
COLLECTIVE URBAN ADVERSE POSSESSION IN REGULATING IRREGULAR OCCUPATIONS AND PROMOTING THE SOCIAL FUNCTION OF URBAN PROPERTY

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In this paper, we will deal with collective adverse possession and focus on analyzing this urban instrument within a more humanitarian view. This is due to the fact that the difficult access of the low-income population to the real estate market has made it settle in the outskirts of the great centers, in faraway territories, frequently without public service, causing urban disorganization and concentration of slums. This setting affects not only people's life but also the whole structure of the city. This study aims to show the evolution of the right to property, abandoning its absolute notion, focusing on the use of the property in line with the social function of the city, thus allowing for this right to be exercised in a more humanitarian and fair way. It points out the importance of the right to housing as a fundamental right and as a way of assuring dignity and healthy development of the city and its inhabitants.

Keywords

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How to Cite

Yaghsisian, Adriana Machado; Cardoso, Simone Alves. "Collective urban adverse possession in regulating irregular occupations and promoting the social function of urban property". In Carola Hein (ed.) *International Planning History Society Proceedings, 17th IPHS Conference, History-Urbanism-Resilience*, TU Delft 17-21 July 2016, V.02 p.251, TU Delft Open, 2016.

DOI: <http://dx.doi.org/10.7480/iphs.2016.2.1240>

INTRODUCTION

In some urban centers, the Brazilian urban development scenario has created a housing shortage and consequent irregular settlements, problems stemming from the combination of the inefficacy of the land reform, industrialization process, rural exodus and a lack of urban planning.

With the 1988 Federal Constitution, the city, with its two realities - the regular settlements and irregular settlements - takes on the legal nature of an environmental good, having as vector principles the social function of the property (article 5, item XXIII, of the Federal Constitution), the capitalist economic system and the respect to the dignity of the human being (article 1, item III and IV, of the Federal Constitution).

So, in item 1 we will show the evolution of the right to property, with emphasis on the social function. In item 2, we will deal with the right to housing, contextualized in the City Statute, aiming at showing the importance of the collective urban adverse possession as an instrument which provides the right to housing and the social function of property with effectiveness.

In item 3, we will touch on the social function of property in the City Statute, where the social function of urban property occurs when it meets the requirements of the master plan designed by the Cities. Thus, the sole paragraph of article 1, of the City Statute, lays down the use of urban property for the collective good, safety, well-being of the citizens as well as environmental balance.

Indeed, urban collective adverse possession allows for the organization of the space to reach life quality of people in the city. This will be the focus of item 4, when it points out the importance of the collective urban adverse possession instrument, because in order for the respect to social function to exist and the exercise of the right to property to reach the urban functions, a study on the Statute, intertwined with the constitutional principles, is necessary. Such study allows for the recognition of the founding principles of the Constitution, in articles 1 to 4, mainly exerting citizenship as well as the dignity of the human being, the democratic management of the city, with social justice, so that a fair and caring society can be built.

URBAN PROPERTY IN BRAZILIAN LAW

Today's legal science studies the legal institutes from the finalistic perspective in search of solidarity and common good. Property is institutionally guaranteed by the Brazilian Constitution and its context established by Law, which ensures the owner the right to use, enjoy and dispose of his properties¹.

More specifically, the Federal Constitution guarantees the existence of the right to property as a fundamental law, while the ordinary law must define and regulate such right² as well as limit it

Property is only guaranteed if its exercise meets both its content defined by ordinary law and the social functions. Social function is seen as a functional element which "takes on a decisive controlling role over the other static elements (use, enjoy, dispose of and retrieve)"³.

The exclusivity character permeates the right to property. However, this doesn't mean using or enjoying a certain property disproportionately.

Once the content of the right to property is defined by ordinary law and there is a considerable variety of it, it is said that there isn't just one property. The Constitution itself differentiates urban property (article 182, § 2) from rural property (articles 184, 185 and 186), resulting in two kinds of property, already in the constitutional text⁴.

The Federal Constitution, article 5, guarantees generic property, which will have structures, contents and social functions different from one another, according to their use.

SOCIAL FUNCTION OF PROPERTY

After a long process of individualization of the human being and removal of the interference of the State in order to define the legal spheres of individual freedom (first generation of fundamental rights) and the subsequent search of intervention of this State to assure equality among people (second generation of fundamental rights), society is ready for solidarity.

In the 1988 Federal Constitution, primacy is attributable to life or extra-patrimonial situations, translated into a long list of fundamental rights. In this system, the lonely individual, isolated in his economic activity, is turned into a caring person who lives in society and finds in the needs of others a clear limit to his acting freedom.

The democratization of the Brazilian State, from 1988 on, has aimed for this solidarity among its members and the restructuring of the social relations, that is, a fair social order, which means putting a social content together with the concept of public and private property ⁵.

Because of the third generation of fundamental rights, we now live the time fraternity, solidarity and collectivization and trans-individualization of the legal institutes. The notion of individuality has been reviewed under the perspective related to the fellow man, to the community, to the common good.

In other words, the social function has imposed duties (positive obligations) on the owners before the community. This idea arose from the Constitution of Weimar which, in its article 153, wrote, “Property entails obligations and its use and exercise must, at the same time, represent a social function” ⁶.

To José Afonso da Silva, private property can no longer be seen as a pure individual right, since it is also included as a principle of the economic order. Therefore, it is linked to the principle which assures everybody a dignified life, according to the dictates of social justice⁷

In this context, “social function is expressed in the structural configuration of the right to property, definitely placing itself in the predetermination of ways to acquire, enjoy and use goods as a qualifying element” ⁸.

Social function qualifies property and imposes a two-way condition (power-duty), that is, the right to use, enjoy, dispose of and claim something, and also a duty before the other members of the society. Indeed, property is only guaranteed as a right if it fulfills the social function.

Because of the evolution of the concept, the social function of property has been given, as far as the Civil Code goes, a socio-environmental feature which prevents damage to the natural, cultural or artistic environment in the exercise of property, in line with the rights of the third generation. Such structure is aligned with article 225 of the Federal Constitution, which deals with a balanced and essential environment for a healthy quality of life.

Social function is a dynamic element which changes the structure of property according to its exteriorization from use, legitimizing it.

RIGHT TO HOUSING

The right to housing is a fundamental right which is in the category of social rights, and, together with economic and cultural rights, represents the second generation of the fundamental rights. They aim to provide the individual with basic conditions so he can live with dignity and actually exercise the right to life, freedom, equality, safety and property.

The right to housing as a right to an adequate standard of living is recognized in article 25 of the Declaration of the Human Rights and article 11 of the International Treaty of Economic and Cultural Rights, which grant every person the right to adequate housing.

It was by means of Amendment 26, of February 14, 2000, that the right to housing was explicitly included in the Constitution, chapter II, article 6, as a social right.

It is about express inclusion of the right to housing in the Constitution, but, as a fundamental right, it had already been accepted by the Federal Constitution through the recognition of international treaties, and, indirectly, through other constitutional articles.

Article 183 of the Federal Constitution also refers to the right to housing.

One can see that the goal of urban adverse possession is for urban property to fulfill its social function and the social function of the city, being an instrument of land regularization and, at the same time, to promote access to housing.

SOCIAL FUNCTION OF URBAN PROPERTY IN THE CITY STATUTE

The City Statute – Law nº 10257 of 2001- deals with the urban property and its social function. It is worth drawing attention to the fact that, although the social interest and common well-being had been provided since the 1934 Constitution, and reiterated in the 1988 Federal Constitution, only in 2001, with the City Statute, was the social function of urban property regulated⁹.

The City Statute provides that the social function of the urban property happens when it fulfills the demands of the master plan designed by the Cities. As for the social function of the urban property, sole paragraph of article 1 of the City Statute provides that its use will be in favor of the common good, safety and well-being of the citizens, as well as the environmental balance. Social function isn't just taken from the master plan, as the City Statute makes it seem. It is present in urban plans and also in building norms. It is also necessary to consider that the installation and development of cities represent huge environmental impacts. That's why it is natural that concepts of environment law permeate the social function of the urban property by direct incidence of article 225 of the Federal Constitution.

Urban law gets the concept of sustainable cities also from environment law¹⁰. According to Odete Medauar, sustainable development is “the fulfillment of the needs of the current generation without sacrificing future generations and, therefore, the meaning of solidarity”. And she adds that sustainable cities are “those where the urban development occurs in an orderly way, without chaos or destruction, without degradation, making urban life possible for everybody”. Housing, adequate conditions of work, recreation and circulation of people exemplify the urban functions which make up the social function of the city¹¹.

The social function of the city, according to Saule Junior, consists of the right of everybody who lives in the city to housing, urban equipment and services, public transportation, basic sanitation, health, education, culture, sport, leisure; in short, inherent rights to life conditions in the city¹².

Housing makes up the social function both of the urban property and of the city. This is reinforced by international treaties and also by the 1988 Constitution, which establishes institutes that value family work and housing, such as the special rural and urban constitutional adverse possession, in which time requirement has been pretty much reduced (to 5 years) if possession with *animus domini* is exercised for work or housing.

The social function of urban property and the social function of the city are intertwined. This is because the use and enjoyment of the property under the attention of the collective interest reflects on the social function of the city.

OWNERSHIP SAFETY AND THE RIGHT TO HOUSING

When we speak of right to housing, ownership safety is essential to guarantee this right. These concepts are practically inseparable from each other “because it is about the central element of the human right to housing”, since housing without safety is subject to “permanent threat” and to “imminent evicting risk or forced displacement”¹³

Due to the emigration to cities, excluding and unplanned urbanization feeds into the insecurity of ownership, once it makes the newcomers, especially the poorer ones, settle in irregular housing and settlements.

In order to avoid that, the State must recognize the different forms of land use and occupation, be it rural or urban, and the laws must provide “legal and urban instruments which recognize people’s rights to stay where they live with safety and protection from evictions and natural disasters”¹⁴.

In this context, we will examine collective adverse possession as an instrument of effectiveness of the ownership safety and protection and, consequently, the right to property.

ADVERSE POSSESSION AND URBAN SOIL PLANNING IN AN ORGANIZED AND SUSTAINABLE MANNER

In Brazilian law today, the fundamentals of the right to adverse possession show the need to pay more attention to the social functions of property so as to improve the collective well-being and decrease the uncertainties of the legitimacy of domain. Adverse possession allows for the consolidation of the property in favor of the owner who has worked and been restored to his socio-economic function.

In Brazilian legislation we have more than a form of adverse possession provided for by the Federal Constitution, Civil Code and City Statute. In this paper, we will talk about collective adverse possession only as a regulating instrument of the urban areas for a sustainable urban development

Brazilian reality shows the concern of big cities occurred disorderly and irregularly, with invasion of areas, clandestine settlements all because of a lack of urban infrastructure and of public and community equipment. This urbanization exposed the inhabitants of these regions to poor living conditions and to uncertainties about ownership legitimacy.

Thus, faced with the need to regulate the adverse possession situation of the low-income population, the constitutional legislator, based on valuing the dignity of the human being, assured the urban adverse possession. To assure the fulfillment of the objectives proposed by the City Statute, one of the instruments aimed for land regularization was the adverse possession. So, in its articles 9 to 14, the Statute has listed, among the instruments of urban policy, the special adverse possession of the urban real estate; in article 9, it includes the individual form and, in article 10, the collective form.

The passing of the City Statute expresses the result of long disputes over social exclusion, in search of the right to housing in a dignified manner.

The Statute has regulated articles 182 and 183 of the Federal Constitution, which aim at ordering the total development of the social functions of the city and assure the well-being of its inhabitants, and regulating the special urban adverse possession.

In order for the respect for the social function to be guaranteed and for the exercise of the right to property to reach urban functions, a study about the Statute, intertwined with the constitutional principles, recognizing the founding principles of the Constitution, provided in articles 1 through 4, is necessary. Among these principles, the ones related to the exercise of the citizenship, the dignity of the human being, the democratic management of the cities, with social justice, for the building of a fair and caring society, stand out.

The legislation meets the social claim for a more democratic management of the urban space, with important instruments to solve the problems stemming from the urban development, especially the right to living, provided for in article 6 of the Constitution.

The collective adverse possession assures the right to housing, promotes land regularization, guaranteeing the

urbanization of areas occupied by the low-income population.

According to the study by Ermínia Maricoto *the illegal settlement and the slum are the most common housing alternatives for the majority of the low-and-lower-middle income urban population*¹⁵. A slum is defined by the total illegality of the relationship between the dweller with the land: they are invaded areas.

For this reason, when setting urban norms that regulate the use and occupation of the urban land, it is necessary to face this reality, aiming for an active policy promoting the legal regularization of these houses, replacing this disorganization for urbanization and making it into an urban environment.

It is in this context that the instruments of land regularization proposed by the Statute, mainly the adverse possession, must be interpreted.

COLLECTIVE ADVERSE POSSESSION IN THE CITY STATUTE

The so-called collective adverse possession is regulated by article 10 of the City Statute, which is about urban areas larger than two hundred and fifty square meters, as long as they are occupied by low-income population for housing, respecting the precept of article 183 of the Federal Constitution, concerning the length of possession, when it is not possible to identify the occupied lands by each holder. The active legitimacy is confined to the universe of the low-income population. The law doesn't make it clear what low-income population is, so, the judge shall observe the socio-economic situation of the holder and adapt it to this subjective requirement.

The occupation of the space shall last five years, and the possession shall qualify as uninterrupted and without opposition.

Urbanization is the most logical solution to solve the problem of the illegal city.

An example of effectiveness of collective urban adverse possession, for the promotion of dignity and ordering of the urban space in a sustainable manner, was Vila Eldorado, in the city of Curitiba, in the State of Paraná.

The occupation of this Vila in the western zone of Curitiba by hundreds of families coming from other areas of Curitiba and Paraná happened in 1989. The occupation started peacefully and without later opposition to the possession, and aiming only at setting up housing.

After the occupation, the Vila totally consolidated itself still in the 1990's. In 2007, when the adverse possession action was proposed, the Vila was made up of 323 (three hundred and twenty-three) families holding ad usucapionem ownership.

Vila Eldorado had a low-income population, since at least 33% of the population was below the poverty line (less than ½ of the minimum salary per capita).

To support the legal regularization of the lands and total urbanization of the Vila, a previous socio-economic survey was made, descriptive memos were produced and legal assistance was promoted for the proposition of the Adverse Possession Action. The action was necessary to implement the Project of Sustainable Land Regularization with financial and institutional support of the City Ministry, Caixa Economica Federal and Federal Government.

The Project aimed for the land regularization of the community in order to make later urbanization possible, with installation of sanitary sewage, approval of project of land subdivision, improvement of street lighting, public equipment, etc, which were put in by the City Hall and State and Federal Governments after the regularization of ownership of the occupied area by the 323 families.

CONCLUSION

Urban property must be analyzed within the current scenario which involves Brazilian cities, mainly in the great centers, where a considerable part of the population live in slums, tenements and on the streets, increasing the number of homeless people, without any perspective and without dignity.

This population has the right to seeing their situation be treated in the light of the Federal Constitution, which assures the dignity of the human being.

So, when defining the social function of the urban property, parameters which enable the city to reach some vital social functions – work, housing, recreation and circulation – must prevail.

By means of the constitutional recognition of the right to housing, the legislator has expressed his concern over the housing problem and has chosen a policy of urban development that seeks land regularization so that the low-income population can have access to housing.

One of the legal instruments which can be used to make the right to housing viable is urban adverse possession, mainly the collective urban adverse possession, which aims for the land regularization and the urbanization of areas occupied by low-income population.

The collective urban adverse possession implements constitutional values, alters the urban illegality and focuses on urban areas with more than two hundred and fifty square meters, as long as occupied by low-income population for housing, when it is not possible to identify lands occupied by each holder, respecting the precepts of article 183 of the Federal Constitution concerning the length of possession.

The adverse possession in the collective form has adapted the constitutional law of article 183 to the current reality of the great urban centers and has done so based on the constitutional principle of social function of property, of reducing social inequalities, of eradicating poverty and of the right to housing.

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