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**ANTISOCIAL BEHAVIOR
IN CONDOMINIUMS:
AN ANALYSIS OF THE
SOCIAL BEHAVIOR
OF RESIDENTS
WITHIN RESIDENTIAL
CONDOMINIUMS**

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Abstract: With the expansion of the urban environment, social life is synonymous with the most diverse conflicts. In the space of building condominiums, where people inevitably start to live with each other continuously, the emergence of conflicts is undeniable. For this reason, rules are necessary, with limits and obligations intrinsic to common life. The present work seeks to analyze the coexistence of the condominium members, and to analyze in the legal scope what are the appropriate punishments when there is no respect in this coexistence. Ensuring this way that the social function implicit in the right to property provided for in our Constitutional law prevails.

Keywords: Property. Condominium. Social role. Antisocial tenant. Civil Code.

INTRODUCTION

In this article, an analysis of the individual property right will be developed, together with the social function and the harmful behavior inside the condominiums, in order to demonstrate the possible punishments assured to the condominium owner with this behavior. The study of the institute of punishments applicable to the antisocial condominium owner is extremely important because it is a theme that involves one of the fundamental principles that guide the Brazilian legal system, which is the principle of the dignity of the human person.

According to the diversity of people with diverse tastes and varied desires, living in a shared environment is quite precarious, as not everyone is willing to accept the limits established when enjoying their right to individual rights, causing disagreements, making a growing number of demands with this theme.

In view of this, this work will explore the institute that provides for punishments for the antisocial condominium owner, in the face of the existing clash between the social function of property and the right to property within the Civil Code of 2002 and the legal provisions of the Brazilian legal system, emphasizing that there is no provision enabling the expulsion of the condominium member that harms the community. This way, the work is justified by the requirement to talk about the adversities experienced in the condominium environment, which has as a protagonist condominium owner with repeatedly antisocial behavior, causing physical, social and psychological damage to others.

The methodology of bibliographic review interpreted by respected scholars of the legal system, such as Maria Helena Diniz and Carlos Roberto Gonçalves, will be used. Aiming to bring relevant discussions on the subject. In addition, other authors such as Professor Flávio Tartuce that will lead to notes of great relevance and aggregation to this study. In addition to the jurisprudential analysis that have already sought to somehow bring relevance to this theme. Articles, condominium conventions, ordinances, ordinary and complementary laws that are somehow connected to the theme, which are relevant, will be explored.

O CONCEPT OF PROPERTY AND THE IMPLIED SOCIAL FUNCTION

Generalizing the definition of property we can say that it has definition as the domain or any patrimonial right. This definition originates from the law of things, since the rules of property are similarly related to the law of things, referring to a right over tangible things, literary, scientific and industrial property. The holder is allowed to dispose of his asset according to his desire. Looking from the point of view of the strictest sense,

the property can be defined as only domain¹. (MIRANDA, 2012, p. 66-70).

The Right to Property constitutes one of the most archaic and advanced institutes, the human demand for appropriation and domain has overcome different aspects that differentiated according to the political context of the centuries, thus Silvio de Salvo Venosa positions himself.

The originality of this concept of property arises from Roman law, which at first had an individual character, the democratization and appreciation of property emerged through the French Revolution². (PEREIRA, 2017, p. 87-88). In our legal system, it is listed in art. 5, item XXII, of the Federal Constitution of 1988, as a fundamental right and guarantee (BRASIL, 1988).

Regarding the domain, there are authors with different views, even contrary to the majority doctrine, differentiating domain from property. Thus, they objectify the formal controversy between the two institutes, which have autonomous and complementary notions. Analyzing the subjective side of property, the legal relationship is complex when it is tied to the one who owns the property and the community of people³. (FARIAS, ROSENVALD, 2018, p. 271-272).

Property causes a sense of accomplishment for the individual, which is provoked when one obtains a good, especially the residence, which is the appropriate place for their dignity, the right to housing as well as dignity, protected by the Federal Constitution of 1988 in its articles 1st, item III, 6th. (BRASIL, 1988) (TARTUCE, 2017, p. 79).

Seeking to establish equality between

individuality and collectivity, both rights included in our Magna Carta, in its art. 5th item XXIII, noted that “the property will fulfill its social function.” (BRAZIL, 1988)

In the same way as our Civil Code of 2002, prescribes in its art. 1228, paragraph 1, which is a right that, even though it is individual, needs to be exercised on an equal basis with other rights, without hierarchy.

The right to property is valid only for individual protection, as well as to serve the interests of society as a whole. This way, the social function was inserted into the context of ownership. From this perspective, § 2 of art. 1,228 of the CC prohibits the owner from carrying out acts that affect the social. What is concluded is that the national legal system refers to property as a constitutionally foreseen fundamental right, being delimited by the social function. (FIGUEIREDO, FIGUEIREDO, 2020, p. 101-102) (BRASIL, 1988) (BRASIL, 2002).

THE CONCEPT ABOUT CONDOMINIUM

The condominium can be defined as the communion of two or more individuals in the same environment, this scenario has as domain the exercise of individuals over their properties⁴. (VENOSA, 2013, p. 329).

The vision of Carlos Alberto Darbus Maluf,⁵ on this theme is in the sense that the need, whatever it may be, makes the option of living in a condominium an advantage for the owners, with its most diverse purposes, whether in commercial or residential use, thus having a limitation imposed on individuals who share the same space.

1. MIRANDA, Pontes de. Right of things: property, acquisition of real estate; Updated by Luiz Edson Fachin. São Paulo: Revista dos Tribunais, 2012, p. 66-70.

2. PEREIRA, Caio Mário da Silva. Civil Law Institutions: 4th vol. 25. ed. Rio de Janeiro: Forense, 2017, p.87-88.

3. FARIAS, Cristiano Chaves de; ROSENVALD, Nelson. Civil Law Course: real – vol.5, 14. ed. Salvador: JusPodovm, 2018. p. 271-272.

4. VENOSA, Silvio de Salvo. Civil law: real rights /Civil law collection. v. 5. 13. ed. São Paulo: Atlas, 2013, p. 329.

5. MALUF, Carlos Alberto Dabus; MARQUES, Márcio Antero Motta Ramos. The condominium building in the new code. São Paulo: Saraiva, 2004. p. 03.

In our legal system, the condominium is defined by an idea of division. As disciplined in our Civil Code of 2002 in its article 1.314, caput, where each owner has its share of rights and obligations.

The idea of a condominium comes from a certain thing being divisible between several owners, each with their rights and duties. Arnaldo Rizzardo argues that there are two theories that define the condominium, the first theory works individuality above collectivity, hierarchizing the right to property; and the second theory would be the collectivity standing out for the individual right, where everyone is responsible for the collective, each one with responsibility for the fraction that belongs to him⁶ (RIZZARDO, 2012, p.593-594).

This way, making a brief summary of the above, it is the division of an environment by several owners, who have obligations and must respect the limits, thus maintaining the best form of coexistence.

CONDOMINIUMS

According to what was exposed throughout this work, the exercise of the right to property has limitations due to its social function, in the condominium scenario, the owner of a unit is limited in his private autonomy, for this reason, there was a prediction in our legal system in its article 1,335 and 1,336 of the 2002 Civil Code, seeking in a general way to expose the rights and duties of the condominium members, adding the need for internal rules made specifically for each condominium, starting from a general meeting. (BRASIL, 2016, p.184)

On the property right, on its fraction, the owner has the right to use, enjoy and dispose of, in the broadest sense. The areas of collective

use, however, are limited to use according to their purpose. It also has the right to give an opinion on the projects prepared for the condominium. And according to the majority, decide the standards that best suit the space they will share. (PENTEADO, 2014, y/n)

Even in compliance with the legal provisions that govern the matter, the regulations that control the organization of condominiums must have specific regulations for that environment, according to the opinion of Elias Filho⁷ (ELIAS FILHO, 2015, p. 95)

This way, the devices agreed in specific regulations for each condominium must meet the needs of that place, and to third parties that may pass through there, in a democratic way it must be instituted by all who reside there, so that it is fair and serves the purpose.

Article 1335 of the Civil Code of 2002 determines that *“The unit owners have the right to use, enjoy and dispose of their units, and they must use the common parts according to their destination, not being able to exclude or prohibit the use of the other owners”*. (BRAZIL, 2016, p. 184)

REGARDING THE PUNISHMENTS

The imbalance in the use of property rights. This concept of inappropriate use is derived in a relative way, but it is not linked to the intention of the act performed by the owner, which may or may not be intentional. Abusive acts result from the culpable exercise of the owner's right, fleeing the economic and social purpose, causing damage to other cohabitants. This way, the illegality in relation to the neighborhood is not only linked to the exercise of the right to property, and may be consequences of incorrect or improper use, damage or inconvenience that the owner causes to other owners. (GOMES, 2012, p.210-211)

6. RIZZARDO, Arnaldo. Law of Things, 6. ed. Rio de Janeiro: Forense, 2012. p. 593-594

7. ELIAS FILHO, Rubens Carmo. Building Condominium: aspects of substantive and procedural law. São Paulo: Atlas, 2015. p.95.

Rizzardo's point of view is that one of the main duties of the condominium owner is to settle the condominium expenses. This obligation is foreseen in Law no. 4,591 in its art. 12. According to the sole paragraph of art. 4 of the same Law, "*the disposal or transfer of rights dealt with in this article will depend on proof of discharge of the obligations of the transferor with the respective condominium*", therefore, the non-payment of expenses is an impediment to the transfer of the autonomous unit. However, there is no provision for this in our Civil Code. (RIZZARDO, 2012, p. 649-651).

The non-forecast in our Civil Code allowed only treasury losses. Pursuant to: §1 of art. 1,336, which provides as follows: "*the condomino who does not pay his contribution will be subject to the agreed arrears interest or, if not foreseen, those of one percent per month and a fine of up to two percent on the debt*".

Law 4,591, § 3, art. 12, had already provided for this combination, with a higher rate. And in case of repetition, the punishments will be increased, according to art. 1.337 of the CC.

This way, the Civil Code expresses in its art. 1.337 brings the predictability of punishment in pecuniary, provided that the legal requirements are observed according to the seriousness of the faults and recidivism, also inserting the losses and damages that result from the concrete case.:

The internal regiment of the condominium may provide for punishments, according to the investigation, and in proportion to the harmful activity carried out by the condominium owner. Starting from a simple warning, it may lead to the application of fines and limitation of the common use of the condominium. (VENOSA, 2019, online)

8. MALUF, Carlos Alberto Dabus. MARQUES, Márcio Antero Motta Ramos. O Condomínio Edifício. 3. ed. reformulada. São Paulo: Saraiva, 2009. p.108

9. SILVA, Neimar Roberto de Souza e. Antisocial tenant: A study on the possibility of exclusion. 1 ed., Rio de Janeiro: Lumen Juris, 2017. p.134.

The competence, according to Carlos Alberto Dabus Maluf, is legitimate for the liquidator to dispose of these punitive measures, followed by ratification in the Assembly, having the autonomy to impose a lower amount and never higher than that determined by article 1.337 of the civil code of 2002.⁸ (MALUF, 2009, p. 108)

Despite the expulsion of the antisocial unit owner, our legal system does not provide for it, not having a fixed position on this subject.

Because without express legislation, this possibility must be reflected starting from the analysis of principles, in this sense Neimar Roberto de Souza e Silva manifests:

"Now, in fact, there is no express provision for the exclusion of the antisocial unit owner in our legal system. But, if one considers the systematic nature of the order and its optimization mandates, the legal principles, as norms of special dimension, the condominal exclusion can be admitted as a possibility."⁹ (SILVA, 2017. p. 134)

In the V day of Civil Law, the Council of Federal Justice signed in its statement 508, that:

"Noticing that the pecuniary sanction proved to be ineffective, the fundamental guarantee of the social function of property (arts. 5, XXIII, of the CRFB and 1,228, § 1, of the CC) and the prohibition against abuse of rights (arts. 187 and 1.228, § 2, of the CC) justify the exclusion of the anti-social unit owner, provided that the subsequent meeting provided for in the final part of the sole paragraph of art. 1.337 of the Civil Code decides to file a lawsuit for this purpose, ensuring all the guarantees inherent to due process of law." (BRASIL, 2012)

Understanding these jurisprudence according to the judgment of the Court of Justice of Rio Grande do Sul:

“INSTRUMENT APPEAL. ANTISOCIAL CONDOMINIUM EXCLUSION ACTION. EARLY GUARDIANSHIP. GRANTING. POSSIBILITY. Verisimilitude of the alleged facts, considering that the appellee proves, unequivocally, the antisocial behavior of the defendant to prevent peaceful agreement with the other residents. Fear of irreparable damage or damage that is difficult to repair, since the defendant's stay in the condominium puts the safety and integrity of other residents at risk. Maintenance of the decision that granted the advance protection of exclusion of the condominium owner, pursuant to art. 273, I, of the CPC. DENIED FOLLOW-UP of the appeal, by monocratic decision. BRAZIL. Court of justice of the State of Rio Grande do Sul. Interlocutory Appeal No. AI 70065533911 RS. Rapporteur: Nelson José Gonzaga. Eighteenth Civil Chamber, Rio Grande do Sul, 08/14/2015¹⁰.”

In the loophole of the law, Judge Felipe Poyares Miranda, of the 16th Civil Court of São Paulo, rejected the guardianship that pleaded for the exclusion of the antisocial condominium owner. But, in the second instance, the judges of the 38th Extraordinary Chamber of Private Law of the São Paulo Court of Justice (TJ-SP) overturned the decision, granting the limit.

Unanimously, the judges understood that the imposition of fines would not be enough in certain cases. They also included in the reasoning that there would be no prohibition in law to exclude condominium members in extreme cases.

Soon after, in the judgment (process n° 1002457-23.2016. 8.26.0100), judge Felipe Poyares Miranda, according to the high incidence of documentary evidence of the various episodes of verbal and physical aggression against residents, decided: “*The antisocial conduct was duly proven, due to all*

the disagreements with the other residents, due to the atmosphere of fear created in the building, due to the threats and aggressions uttered by the defendants”.

According to the judge, even in the absence of specific legislation for expulsion, jurisprudence and doctrine support its adherence as an exceptional and extreme measure. It was determined in the sentence that from the final decision the couple would have a period of 60 days to withdraw, under penalty of forced removal. The decision also prohibits the couple from calling other residents and turning on the loud music in the service area.

Even with the very high fines applied in this case, being a repeat offender, the problem was not being solved. Then, a lawsuit for the exclusion of tenants was filed, which was an attempt to stop all disturbance that was being caused by the defendants.

Although the right to property is guaranteed by article 5 of the Constitution, the owner cannot only dispose of his individual interests, without respecting the community.

Another TJ-SP decision, in appeal, number: 0003122-32.2010.8.26.0079, decided to exclude a resident who promoted frequent private parties in her apartment. She didn't care about the complaints and even shared the amount of the fine imposed by the condominium among the guests.

According to the decision of the 2nd Chamber of Private Law, “*the law cannot remain inert, on the contrary, it is necessary to pacify this conflict through judicial activity”*, since the fines provided for in the Civil Code do not fulfill their purpose.

Another judged in the capital of São Paulo appeal n° 0135761-28.2008.8.26.0000, where a resident of a building in the north zone was expelled from her apartment. In this case,

10. Interlocutory Appeal No. AI 70065533911 RS. Rapporteur: Nelson José Gonzaga. Eighteenth Civil Chamber, Rio Grande do Sul, 08/14/2015. Available at: <https://tjrs.jusbrasil.com.br/jurisprudencia/219768352/agravo-de-instrumento-ai70065533911-rs?ref=serp>. Accessed on Oct 29. from 2022.

there is no further appeal. The 7th Chamber of Private Law of the TJ-SP understood that there was “*irrefutable proof of the antisocial and aggressive conduct*” and that the tenants “*no longer tolerated the conduct of the defendant, which was abnormal to the rules of coexistence in society, and must be repressed*”

These examples are cases where it was demonstrated that there was no longer any way to live with the residents.

Although there is no legal provision that determines the exclusion of the unit owner, article 4 of the Law of Introduction to the Norms of Brazilian Law establishes that, “*when the law is silent, the judge will decide the case according to analogy, custom and general principles of law*”.

And the solution to this type of situation, he adds, is in the Constitution. Article 5 says that all are equal before the law, guaranteeing the inviolability of the right to life, liberty, equality, security and property. The right of ownership of the unit owner cannot be used against the freedom and safety of others.

Contrary to what is shown here, the Court of Justice of São Paulo ruled that it was impossible to proceed with the expulsion, due to the lack of legislation in this regard.

“OBLIGATION TO DO ACTION – EVICTION OF CONDOMINIUM FOR ANTISOCIAL BEHAVIOR - INTERDICTED RESIDENT SUFFERING FROM MANIC-DEPRESSIVE DISORDER (BIPOLAR) - FUNDAMENTAL RIGHT TO PROPERTY – ABSENCE OF LEGAL PROVISION FOR EXPULSION – OBSERVANCE OF THE PROVISIONS IN ART. 1.337, OF THE CIVIL CODE¹¹ – THE OUTCOME OF THIS CONTEST INVARIABLY PASSES BY WEIGHTING BETWEEN THE FUNDAMENTAL RIGHT TO PROPERTY (CF, ART. 5, CAPUT, AND XXII) AND THE SOCIAL FUNCTION OF PROPERTY

(CF, ART. 5, XXIII). IT IS TRUE THAT THE SOCIAL FUNCTION AIMS TO CONTINUE ANY ABUSES OF RIGHTS BY THE OWNER OF THE PROPERTY, OR BY THOSE WHO EXERCISE DIRECT POSSESSION OF THE PROPERTY, AS IN THE PRESENT CASE. HOWEVER, ITS APPLICATION CANNOT GIVE RISE TO THE APPLICATION OF SANCTIONS THAT ARE NOT PROVIDED FOR IN THE BRAZILIAN LEGISLATION. IN THIS SENSE, EVEN IF THE ANTISOCIAL CONDUCT OF THE APPELLEE IS CONSIDERED UNCONTROVERSIAL, THERE IS NO WAY TO JUDGE THE CLAIMS VEHICLED BY THE CONDOMINIUM THROUGH THE PRESENT ACTION, DUE TO THE ABSENCE OF LEGAL PROVISION; THE CASE NARRATED BY THE APPELLANT (CC, ART. 1.337, SOLE PARAGRAPH), IN A WAY THAT THE JUDICIARY CANNOT EXTRAPOLATE IT. THE PREVALENCE, IN THIS HYPOTHESIS, OF THE FUNDAMENTAL RIGHT TO PROPERTY IS VERIFIED, LEAVING THE CONDOMINIUM THE APPLICATION OF FINES THAT AIM TO COACT THE PROBLEM OWNER TO CANCEL THE HARMFUL BEHAVIOR. IMPROVED APPEAL.” (SÃO PAULO: Court of Justice of the State of São Paulo. Civil Appeal 1023982- 32.2014.8.26.0100. 30th Chamber of Private Law. Appellant: Condomínio Edifício King Arthur. Appellee: Teresa Pires Teixeira. Rapporteur: Maria Lúcia Pizzotti. São Paulo 13th Civil Court.07/31/2019)¹¹

“APPEAL. CONDOMINIUM. ANTI-SOCIAL OCCUPANT EXCLUSION ACTION. JUDGMENT OF IMPACT. ABSENCE OF EXPRESS LEGAL PROVISION IN THE LEGAL SYSTEM THAT ALLOWS THE EXPULSION OF A CONDOMINIUM FOR BAD BEHAVIOR. STRICT APPLICATION OF THE PROVISIONS IN ART. 1.337 OF THE 2002 CIVIL CODE. EVEN IF THE

11. SÃO PAULO: Court of Justice of the State of São Paulo. Civil Appeal 1023982- 32.2014.8.26.0100. 30th Chamber of Private Law. Name: Condomínio Edifício King Arthur. Name: Teresa Pires Teixeira. Rapporteur: Maria Lúcia Pizzotti. São Paulo.13th Civil Court.07/31/2019 Available at: <https://esaj.tjsp.jus.br/cjsj/resultadoCompleta.do>. Accessed on: 29 Oct. from 2022.

PROPERTY RIGHT IS LIMITED IN ITS SOCIAL FUNCTION, THE CONDENT MUST OBSERVE MINIMUM RULES OF GOOD BEHAVIOR AND CONVICTION, THE EVICTION MEASURE DOES NOT FIND LEGAL SUPPORT. HYPOTHESIS IN WHICH THE CONDOMINIUM MAY APPLY HIGH-VALUE FINES, AS A WAY TO ENCOURAGE THE OWNER TO LEAVE HIS COMFORT ZONEM AND TAKE PROVISIONS REGARDING HIS LESSEE. EXPULSION THAT PROVES EVEN MORE TEMERARY WHEN IT IS OBSERVED THAT WE ARE FACING AN EMERGENCY SITUATION DUE TO THE COVID-19 PANDEMIC, IN ADDITION TO BEING THE DEFENDANT PERSON OF EXTREME VULNERABILITY BECAUSE HE IS AN ELDERLY PERSON. JUDGMENT KEPT. INCREASED FEES. RESOURCE DENIED.” (SÃO PAULO, 2021, OUR GRIPHONS)

CONSIDERATIONS

It is concluded that property is not inert, it remains, accompanying the evolution of society. Encompassing a whole, there is no possibility of personal autonomy prevailing over the community. This way, the social function was inserted in the context of property, even merging with its definition.

The social function of property is necessary to ensure the minimum conditions for social coexistence. The condominium must have a set of rules that provides rights and duties to those who use it. Seeking this way, a better organization. Regarding the inappropriate use of the property, neighborhood relations are bound by the general principle that the owner cannot dispose of his right in a way that is harmful to the safety, peace and health of neighboring residents.

The relevance of these antisocial behaviors is far from what is expected for a balanced coexistence, violating collective principles.

Being abusive and making coexistence with others unfeasible, the recurrence of these disorders that affect and hurt the sense of peace in the chosen place of residence cannot be unlimited.

The unpredictability of exclusion divides opinions in this sense, causing more demand without being sure whether the claim is viable or not. The Federal Justice Council, in its V Journey of Civil Law, defined in its statement 508¹², that there are cases in which only the sanctions already provided for are not effective, within the law there needs to be more severe punishment and also to bring peace to those who face this problem.

In closing, after dissecting the entire subject discussed here, the objective is to pacify the theme and resolve conflicts over the spheres of very personal rights and collective rights, it is noted that the adoption of a legal exclusion procedure for condominium members with repeated harmful conduct is achievable by the legislator, seeking the good of the collective, while safeguarding the dignity of the human person exercised by property.

12. BRASIL. Conselho de Justiça Federal. V jornada de Direito Civil 2012. Disponível em: <https://www.cjf.jus.br/cjf/CEJ-Coedi/jornadas-cej/v-jornada-direitocivil/VJornadadireitocivil2012.pdf/view>. Acesso em 29 de out. de 2022.

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SÃO PAULO: Tribunal de Justiça do Estado de São Paulo. Apelação Cível 1023982- 32.2014.8.26.0100. 30ª Câmara de Direito Privado. Apelante: Condomínio Edifício King Arthur. Apelada: Teresa Pires Teixeira. Relator: Maria Lúcia Pizzotti. São Paulo.13ª Vara Cível.31/07/2019 Disponível em: <https://esaj.tjsp.jus.br/cjsg/resultadoCompleta.do>. Acesso em: 29 de outubro de 2022