Court to consider cohabitation relationships as a sufficient title to defeat the action of precarious possession are reviewed (III). Third, it is noted that cohabitation relationships do not constitute a legal bond, but merely a matter of fact (IV). Finally, some conclusions are presented (V).

II. COHABITATION RELATIONSHIPS AS A TITLE FOR PRECARIOUS POSSESSION

Regarding cohabitation relationships[8] as a title[9] justifying the occupant's corporal possession, the truth is that a sector of the doctrine has shown some skepticism; thus, for example, HALABÍ and SAFFIRIO assert that cohabitation does not constitute, by itself, a title capable of defeating the action of precarious possession, since it does not always lead to a community of ownership.[10]

Another author who has addressed the subject is Hernán CORRAL, who, critically commenting on a Supreme Court judgment dated January 21, 2021, maintains the following:

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[8] For the purposes of this work, I will use interchangeably the concepts of "concubinage relationship" and "cohabitation relationship." By "cohabitation relationship," I understand an affective relationship that involves, as an operative fact, the cohabitation of two individuals without the existence of marriage or a civil union agreement; in other words, a simple "*de facto* union" that is not formalized. This point –the lack of formalization– is particularly relevant because Law No. 20,830, which establishes Civil Union Agreements, came to "formalize," in some way, *de facto* unions. Regarding the concept of "cohabitant," reference can be made to: BARRIENTOS (2006), pp. 191-233.
Now, according to Laura Albornoz, who follows Lepin on this matter, concubinage is defined as "an affective-sexual relationship between two people who form a community of life, of stable and permanent character, not legally formalized" (Original: *"una relación afectivo-sexual entre dos personas, que conforman una comunidad de vida, de carácter estable y permanente, no formalizada legalmente"*), in: ALBORNOZ (2023), p. 568.

[9] Following Larroucau and Rostión, I understand "title" to mean the justifying reason for corporal possession: LARROUCAU and ROSTIÓN (2013), p. 76. On the other hand, the Supreme Court has indicated that this reason does not necessarily have to be contractual, as the expression "contract" has been defined by the legislator in Article 1438 of the Civil Code as the act by which one party obligates itself to another to give, do, or refrain from doing something. Although this is the legal concept, the expression used in subsection 2 of the cited Article 2195 has been understood in broader terms, meaning that corporal possession of someone else's property, to avoid being considered precarious, must at least be based on a title recognized by law as justifying it, even if it is not of contractual or conventional origin, and that this title must be enforceable against the owner, so that the law places the latter in a situation where he must respect it and, consequently, tolerate or accept the occupation of a thing of which he is the owner by another person who may potentially not have that real right over it" (Original: *"la expresión contrato ha sido definida por el legislador en el artículo 1438 del Código Civil, como el acto por el cual una parte se obliga para con otra a dar, hacer o no hacer alguna cosa. Si bien este es el concepto legal, la expresión que utiliza el inciso 2° del artículo 2195 citado se ha entendido en términos más amplios, en el sentido que la tenencia de la cosa ajena, para que no se entienda precario, debe al menos sustentarse en un título al que la ley le reconozca la virtud de justificarla, aún cuando no sea de origen convencional o contractual y que ese título resulte oponible al propietario, de forma que la misma ley lo ponga en situación de tener que respetarlo y, como consecuencia de lo anterior, de tolerar o aceptar la ocupación de una cosa de que es dueño por otra persona distinta que puede eventualmente no tener sobre aquélla ese derecho real"*). *Inmobiliaria e Inversiones Tres Cantos Ltda. con Melgarejo y otra* (2012). In a similar vein, the following judgements: *Lepimán con Lepimán* (2020) and *Banco Falabella con Heresmann Fuentes* (2016). Likewise, regarding the interpretation of the expression "without prior contract," it can be reviewed: DE LA MAZA (2010), p. 179, ROSTIÓN (2013), pp. 32 and ALCALDE (2016), p. 291.

[10] HALABÍ and SAFFIRIO (1996), p. 78. In the same vein, BARRÍA e HIDALGO (2003), pp. 53-54; LECAROS (2008), p. 95; PIZARRO (2019), p. 1222 and LOAYZA (2023).

> "Once again, the Court classifies as a legal bond a cohabitation that is clearly a factual situation. This minimizes the effectiveness of this action, as it disregards the requirement of a legal title necessary to justify possession and interprets mere tolerance as a passive attitude with no motivation to tolerate the corporal possessor to use someone else's property."[11]

Indeed, in the author's opinion, neither marriage nor "simple non-marital cohabitation" are suitable titles to justify the precarious occupant's possession. The reason, as can be observed, is that cohabitation relationships are a factual situation; purely factual in nature.[12]

According to jurisprudence, however, the point does not seem to generate significant conflict: cohabitations are sufficient to defeat precarious possession under the second paragraph of Article 2195 of the CC. A look at the decisions of the Supreme Court demonstrates this,[13] as there are at least twenty-two cases where cohabitation was invoked as a title to defeat precarious possession, of which in eighteen instances the Court chose to reject the action.[14]

Two examples will help illustrate this idea.

The first of these, issued on July 6, 2021[15], resolves a precarious possession lawsuit filed by the owner of a real estate property located in the commune of Calbuco, alleging that the defendant occupies the property without legal justification and due to her ignorance or mere tolerance. The defendant, for his part, requested the dismissal of the lawsuit arguing, among other things, that he has occupied the property since 1982 due to a romantic relationship he had with the plaintiff, from which two daughters were born.

Considering the facts presented, the Supreme Court accepted the appeal for cassation, dismissing the precarious possession action filed; it did so in the following manner:

> "That, under the aforementioned conditions, the factual situation established in the case does not fall within the hypothesis of an absolute lack of legal connection between the corporal possessor or occupant of the property and its owner. On the contrary, the possession of the property is justified by the pre-existing cohabitation relationship, under which the defendant is authorized to occupy the property by the plaintiff herself, due to the cohabitation they both maintained. Consequently, contrary to what is stated in the precarious possession claim, the facts demonstrate

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[11] Original: *"Nuevamente, la Corte califica de vínculo jurídico una convivencia que es claramente una situación fáctica. Con ello reduce al mínimo la operatividad de esta acción, ya que omite la exigencia de un título que debe ser jurídico para justificar la tenencia y se interpreta la mera tolerancia como una actitud pasiva que no tiene motivación alguna para soportar que el tenedor use una cosa ajena."* CORRAL (2021).

[12] CORRAL (2021).

[13] The review of judgments is limited to the period between 2005 and 2023, during which approximately 380 rulings were issued concerning the defendant's passive legitimacy. From there, it is possible to identify different groups of justifications, including those related to patrimonial and non-patrimonial matters. Within the latter group are cohabitation relationships, which are the subject of this study. It is noted that the judgments were extracted from the frequent platforms: Vlex, Westlaw, and primarily the Judiciary's Search Engine for Jurisprudence (*Buscador de jurisprudencia del Poder Judicial*). The filters used were: "action of precarious possession," "without prior contract," and "ignorance or mere tolerance".

[14] The four judgements in which the precarious possession action was accepted are the following: *Inmobiliaria Los Esteros Ltda. con Vidal Uria* (2009); *Vega Molina con Caroca Pino* (2017); *Poblete Hinrichsen con Ferrada Sánchez* (2018) and *Mellado Reyes con Arce Pineda* (2022).

[15] *Montero Toledo con Ruíz González* (2021). I have commented this judgement elsewhere, see: LOAYZA (2023), pp. 155-163.

> a clear bond between the owner and the occupant of the property, which contrasts with mere suffered, permitted, tolerated, or ignored corporal possession."[16]

Regarding the second judgment, issued on March 8, 2023,[17] it was decided on a precarious possession lawsuit filed by the owner of a property located in the commune of Nogales against the defendant, who justified her corporal possession based on a cohabitation relationship she had with the plaintiff's son.

The Supreme Court rejected the precarious possession action, given that:

> "It is observed that the trial judges have correctly applied the relevant regulations to the case at hand, as although the plaintiff's ownership of the property backed by a registered and valid title and the defendant's occupation of it have been established, the occupation does not stem from the owner's ignorance or mere tolerance, but rather from the existence of a family relationship between the plaintiff and the defendant. The latter maintained a cohabitation relationship from which a daughter in common with the plaintiff's son was born. Additionally, it should be noted that the plaintiff authorized the defendant to build the residential house she currently occupies on his property."[18]

Well then, both cases are sufficiently clear regarding the stance of the Supreme Court; contrary to the opinion of the authors, cohabitation relationships lacking formalization would allow justifying the defendant's possession. The question that arises, then, is to consider what criteria or circumstances said court used to justify its position.

III. CRITERIA USED BY THE SUPREME COURT TO JUSTIFY COHABITATION RELATIONSHIPS AS A CORPOREAL POSSESSION TITLE OF THE DEFENDANT

A review of the judgments where the Supreme Court has rejected the precarious possession action on the grounds that the cohabitation relationship is sufficient to justify the defendant's occupation shows that the Court has relied on two criteria[19] to justify its position. The first is the existence of common children; the second, meanwhile, is the authorization granted by the plaintiff for the occupation. These criteria are not mutually exclusive and often overlap in many cases.

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[16] Original: *"Que, en las condiciones antes anotadas, la situación fáctica establecida en la causa no se encuadra dentro de la hipótesis de ausencia absoluta de nexo jurídico entre quien tiene u ocupa la cosa y su dueño. Muy por el contrario, la tenencia del inmueble se justifica en la relación de convivencia preexistente, en cuya virtud el demandado aparece autorizado para ocupar el inmueble por la propia actora, en virtud de la convivencia que ambos mantuvieron. Consecuencialmente, al contrario de lo expuesto en la demanda de precario, los hechos dan cuenta de un claro vínculo entre la propietaria y el ocupante de la cosa, lo cual se contrapone a una tenencia meramente sufrida, permitida, tolerada o ignorada"Montero Toledo con Ruíz González* (2021), consideration n°12°.

[17] *Torres con Torres* (2023).

[18] Original: "*se observa que los jueces del fondo han efectuado una correcta aplicación de la normativa atinente al caso que se trata, por cuanto si bien se ha acreditado el dominio del demandante sobre el bien respaldado por un título inscrito y vigente y la ocupación que de él ha hecho la demandada, no deriva de la ignorancia o mera tolerancia por parte del dueño, sino de la existencia de una relación de familia entre el actor y la demandada, pues ésta última mantuvo un vínculo de convivencia de la cual nació una hija en común con el hijo del actor. A lo que debe agregarse que éste último autorizó a la demandada para que se construyera la casa habitación que hoy ocupa dentro del terreno de su propiedad.*"

[19] For the purposes of this work, I understand "criterion" to mean those conditions which, with an aspiration of generality, allow for the same resolution of a set of similar cases. That is, a reason used to support a position, and which appears on more than one occasion.

3.1 First criterion: the existence of common children

The first criterion used by the Supreme Court to reject the precarious possession action is also the most frequent, as out of the twenty-two cases considered in this study, this criterion[20] was present in fourteen of them. It involves determining the existence of common children. Based on this criterion, the Court has justified the effectiveness of cohabitation relationships as a title to defeat the precarious possession action.

This can be inferred from the judgments cited in the previous paragraph; in both cases, it was established that children were born from the pre-existing relationship. A similar situation occurs in the judgment of April 6, 2020,[21] where it was determined that the defendant maintained a cohabitation relationship with the plaintiff for 17 years. According to the judgment:

> "In this case, it cannot be overlooked that the title under which the defendant claims protection is the cohabitation relationship she had with the owner of the property, with whom she has two minor children who currently live there with their mother, a family bond that specifically excludes mere tolerance."[22]

And the same occurs in the judgment of August 11, 2019.[23] The facts established in the case state that the defendant occupies the property together with her two children, who are related by kinship to the plaintiff, who in turn is the daughter of the defendant's former partner. In the judgment, the Supreme Court stated the following:

> "Therefore, if it is an established fact that the defendant occupies the property by virtue of her cohabitation relationship with the former owner, who is the father of her minor children (who also reside there) and is also the parent of the plaintiff, it must be inferred that the occupation is not due to the plaintiff's ignorance or mere tolerance, which prevents the success of the action brought; the plaintiff must pursue other avenues to satisfy her claim to recover the property."[24]

As seen from the examples cited, given the existence of common children, it can be ruled out that the corporal possession of the property is due to the owner's ignorance or mere tolerance. In other words, the presence of children would stand as a sufficient reason to restrict the owner's ownership, particularly when considering the best interest of the child.

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[20] The judgements are the following: *Valenzuela Vásquez con Arratia Díaz* (2013); *Escobar Espinoza con Miranda Villacorta* (2017); *Fernández con Ochoa* (2017); *Hernández Fernández con Silva Silva* (2019); *Alvarado con Norambuena* (2020); *Montero Toledo con Ruíz González* (2021); *Sociedad Veryval SpA con Ibarra Rodríguez* (2022); *Rubio con Rojas* (2022); *Fee con Alvarado* (2022); *Torres con Torres* (2023); *Carvallo con Meza* (2023); *Osorio Herrera con López Acuña y otros* (2023); *Valenzuela Romero con Vargas Palma* (2023) and *Araya con Narváez* (2023).

[21] *Araneda Fuentes con Piña González* (2020). In this vein: *Alvarado con Norambuena* (2020); *Valenzuela Vásquez con Arratia Díaz* (2013); *Valenzuela Romero con Vargas Palma* (2023) y *Valenzuela Vásquez con Arratia Díaz* (2013).

[22] Original: "*En este caso, no es posible soslayar que el título en el que se ampara la demandada es la relación de convivencia que mantuvo con el dueño del bien raíz, con quien tuvo dos hijos, menores de edad que actualmente lo habitan junto a su madre, vínculo de familia que precisamente excluye la mera tolerancia*"

[23] *Hernández Fernández con Silva Silva* (2019).

[24] Original: "*Entonces, si es un hecho pacífico que la demandada ocupa el inmueble en virtud de su relación de convivencia con el anterior dueño de la propiedad, que es el padre de sus hijos menores, quienes también la habitan, y además es el progenitor de la demandante, se debe inferir que la ocupación no lo es por ignorancia o mera tolerancia de la actora, lo que impide que prospere la acción intentada; debiendo dicha parte deducir aquellas que correspondan para satisfacer su pretensión de recuperar la propiedad.*"

In principle, this criterion seems appropriate considering that the best interest of the child is a general principle of law that establishes a guarantee for the minor, meaning that every decision concerning them must consider their rights. Additionally, its normative recognition is reflected in Article 7 of Law No. 21,430 on Guarantees and Comprehensive Protection of the Rights of Children and Adolescents (*Ley N° 21.430 sobre Garantías y Protección Integral de los Derechos de la Niñez y Adolescencia*), which establishes that the best interest of the child and adolescent is a principle, right, and procedural norm based on an assessment of all elements concerning the interest of one or more children in a specific situation.

However, in my opinion, this criterion is not sufficiently persuasive.

We must begin by noting that the situation varies depending on whether the children are minors or adults. The reason is that concerning minor children, parents have a special duty of care, based on the rules of the 1989 Convention on the Rights of the Child.[25]

In this regard, it is useful to refer to a dissenting opinion of Minister Rodrigo Biel in a judgment dated January 25, 2022,[26] according to which:

> "It is not reasonable to accept the lack of knowledge or mere tolerance of the plaintiff, since the use and enjoyment of the precarious property is for the benefit of the children of his cousin, the previous and near owner of the property, who are under the care of their mother, the defendant. She obtained that her former cohabitant left the house, which implies at least an authorization from the father and not mere tolerance. Otherwise, it would constitute a clear violation of the guiding principle of the best interest of the child, aimed at guaranteeing all minors within the national territory the full and effective exercise and enjoyment of their rights, as recognized in Article 3 of the Convention on the Rights of the Child, applicable by reference under Law No. 19,968."[27]

The excerpt teaches us that, in the presence of minor children, the issue of precarious possession is not solely about strict economic terms, but also involves considering their best interests. In other words, the tension between the interests of the owner (property rights) and the occupant (personal rights) is influenced by another distinct interest—that of children and adolescents, who must be protected in their essential rights, so that these latter interests could justify the possession, rather than the cohabitation relationship.

Reflecting on this shows that a position more aligned with the property rights of the plaintiff would allow for the acceptance of the actions for precarious possession. On the other hand, a more protective stance towards the best interests of the child or adolescent, and ultimately towards their personal rights, would consider that actions for precarious possession should be rejected. Depending

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[25] Regarding how this principle has been received in Chilean civil law, see: RAVETLLAT and PINOCHET (2015), pp. 903-934.

[26] *Sociedad Veryval SpA con Ibarra Rodríguez* (2022).

[27] Original: "*No resulta razonable aceptar la falta de conocimiento o mera tolerancia del actor, ya que el uso y goce del bien precariado lo es en beneficio de los hijos de su primo, anterior y próximo dueño del predio, padre de los niños que se encuentran al cuidado de su madre, la demandada, quien obtuvo que su ex conviviente saliera de la casa, lo que supone al menos una autorización del padre y no una mera tolerancia, lo contrario constituiría una clara transgresión al principio rector del interés superior del niño, niña o adolescente, que tiene como objeto garantizar a todos los menores que se encuentren en el territorio nacional el ejercicio y goce pleno y efectivo de sus derechos, como lo reconoce el artículo 3 ° de la Convención de los Derechos del Niño, aplicable por remisión de la Ley n° 19.968.*"

on where the judges find themselves on this balance, they will decide regarding the precarious possession action.

Well then, a look at the judgments of the Supreme Court reveals a trend of rejecting precarious possession actions in the presence of common children. However, framing things in this way raises a question: What is actually the title that allows justifying corporal possession and defeating the precarious possession action?

The question arises when considering some materials. Firstly, BARCIA LEHMAN's opinion, who, when analyzing a ruling from the Court of Appeals of San Miguel that decided the cohabitation of the defendant, with whom the plaintiff had two daughters, would prevent the precarious possession action from succeeding, argued that this position is debatable, since it does not indicate a legal category to maintain possession of the property, such as could have been cohabitation or even support (alimony).[28]

Secondly, another judgment cited above from November 3, 2020; as mentioned, it is stated in the facts that through an extrajudicial transaction approved by the competent family tribunal, child support was regulated without including housing expenses, as the children lived in the property whose restitution was sought.

Thirdly, the question about the true title that allows justifying the defendant's corporal possession arises when examining a recent judgment from October 23, 2023.[29] In this regard, it is stated in the judgment:

> "(...) the factual situation established in the case does not fall within the hypothesis of an absolute absence of legal connection between the occupant and the owner of the property.
>
> (...)
>
> (...) contrary to what is alleged in the precarious possession claim, the facts indicate a clear link between the owner of the property in question and the occupant, which contradicts mere suffered, permitted, tolerated, or ignored possession."[30]

The interesting aspect of the case lies in considering what "factual situation", in the Court's opinion, allows for the rejection of the precarious possession claim. The response that emerges from the facts established by the tribunal is that, due to a cohabitation relationship of 15 years between the parties, from which a child in common was born, the defendant dedicated herself to care for the common child and also to household chores, without being able to pursue a paid or profitable activity for herself, unlike the plaintiff, who was able to do so, working in a paid capacity, which allowed him to increase his economic capacity and access a mortgage loan, thus financing the purchase of the property in dispute, which served as the family residence.

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[28] BARCIA (2017), p. 86. According to Carlos Pizarro, these cases are scenarios where judges are often sensitized, and therefore tend towards substantive justice, in: PIZARRO (2019), p. 1233.

[29] *Araya con Narváez* (2023).

[30] Original: "*(...) la situación fáctica establecida en la causa no se encuentra dentro de la hipótesis de ausencia absoluta de nexo jurídico entre quien tiene la ocupación de la cosa y su dueño.*

(...)

(...) al contrario de lo expuesto en la demanda de precario, los hechos dan cuenta de un claro vínculo entre el propietario del inmueble sub lite y la ocupante de la cosa, lo cual se contrapone a una tenencia meramente sufrida, permitida, tolerada o ignorada."

The situation described in the facts closely resembles the criteria provided by the legislator in Article 62 of Law No. 19,947 on Civil Marriage (*Ley de Matrimonio Civil*) for economic compensation. However, we are not dealing with a case of economic compensation because, according to the law, this is an institution applicable only when *marriage or civil union agreement*, as applicable, *terminates.*[31]

What, then, is the title that justifies the defendant's occupation? Cohabitation relationships, or rather, a different institution? And if it is the latter solution, what is that institution? Is it legally decreed alimony, economic compensation, or something else?

As has been attempted to be shown, it is not clear whether the Supreme Court, in rejecting the precarious possession action, does so because of the existence of a cohabitation relationship, because children were born from that relationship (who have personal rights regarding the plaintiff, notably regarding alimony[32]), or because the Court understands that there should be some form of "economic compensation." If this is the case, the solution should be channeled under the discipline of family tribunals and not in this forum.[33] In other words, it is not that the existence of children cannot impose obligations –of course, they do[34]– but if the Supreme Court understands that parents have alimentary obligations towards their children or that cohabitants have an obligation to compensate for certain damages to their respective partners, such obligations should be decreed in the appropriate instance,[35] and precarious possession should not be an effective tool for this purpose. Hence, the criterion -the existence of common children- actually needs to be clarified or, rather, reformulated.

Understanding things differently would blur the understanding of the title (or contract) and would produce two negative effects: on one hand, it would assign to precarious possession a function

[31] As indicated by Article 27 of Law No. 20,830, which establishes the Civil Union Agreement, this institution applies in cases where the agreement terminates due to causes d), e), and f) of Article 26 of the same law. If applicable, the regulations provided in Law No. 19,947 apply.
However, there is a case where "economic compensation" was applied to an informal civil cohabitation. Nevertheless, the nature of such economic compensation is not the same as that regulated by Law No. 19,947. See: ESPADA (2013), pp. 105-134. However, according to the author, such compensation –applicable in cases of annulment or divorce– could have resembled "the dissolution of de facto cohabitation".

[32] In a judgement from June 2017 resolved by the Supreme Court regarding a precarious possession claim, it was stated that the competent Family Tribunal had the authority to regulate alimony due to the occupation of the property owned by the father. See: *Rojas Geldres con Jaramillo Soto* (2017).

[33] For an analysis of the procedure to be followed in cases of precarious possession under Law No. 21,461, which amends Law No. 18,101 and introduces a monitoring procedure, see: LARROUCAU (2023), pp. 263-283. According to the author, there are certain rules of the monitoring procedure applicable to precarious possession lawsuits, namely: 1) the requirement that the precarious possession complaint must include a specific request; 2) the rule allowing that if the judge finds the complaint admissible, the defendant must be warned that if they do not appear, their eviction and that of the occupants of the property will be ordered within a period not exceeding ten days; and 3) the rule stating that the defendant's response will define the subject matter of the lawsuit between the parties. LARROUCAU (2023), pp. 268-269.
In my opinion, the most useful rule in conflicts arising from the subject of this work is the second one, because if the defendant does not appear at the trial or does not raise objections, eviction can be demanded within a period not exceeding 10 days (Article 18-C, Law 18,101).

[34] Moreover, Article 9 of Law No. 14,908 allows the judge to assign, in whole or in part, alimony to a right of usufruct, use, or habitation over the assets of the person liable for maintenance. The point, however, is different; if such an obligation exists, it must be decreed by the corresponding judge in the respective procedural instance, not in the precarious possession trial.

[35] See: RODRÍGUEZ (2018b), pp. 80-82.

that is improper to it;[36] and on the other hand, it would deprive it of its proper function, which is to fill the gap left by the registered possession regime.[37]

3.2 Second criterion: the authorization granted by the plaintiff

The second criterion present in the decisions of the Supreme Court corresponds to certain authorizations granted by the plaintiff that would justify the defendant's occupation. There are ten cases (out of the twenty-two used in this study).[38] In this regard, the judgement of June 14, 2021[39] stands out, according to which the possession of the property was justified by the pre-existing cohabitation relationship between the parties, given that the defendant had been authorized to occupy the property, which contrasts with a corporal possession that is suffered, tolerated, or ignored by the owner.

Similarly, this can be ascertained in the aforementioned judgement of July 6, 2021[40]. In it, the following is noted:

> "On the contrary, the corporal possession of the property is justified by the pre-existing cohabitation relationship, under which the defendant appears authorized to occupy the property by the plaintiff herself, due to the cohabitation they both maintained. Consequently, contrary to what is stated in the claim of precarious possession, the facts show a clear bond between the owner and the occupant of the property, which contrasts with a corporal possession that is merely suffered, permitted, tolerated, or ignored."[41]

A similar passage can be found in the ruling of January 25, 2022.[42] In it, it was established as proved that the defendant maintained a cohabitation relationship with the former owner of the property, a fact that was not disputed by the plaintiff. As stated in the ruling, the described facts do not fall under the hypothesis of an absolute lack of legal connection between the occupant and the owner. On the contrary, the corporal possession of the property is justified by the pre-existing cohabitation relationship between the parties, according to which the defendant would have been authorized to occupy the property. This contrasts with a corporal possession that is suffered, tolerated, or ignored.

As seen in all these cases, it is through an "authorization" granted by the party seeking to recover the property that the Court excludes ignorance or mere tolerance, and consequently considers

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[36] Regarding assigning an improper function to precarious possession, see: DE LA MAZA (in print, A). In this vein, the author discusses a "subversive potential of precarious possession", which would be given by an "immanent" interpretation of Article 2195 subsection 2 of the CC.

[37] ATRIA (2017), p. 61.

[38] These are the following: *Hernández Fernández con Silva Silva* (2019); *Vidal con Valencia* (2020); *Del Pino Ponce con Orellana Zamorano* (2021); *Santander Araya con Paredes Leiva* (2021); *Montero Toledo con Ruíz González* (2021); *Sociedad Veryval SpA con Ibarra Rodríguez* (2022); *Rubio con Rojas* (2022); *Torres con Torres* (2023); *Álvarez con Fabián* (2023) and *Araya con Narváez* (2023).

[39] *Santander Araya con Paredes Leiva* (2021). In the same vein, DOMÍNGUEZ (1992), pp. 211-213.

[40] *Montero Toledo con Ruíz González* (2021).

[41] Original: "*Muy por el contrario, la tenencia del inmueble se justifica en la relación de convivencia preexistente, en cuya virtud el demandado aparece autorizado para ocupar el inmueble por la propia actora, en virtud de la convivencia que ambos mantuvieron. Consecuencialmente, al contrario de lo expuesto en la demanda de precario, los hechos dan cuenta de un claro vínculo entre la propietaria y el ocupante de la cosa, lo cual se contrapone a una tenencia meramente sufrida, permitida, tolerada o ignorada*"

[42] *Sociedad Veryval SpA con Ibarra Rodríguez* (2022). In the same vein: *Santander Araya con Paredes Leiva* (2021) and *Del Pino Ponce con Orellana Zamorano* (2021)

cohabitation as sufficient reason to render the filed action of precarious possession ineffective.[43]. However, the Court refrains from labeling these authorizations as loans for use or "*commodatum*".[44]

However, as regarding the aforementioned criterion, this results unconvincing as well.

To consider this point, it is advantageous to pose the following question: What does it mean that the defendant's corporal possession was authorized by the plaintiff?

According to the RAE, "*autorización"* ("authorization") means "*Acción y efecto de autorizar*" ("action and effect of authorizing"). Furthermore, "*autorizar"* ("to authorize") means "*Dar o reconocer a alguien facultad o derecho para hacer algo*" ("To give or acknowledge someone the authority or right to do something"). Therefore, "*autorizar"* ("to authorize") comprises situations in which an empowerment or permission by the owner to the occupant exist, in order that the latter keeps for himself the corporal possession of the thing during a certain period of time.

To encompass this criterion, it will be convenient to start with the conclusion: just as in the previous case –the presence of common children linked to the best interests of the child or adolescent– the title is not the cohabitation or concubinage relationship. Therefore, what justifies the defendant's occupation of the property is the permission granted to him by the owner himself.

This is a complex case because it is the owner's conduct that authorizes the occupant to enter the property. The point, however, is that such conduct contradicts the "ignorance or mere tolerance" necessary to establish a precarious possession claim. Along these lines, legal doctrine has indicated that mere tolerance presupposes the owner's knowledge regarding the corporal possession exercised by a third party over their property; therefore, it is incompatible with ignorance.[45]

A similar opinion is also presented in the judgments of the Supreme Court. Thus, for example, a ruling dated August 5, 2015 concerning a promise contract:[46]

> "Regarding this matter, jurisprudence has stated: "For the legislator, the tolerance of another's property is considered precarious—in what concerns us here—when it is caused by simple and exclusive indulgence, condescension, permission,

[43] A recent ruling issued by the Supreme Court on May 30, 2023 (*Álvarez con Fabián* (2023)) provides a clear illustration of the concept of "authorizations." The plaintiffs were co-owners of real property occupied by the defendant, who is the daughter of one of the co-owners and had received authorization from her mother. "According to the Court: In this case, having established that the defendant has a family relationship with the previous owner and that her mother - who authorized the occupation - is a co-owner of the property in question along with the plaintiffs, it allows for the determination of the existence of a legal relationship between the occupant and the property subject to occupation. This necessarily contrasts with a corporal possession that is merely suffered, permitted, tolerated, or ignored, indicating a situation that must be resolved through specific actions for that purpose, not through a claim of precarious possession, which is not the appropriate route to resolve the conflict, given that the described factual basis does not fall within the factual requirements thereof." (Original: *"En la especie, habiéndose constatado que la demandada tiene un vínculo familiar con el anterior dueño y que su madre -quien autorizó la ocupación- es propietaria en conjunto con los demandantes del inmueble sub lite, permite determinar la existencia de un vínculo jurídico entre el ocupante y la cosa objeto de la ocupación, lo cual necesariamente se contrapone a una tenencia meramente sufrida, permitida, tolerada o ignorada y denota una situación que debe ser solucionada a través de las acciones específicas para ello, no por medio de una demanda de precario, que no resulta ser la vía idónea para resolver el conflicto, en tanto el sustrato fáctico descrito no resulta subsumible en los presupuestos de hecho del mismo."*) In the same vein, DOMÍNGUEZ (1992), pp. 211-213.

[44] In only one of the cases reviewed in this work did the Supreme Court refer to such authorizations as a loan for use. This case is: *Santander Araya con Paredes Leiva* (2021).

[45] HALABÍ and SAFFIRIO (1996), p. 86.

[46] *Reyes Flores con Espinoza Reyes* (2015). In the same vein: *Macaya Martínez con Valeria Ojeda* (2016).

> acceptance, admission, favor, or grace of its owner.' (Court of Appeals of Santiago, March 23, 1987, G.J. 1987, t 81, N° 1, p. 32).
>
> Thus, mere tolerance should be understood as not opposing acts that could be prevented, accepting them, allowing them, because not suppressing them implies tolerating them, which entails a permissive attitude, willingness to compromise, acquiescence, or indulgence. This is based on the understanding that it involves a situation where there is knowledge of the corporal possessor's acts, because otherwise, one could be facing an omission due to ignorance, which does not represent the concept under examination."[47-48]

Given that there is permission from the owner, it is not possible to argue, in turn, that the corporal possession of the third party is due to mere tolerance: what justifies the occupation of the property is precisely the authorization.[49]

Does this mean that the precarious possession claim should be rejected, and consequently, the owner will be prevented from recovering their property?

To resolve this issue, two points must be noted. Firstly, that even though there was "authorization" from the owner, such permission has expired. Thus, the situation fits into what legal doctrine has termed "subsequent precarious possession,"[50] meaning that the person holding the thing

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[47] Original: "*Por su parte, la jurisprudencia ha dicho al respecto que: 'Para el legislador la tolerancia de cosa ajena se entiende precaria -en lo que en la especie nos atañe- cuando está causada en la simple y exclusiva indulgencia, condescendencia, permiso, aceptación, admisión, favor o gracia de su dueño.*
Así, debe entenderse entonces por mera tolerancia el no oponerse a los actos que podrían ser impedidos, aceptándolos, permitiéndolos, por cuanto, el no reprimirlos, supone tolerarlos, lo que importa una actitud permisiva, de transigencia, aquiescencia o condescendencia. Lo anterior en el entendido que se trata de una situación en la cual se tenga conocimiento de los actos del tenedor, por cuanto, en caso contrario se podría estar frente a una actitud omisiva derivada de la ignorancia y no representativa del concepto en examen."

[48] In the same vein: *Neira Cáceres con Vallejos Pérez* (2017); *Compañía Ganadera Tongoy con Cortés Pizarro* (2019) and *Bahamonde con Municipalidad de Punta Arenas* (2019).
According to the first of these judgements: "The expression "mere tolerance" denotes nothing more than the lenient attitude of a thing's owner, who allows -without expressly approving it- the actions of the defendant, through which they detent the property; in short, the expression refers to the condition of simple indulgence by the owner of the property who then seeks to recover it" (Original: *"la expresión "mera tolerancia" no denota otra cosa que la actitud indulgente del dueño de una cosa, que permite -sin aprobarlo expresamente- actos del demandado, por los cuales ejerce la tenencia del bien; en resumen, la expresión menciona la situación de simple condescendencia del propietario de la cosa que luego trata de recuperar."*)

[49] This follows from this passage: "That, under the aforementioned conditions, the factual situation established in the case does not fall within the hypothesis of absolute absence of legal connection between the occupant of the property and its owner. Quite the contrary, the possession of the property is justified by the preexisting cohabitation relationship, pursuant to which the defendant was authorized to occupy the property by its current owner." (Original: "*Que, en las condiciones antes anotadas, la situación fáctica establecida en la causa no se encuadra dentro de la hipótesis de ausencia absoluta de nexo jurídico entre quien tiene la ocupación de la cosa y su dueño. Muy por el contrario, la tenencia del inmueble se justifica en la relación de convivencia preexistente, en virtud de la cual la demandada fue autorizada para ocupar el inmueble por su actual dueño.*") in *Araya con Narváez* (2023).

[50] According to a judgement of the Supreme Court of October 10, 2018, there is subsequent precarious possession "Whenever someone who had a thing as a holder by virtue of a real or personal right continues to hold it in fact after the right has been extinguished for some effective cause. This happens, for example, to the lessee, if their lessor alienates the thing to a third party: before this, the lessee lacks any rights (although they may seek indemnity from their former lessor), and their situation regarding the thing will depend exclusively on the will of the new owner: consequently, the holder is a precarious possessor in their regard" (Original: *"toda vez que alguien que había una cosa como tenedor en virtud de un derecho real o personal, continúa habiéndola de hecho, después*

under a title continues to do so even though that right has been extinguished. Therefore, there is not sufficient basis to protect the occupant.[51]

Secondly, it should be noted that what the Supreme Court calls *authorizations* are nothing but loans for use ("*commodatum*").[52] Having pointed this out, it must be stated that these can only be precarious loans for use, meaning a type of loan where the item has not been lent for a specific purpose or for a fixed period for its restitution (Art. 2195, paragraph 1, Civil Code).

Leonor ETCHEBERRY reaches a similar conclusion:

> "(...) if we understand that there is a precarious loan for use, the judgment will be favorable in a lawsuit of this kind. Is it then necessary to subject the owner to a new trial just because, based on two testimonies, it is proven that there was a loan that the owner was unaware of at the time of contracting? Certainly, it will be argued that contracts must be respected, there is no doubt about it, and we also agree. The problem is that due to family relationships, it will always be easier to prove the supposed "initial loan" with witnesses, which will lead the occupant to gain extra time on the property, which often also contributes to another purpose of the law, which is social peace."[53]

Given this situation, it is perfectly possible for the tribunal to grant the main request substantiated in the trial –the restitution of the thing– based on the principle of *iura novit curia*, which grants judicial bodies the freedom to apply the law to the specific case, with the sole limitation of adhering to the facts alleged by the parties and not granting a different benefit than that requested.[54]

3.3 A kind of *de facto* partnership

Finally, it is worth noting an isolated case that, occurring only once, cannot be considered as "criterion", but nonetheless allowed the Court to justify its decision by referring to a "kind of *de facto* partnership" between the parties.

This is a ruling issued on August 21, 2020, in which the sufficiency of the title invoked by the defendant to invalidate the action of precarious possession was discussed. The defendant argued the existence of a cohabitation relationship spanning at least eleven years, between 2007 and 2018.

Based on the foregoing, the trial tribunal accepted the lawsuit; however, the Court of Appeals of Valdivia overturned it, arguing, as stated in the Supreme Court judgment, that the cohabitation

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que el derecho se extinguió por alguna causa eficaz. Esto le acaece, por ejemplo, al arrendatario, si su arrendador enajena la cosa a un tercero: ante éste, dicho arrendatario carece de cualquier derecho (aunque pueda indemnizarse frente al que fue su arrendador), y su situación frente a la cosa dependerá exclusivamente de la voluntad del nuevo dueño: en consecuencia, el tenedor es un precarista a su respecto"), in: *Inversiones Mirasol E.I.R.L con Donoso Saavedra y otros* (2018).

[51] ALCALDE (2016), p. 303.

[52] Without going any further, in the ruling of June 14, 2021, the Supreme Court, in fact, refers to this situation as a loan for use.

[53] Original: *"(...) si entendemos que hay comodato precario, la sentencia va a ser favorable en un juicio de este tipo, ¿es necesario entonces someter al dueño a un nuevo juicio sólo porque sobre la base de dos testimonios se logra acreditar que hubo un préstamo que el dueño ignoraba al momento de contratar? Por cierto, se sostendrá que los contratos se deben respetar, de ello no hay duda y también somos partícipes. El problema es que por la relación de familia siempre va a ser más fácil probar por testigos el supuesto 'préstamo inicial', lo que llevará a que el ocupante gane un tiempo extra en la propiedad, lo que muchas veces también contribuirá con otro fin del derecho, cual es la paz social"* ETCHEBERRY (2016), p. 82.

[54] HUNTER (2010), p. 220. Against this opinion: LARROUCAU and ROSTIÓN (2013), pp. 50-51.

relationship between the parties constituted a kind of *de facto* partnership that serves as sufficient grounds for occupying the property and dismisses the mere tolerance claimed by the plaintiff.

Subsequently, and without disregarding that argument, the Court adds that, in the present case, the title deemed sufficient to justify the defendant's occupation was the cohabitation relationship maintained with the plaintiff. The judgment concludes:

"Therefore, if it is an undisputed fact that the defendant occupies the property by virtue of their cohabitation with the plaintiff, the described situation contradicts mere passive tolerance towards the defendant's entry into that property".[55]

In this way, on at least one occasion, the Supreme Court has referred to the existence of a kind of *de facto* partnership between the parties, which ultimately establishes the existence of a legal relationship that excludes the mere tolerance of the owner.[56]

Note, however, that the Supreme Court does not use the term *de facto partnership*, which refers to a type of partnership where, by the common intention of its members, it is intended to avoid legal formalities (Articles 2057 and 2058 of the Civil Code),[57] but rather only states that it is a *kind* of this.[58] In my opinion, what the Court seeks to establish is a community of property arising from cohabitation, and by virtue of this community, invalidate the action of precarious possession. The reason is clear: cohabitation –even if prolonged– does not by itself constitute a suitable basis to invalidate the action of precarious possession,[59] as it does not create any legal relationship. Instead, as will be shown later, it is purely a factual matter. However, the point is that if such a community of property exists, the matter should have been addressed in a different proceeding, a procedure of general jurisdiction,[60-61] because what would have been discussed there is the ownership of the thing and not the passive legitimacy.

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[55] Original: *"Entonces, si es un hecho pacífico que la demandada ocupa el inmueble en virtud de su relación de convivencia con el demandante, la situación descrita, se opone a la mera tolerancia pasiva a la entrada de la demandada en ese inmueble."*

[56] Contrary to the decision in this ruling is another from November 19, 1963, cited by Halabí and Saffirio. The authors state that "The Supreme Court considered that despite the proven existence of a *de facto* partnership between the defendant and their cohabitant, and that the property had been acquired with the fruit of their joint efforts, it was necessary to bring an action to have this partnership recognized and the respective rights of the parties acknowledged. As there was no court decision making such a declaration nor any contract allowing the defendant to occupy that property, it had to be concluded that there was mere tolerance on the part of the plaintiff." (Original: *"La Corte Suprema consideró que no obstante estar comprobada la existencia de una sociedad de hecho entre el demandado y su conviviente, y que la propiedad se había adquirido con el fruto de sus esfuerzos mancomunados, era indispensable deducir acción para que se reconociera dicha comunidad y los respectivos derechos de las partes. Al no existir –agregó la Corte– una sentencia que hiciera tal declaración ni algún contrato que permitiera a la demandada ocupar esa propiedad, debía concluirse que concurría la mera tolerancia del demandante (...)*)", in: HALABÍ and SAFFIRIO (1996), p. 77. In a similar vein, ATRIA (2017), p. 76 and RAMOS (1986), p. 16.

[57] TORRES (1998), p. 194. In the same vein, MEZA (2007), p. 141.

[58] It's not about understanding this "species" of *de facto* partnership as a subtype within the genus "*de facto* partnership", but rather to illustrate that it refers only to a figure close to it.

[59] HALABÍ and SAFFIRIO (1996), p. 78. Against: RAMOS (1986), p. 16.

[60] Translator's Note. In the original: "procedimiento de lato conocimiento." Even though the translation is not precise, this is the technical term used in civil law jurisdictions for a procedure covering a broad spectrum of legal matters.

[61] In a similar vein: ALCALDE (2018), pp. 349-365.

IV. THE NON-OPPOSABILITY OF COHABITATION-RELATIONSHIPS

Most likely, what underlies the discipline of precarious possession in the second paragraph of Article 2195 of the Civil Code is a conflict between the interests of the owner and the occupant. For example, ROSTIÓN has pointed out that precarious possession addresses the interests of the owner to recover property that is in the hands of another.[62]

Furthermore, this can be inferred from a judgment dated December 27, 2017,[63] where the Supreme Court held:

> "The situation that precarious possession seeks to regulate is one where, as happens in this case, the right of ownership is opposed to mere corporal possession; and the question that the second paragraph of the mentioned article seeks to answer is: which one should prevail? The correct interpretation of the provision indicates that the owner's right should prevail, unless the corporal possession is justified. However, not justified in abstract terms, as this would limit the protection of ownership in ways that are not consistent with national legal system, but in concrete terms, meaning regarding the holder of the ownership right".[64]

Indeed, upon closer examination of the problem posed by precarious possession, it revolves around the tension between the interests of the owner on one hand, and those of the occupant on the other. This tension must be resolved in favor of the owner, unless the occupant has a sufficiently compelling reason that justifies his corporal possession.[65] This justification, on the other hand, is structured through two avenues: real rights and personal rights.

In this way, if the occupant claims to have an easement or usufruct over the thing, his corporal possession is justified, and consequently, the judge must reject the action of precarious possession, as there is no doubt that the occupant is justified in their corporal possession. On the other hand, if the defendant's claim is based on the presence of a personal right, such as a lease or a promise, the judge must determine whether such a contract imposes on the owner the obligation to respect that occupation.

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[62] ROSTIÓN (2013), p. 9. The author argues: "This traditional view of precarious possession has managed to gain interpretative hegemony, establishing Article 2195 subsection 2 as a real action, distinct from the other actions concerning loan for use and precarious loan, to protect the owner in the described situation: when someone deprives them of a property without a title or basis to justify that corporal possession." (Original: "*Esta visión tradicional del precario ha logrado hacerse con la hegemonía interpretativa, erigiendo al art. 2195 inciso 2° en una acción real, distinta de las demás acciones del comodato y del comodato precario, para proteger al dueño en la situación antes descrita: cuando alguien le priva de un bien, sin un título o antecedente que sirva para justificar esa tenencia.*") In a similar vein, HALABÍ and SAFFIRIO (1996), p. 23.

[63] *Ruz Aguayo, Agrícola San Juan Ltda. con Céspedes Veloso* (2017).

[64] Original: "*La situación que busca regular el precario es una en que, como sucede en este caso, se contraponen el derecho de dominio por una parte y la mera tenencia por otra; y la pregunta que busca responder el inciso segundo del mencionado artículo es ¿cuál ha de prevalecer? La respuesta que arroja la correcta inteligencia del precepto es que ha de predominar la del dueño, salvo que la tenencia se encuentre justificada. Pero no justificada en abstracto, pues esto limitaría la protección del dominio en términos que no resultan consistentes con el ordenamiento jurídico nacional, sino en términos concretos, es decir, respecto del titular del derecho de dominio.*"

[65] According to Jaime Alcalde, in any of the cases described in Article 2195 of the Civil Code (precarious loan or simple precarious possession), what is decisive is that "the owner has the obligation to tolerate the thing being held by the corporal possessor, because only then will he be protected against a claim for restitution." (Original: "*el dueño tenga la obligación de soportar la cosa por el que la tiene en su poder, porque solo entonces gozará de protección frente a una demanda de restitución*") ALCALDE (2016), p. 292. Furthermore, he adds later that the key point is the absence of a title of mere corporal possession.

Additionally, the judge must weigh whether such a basis is still in force or not. The outcome of the precarious possession action will depend on these considerations.

The situation with cohabitation relationships aligns more closely with the second of the scenarios presented, that is, it is the judge who must determine whether such a bond imposes on the owner the duty to respect the defendant's corporal possession of the thing. For this purpose, the Court has employed two criteria through which it has sought to establish this obligation. The issue is that, as has been attempted to demonstrate, neither the existence of common children nor the authorizations granted by the plaintiff appear to be adequate criteria to justify the occupant's corporal possession.

Indeed, as mentioned, the true reasons employed by the tribunal are different, extending beyond the precarious possession institution and finding their basis in other institutions –specifically, in this case, family law– such as legally decreed alimony, precarious loan for use, or other national legal institutions.[66] The question, then, is whether it is possible or not to use these institutions for a purpose that is unrelated to them. In my opinion, the answer is no; if one wishes to exercise the protection provided by these institutions, it must be done in the respective forum before the competent authority.[67]

Therefore, it is possible to argue that the criteria employed by jurisprudence extend beyond precarious possession because, as the Supreme Court has held in some judgments, cohabitation is actually a situation that does not generate a title of occupation, nor does it mean that this status can be indefinitely prolonged. In other words, cohabitation relationships are unenforceable against the owner.[68]

In this vein, there is a judgment dated March 28, 2009,[69] whereby the Supreme Court upheld a precarious possession action filed by a real estate company against the occupant who claimed to be the former domestic partner of the representative of the plaintiff company. In the words of the Court:

> "As mentioned above, in the present case, the trial judges established as facts of the case that the plaintiff company owns the property whose restitution is sought, and that the defendant is currently occupying it. Therefore, the first two prerequisites for the admissibility of the action filed must be considered proven by the party who legally had the burden to do so. Consequently, it was incumbent upon the defendant to demonstrate that this occupation is supported by a title enforceable against the owner, such that the law obliges the owner to respect it. Now, the trial judges have found that the defendant did not provide sufficient evidence to generate conviction on part the judges that the occupation of the property is supported by a title enforceable against the plaintiff company, and therefore, correctly decided to uphold the claim."[70]

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[66] I refer, for instance, to family assets (arts. 141 and ff. Código Civil), to economic compensation (art. 61 and ff. LMC), or to the rights of use and habitation in favor of the surviving spouse (art. 1337 rule 10 of the Civil Code).

[67] On the contrary, as an author indicates, precarious possession would have a subversive potential, since through its interpretation the discipline of institutions unconnected to it could be modified, by deploying effects they do not possess. See: DE LA MAZA (in print, A). A similar opinion, albeit regarding the marital community (*sociedad conyugal*), is presented by Jaime Alcalde, in: ALCALDE (2016), p. 307).

[68] However, this is despite the fact that the unformalized former civil cohabitant may have some type of "obligational" right. In other words, they could indeed request "economic compensation" (ESPADA (2013) or file a claim for unjust enrichment against the former cohabitant who is the owner. What they cannot request, of course, is to impose their occupation on the owner.

[69] *Inmobiliaria Los Esteros Ltda. con Vidal Uria* (2009).

[70] Original: "*Que, como se dijo más arriba, en el caso de autos los magistrados de la instancia establecieron como hechos de la causa que la sociedad demandante es dueña del inmueble cuya restitución se pretende y que la demandada se encuentra actualmente ocupándolo. En razón de lo anterior, deben tenerse por probados, por quien legalmente tenía la carga de hacerlo, los dos primeros presupuestos de procedencia de la acción deducida.*

The same opinion is found in a dissenting vote written by Carlos PIZARRO,[71] according to which, the defendant did not have a title enforceable against the owner, since the mere existence of a cohabitation relationship between the parties does not constitute a precedent that allows preventing the owner of the property from reclaiming it. Thus, there is no title at all, only a fact which is the cohabitation, which does not justify rendering the action of precarious possession ineffective.

The previous examples demonstrate the correct doctrine: cohabitation relationships are exclusively factual matters, from which no rights over the owner's property arise -unless formalized through relevant legal institutions, such as a civil union agreement.

Something like this is inferred from the words of Hernán CORRAL, who, commenting on a ruling by the Supreme Court issued in 2021, argued that the Court classified as a legal bond a cohabitation that is clearly a factual situation, thereby minimizing the effectiveness of the action of precarious possession, since the requirement of a legal title justifying corporal possession is omitted and mere tolerance is interpreted as a passive attitude without any motivation to allow the corporal possessor to use someone else's thing.[72]

The previous conclusion is relevant, as it shows something that often goes unnoticed in Supreme Court judgments, which is that the basis invoked by the defendant must be "legal" in nature.[73] This is clearly evident without any difficulty from a judgement dated August 21, 2020, already mentioned:

> "Consequently, the requested thing[74] in the action of precarious possession, that is, the restitution or return of a movable or immovable thing, finds its justification in the complete absence of a legal bond between the corporal possessor or occupier of that thing and its owner, or between the former and the thing itself."[75]

And also from the judgement dated January 25, 2022:[76]

Por consiguiente, correspondía a la parte demandada demostrar que esa ocupación encuentra sustento en un título oponible a la propietaria, de forma tal que la ley la ponga en situación de tener que respetarla. Ahora bien, los jueces de la instancia han estimado que la demandada no rindió prueba suficiente que permitiera formar convencimiento en orden a que la ocupación que hace del inmueble se encuentra amparada en un título oponible a la sociedad demandante y, en virtud de lo anterior, acertadamente decidieron acoger la demanda."

[71] *Escobar Espinoza con Miranda Villacorta* (2017).

[72] CORRAL (2021).

[73] This is evident from the following words of Selman: "precarious possession would thus be a factual situation implying a total absence of legal bond between the owner of the thing and the so-called precarious occupant."(Original: "*el precario vendría a ser una situación de hecho que implica una ausencia total de vínculo jurídico entre el dueño de la cosa y el llamado precarista.*"), in: SELMAN (2018), p. 360.

[74] Translator's Note: The term "requested thing" refers to the equivalent of the common law term "relief sought" in the context of the civil law tradition.

[75] Original: "*Consecuencialmente, la cosa pedida en la acción de precario, esto es, la restitución o devolución de una cosa mueble o raíz, encuentra su justificación en la ausencia absoluta de nexo jurídico entre quien tiene u ocupa esa cosa y su dueño o entre aquél y la cosa misma.*"

[76] *Sociedad Veryval SpA con Ibarra Rodríguez* (2022). The Supreme Court has also understood this in *Neira Cáceres con Vallejos Pérez* (2017), stating that the precarious possessor was introduced to the property "as a consequence of the legal bond existing with the spouse of the predecessor in title" (Original: "*consecuencia del vínculo jurídico existente con la cónyuge del antecesor del dominio*"); and the judgement –although in the context of a promise of sale– of July 21, 2023, stating: "That, under the aforementioned conditions, the factual situation established in the case does not fall within the hypothesis of a complete absence of legal connection between the person who has or occupies the thing and its owner." (Original: "*Que, en las condiciones antes anotadas, la*

"That, under the aforementioned conditions, the factual situation established in the case does not fall within the hypothesis of absolute absence of legal bond between the corporal possessor or occupier of the thing and its owner."[77]

The review of these judgements shows that the only fitting base for an occupation is the "absolute absence of a legal bond between the corporal possessor or occupier of the thing and its owner". Hence, the Court's argument regarding the "sort of *de facto* partnership" mentioned in the preceding paragraph and, in general, cohabitation relationships, must be disregarded, as these are based on purely factual circumstances that do not legally bind the parties[78] and, since they do not establish any legal relationship, the issue of the obligation to respect the occupation does not arise

Understanding things differently ends up expanding the notion of "legal bond" beyond tolerable limits, which leads to a detrimental outcome: the owner loses both the thing and the possibility to exercise the action arising precisely for such cases.[79] In other words, understanding that cohabitation relationships constitute a sufficient legal bond to negate precarious possession ultimately deprives the owner of that quick and effective mechanism to obtain restitution of registered real estate in cases where the owner is deprived of physical possession and the corporal possessor cannot be considered a possessor.[80]

Notwithstanding the foregoing, it is possible to discard cohabitation relationships for a more decisive reason: they are titles that are no longer in force.[81] That is to say, even in the event that cohabitation is considered a basis or legal bond, the reality is that such connection has expired, and it is precisely this situation that motivates one of the parties to bring an action for precarious possession.

Although regarding marriage, Iñigo DE LA MAZA has pointed out that for it to constitute a defense against the action of precarious possession, it must be in force and be sufficient to justify tolerance towards the defendant's occupation.[82] In this sense, he explains:

> "It does not seem –at least not generally– controversial that the duties imposed by marriage on spouses may limit the possibility that one of them has against the other to claim ownership in order to terminate the occupation of a thing. In this way, it is perfectly natural that, if its requirements are met, the duties of mutual support, mutual aid, and reciprocal protection can be strong arguments, originating in marriage, to restrict one spouse's ownership rights, thereby preventing them from pursuing an action of precarious possession against the other.

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situación de hecho establecida en la causa no se encuadra dentro de la hipótesis de ausencia absoluta de nexo jurídico entre quien tiene u ocupa la cosa y su dueño."), in *Zumelzu con Álvarez* (2023).

[77] Original: "*Que, en las condiciones antes anotadas, la situación fáctica establecida en la causa no se encuadra dentro de la hipótesis de ausencia absoluta de nexo jurídico entre quien tiene u ocupa la cosa y su dueño.*"

[78] Unlike the situation regarding, for example, marriage or the civil union agreement. Regarding marriage, see: RODRÍGUEZ (2018b), pp. 170-176. Concerning the civil union agreement, see: RODRÍGUEZ (2018a), pp. 154-169.

[79] On the bases of precarious possession and its function, see: DOMÍNGUEZ (2006), pp. 341-446. Regarding precarious possession in the Chilean system of real actions: ATRIA (2017), pp. 57-86. This author argues that "The reason why an action like precarious possession is necessary is that the system of real actions in the Civil Code has a noticeable gap, which is a result of the registered possession regime." (Original: "*La razón por la que una acción como la de precario es necesaria es que el sistema de acciones reales del Código Civil tiene una notoria laguna, que es resultado del régimen de posesión inscrita*"), in: ATRIA (2017), p. 61.

[80] Translator's Note: in this context, the term "possession" is used in its strictest technical meaning, which is the corporal detention of a thing with the intent of owning it as one's own.

[81] RAMOS (1986), pp. 14-15; ROSTIÓN (2013), p. 45 and LOAYZA (2023), p. 161.

[82] DE LA MAZA (2022), p. 41.

(...)

However, once the marriage ends, those duties –which are part of its effects– also end. Therefore, after the marriage, it is no longer possible to continue justifying the occupation of the thing based on marriage."[83]

This situation –as discussed in relation to marriage– is perfectly applicable to cohabitation relationships. Thus, assuming that these relationships constitute a legal bond –for instance, due to authorization– what cannot be accepted is that such authorization continues beyond the termination of the cohabitation. This would imply accepting that the "effects" of the cohabitation relationship persist beyond the relationship itself.[84]

V. CONCLUSIONS

As mentioned, this work starts with an assumption: it is not sufficient to invoke any title to invalidate the action of precarious possession; instead, it is required that such title specifically and according to general norms imposes on the owner the obligation to tolerate the use that the defendant makes of his thing.[85]

The way in which the Supreme Court, despite the position of the authors, has sought to impose this obligation on the owner raises two questions. The first is under what circumstances has the Supreme Court understood that a cohabitation relationship is a sufficient basis to justify the defendant's possession? The second, meanwhile, is whether these circumstances are correct or if, on the contrary, there is something overlooked in the decisions of the Supreme Court.

The first issue is resolved through two jurisprudential criteria: the existence of common children and certain authorizations granted by the owner of the property to the occupant. On the other hand, there is at least one case where the Supreme Court justified rejecting the action of precarious possession based on a kind of *de facto* partnership between cohabitants.

Taking into account these criteria allows us to address the second issue that interested this article, namely: the correctness of the criteria used by the Supreme Court.

The idea that this work sought to defend is that informal cohabitation relationships are not suitable to justify the action of precarious possession; that is, they do not constitute a title enforceable

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[83] Original "*No parece –no al menos en general– controversial que los deberes que impone el matrimonio a los cónyuges pueden limitar la posibilidad que uno de ellos tiene contra el otro de alegar el dominio para poner término a la ocupación de una cosa. De esta manera, resulta perfectamente natural que, si se cumple con sus requisitos, el deber de socorro, de ayuda mutua y de protección recíproco sean buenos argumentos, desde el matrimonio, para limitar el derecho de dominio de uno de los cónyuges, impidiéndole ejercer la acción de precario frente al otro.*
(...)
Sin embargo, una vez que el matrimonio termina, esos deberes –que son parte de sus efectos– también. Por lo mismo, con cargo al matrimonio ya no se puede seguir justificando la ocupación de la cosa." DE LA MAZA (2022), p. 35.

[84] In the same vein: *Poblete Hinrichsen con Ferrada Sánchez* (2018). According to it: "That, according to the facts set forth in the appealed judgment, it is clearly established that the defendant entered the property by virtue of a cohabitation or *de facto* union between the plaintiff and Mrs. Violeta Ferrada Sánchez, a situation that ceased upon its termination, with the defendant acquiring no rights in the real estate, lacking any title to occupy it." (Original: "*Que, conforme a los hechos asentados en la sentencia recurrida queda claramente establecido que la demandada ingresó al inmueble en mérito de una convivencia o unión de hecho entre el actor y doña Violeta Ferrada Sánchez, situación que cesó al extinguirse la misma, no adquiriendo la demandada ningún derecho en el bien raíz, careciendo de título para ocupar el mismo*". In more detail, DE LA MAZA (in print, A).

[85] DE LA MAZA and LOAYZA (2023), p. 384.

against the owner. This is justified precisely because the reasons employed by the Supreme Court are inadequate or, at least, need to be reformulated, for the following reasons:

Firstly, regarding the cohabitation relationships addressed in this study, these are not legal bonds or connections, but rather factual situations that have often lost their validity.

Secondly, even if it could be understood that they do constitute legal relationships, because there is a cohabitation marked by the existence of common children or, alternatively, by the presence of authorization from the owner, such facts are not sufficient. As doctrinal discussions have raised, it would have to be the case that these circumstances impose on the owner the duty to tolerate the use of the property, and such obligation does not arise -at least not strictly- from the *cohabitation relationship itself*, but rather from *other institutions* incapable of producing effects in this context.

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