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## INTERCONNECTION BETWEEN THE SOCIAL FUNCTION OF PROPERTY AND DECENT HOUSING IN THE BRAZILIAN LEGAL SYSTEM

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**Abstract:** This work is the result of bibliographical research, where we will seek to demonstrate the link between the social function of property and the social right to housing. We seek to highlight the connection between apparently contradictory elements (duty X right), both applied to property. We will demonstrate that at the same time that the Constitution guarantees the right to property, it conditions the exercise of this right to a duty (social function), and within this aspect, the right to housing falls. The studies begin with the notion of property, highlighting the existing normative framework, focusing on the constitutional right/duty protection of property. Next, the inseparable relationship between the aforementioned right and the social right to decent housing will be addressed, also considering the public policies responsible for the correlation.

**Keywords:** Social function of property – Private Property – Decent housing – Social Law – City statute.

## INTRODUCTION

To understand the social function of property in Brazil is a widely debated topic in colleges, seminars, congresses, events, etc., however, there are still few studies focused specifically on the link between the social function of property and the relationship between this socialization and the right to decent housing.

The right to housing is one of the aspects of the Right to the City, which comprises the study of the growing urbanization process in recent decades, resulting from the displacement of the rural population to cities, attracted by better opportunities, progress, the aggregation of rights to urban workers that were initially not extended to rural workers, and the list of harmful consequences caused by such uncontrolled population concentration, which brought with it a series

of social problems, with particular emphasis on the housing issue.

Over the years, there was a need to attribute to private property, already constitutionally guaranteed (article 5, XXII and XXIII [BRAZIL, 1988]), a social connotation, stripping away the individualistic character that existed until then, aiming to attribute obligations to the owner before society. Among these obligations, the need to implement public policies was considered, seeking to achieve a better quality of life for citizens, promoting social justice and the development of economic activities.

Faced with the lack of effectiveness of hitherto non-existent norms, corroborated by international demands for an effective housing policy that guaranteed the dignity of citizens and having a safe place to live, the Brazilian legislator was forced to introduce into the constitutional text (E.C. number: 26/2000 [BRAZIL, 1988]) expressly the social right to housing, until then provided indirectly.

Even though there is a specific constitutional chapter to deal with the issue of urban policy (articles 182 and 183, of the Federal Constitution [BRAZIL, 1988]), since 1988, coincidentally, the regulatory Law (Law number: 10.257/01 – City Statute - [BRAZIL, 1988]), of the aforementioned constitutional provisions, was only published after the consecration of housing as a social right, and aimed to establish general guidelines on urban policy under the responsibility of the Municipalities.

The publication of the aforementioned Law reinforced the need for private property to fulfill its social function, to have state protection, under penalty of not observing it, suffering the appropriate sanctions. This socialization of property gave the understanding a public aspect, where the exercise of this right began to take into consideration, not only the interests of the owners, but also of the entire

community, with decent housing being one of the main aspects of this sociality.

Thus, the property will be fulfilling its social function when it guarantees the possibility of decent housing for its inhabitants, preventing the use of urban land from becoming a form of segregation and social exclusion.

## **SOCIAL FUNCTION OF URBAN PROPERTY**

The analysis of the social function of urban property necessarily involves understanding the notion of what property is. Conceptualizing property is not an easy task, as its definition has quite remote origins since ancient times, and its concept has varied over time, with culture and with the legal and economic regime adopted by each country. Given these variants, the conception of property is diverse according to each country, however, one fact is similar in all definitions, namely, it refers to the connection that exists between a person and a movable and/or immovable asset.

The Brazilian legal system, especially the current Civil Code (Law number: 10.406/02 [BRAZIL, 2002]), has not defined what property is, establishing only the powers inherent to the owner, highlighting that “the owner has the right to use, enjoy and dispose of the thing, and the right to recover it from the power of anyone who unjustly possesses or holds it” (article 1.228).

Carlos Roberto Gonçalves (2011, p.229) highlights the difficulty of conceptualizing property, even citing Pereira, who said that property “is felt more than it is defined” (PEREIRA apud GONÇALVES, 2011, page: 229). Even in the face of this adversity, considering only the essential elements set out in article 1228 of the Civil Code (BRAZIL, 2002), it defines the right to property as: “the legal power attributed to a person to use, enjoy and dispose of an asset, corporeal or intangible, in its entirety and within the limits

established by law, as well as to claim it from anyone who unjustly holds it”.

Constitutionally, property was elevated to the category of right, as provided in article 5th, XXII (BRAZIL, 1988), that “the right to property is guaranteed”. Making an intellect between the powers of the owner highlighted in the Civil Code (CC), and the elevation of the notion of property to the category of right explained in the Federal Constitution, it can be understood that property is a right that links a person to an asset, which allows its holder to exercise certain powers over it, such as using, enjoying, disposing of and recovering it from those who improperly possess it.

The constituent, by imposing that property must fulfill its social function (BRAZIL, 1988), sought precisely to highlight that the exercise of the powers described in the Civil Code (use, enjoy, dispose and recover), much more than simply a right, also presents limits/obligations when exercising said rights. In fact, alongside such rights, concomitant with their exercise, there is on the other hand the obligation to, when exercising it, seek to protect not only the interest of its holder, but also of all those who may be affected by its exercise. excessive and/or lack of exercise.

This new vision of property rights, which moves from an eminently patrimonial and individualistic thinking to a social vision, which imposes much more than simply a conduct of not affecting the rights of others (negative), where the owner starts to demand a stance towards giving a social destination to property (positive), began with the ideas of the Frenchman León Duguit, who at the beginning of the last century (1911), in a series of lectures in Buenos Aires, the law professor in question, articulated a notion of property that we now know as the social function of private property (DUGUIT, 2016).

The constitutional concern with the social function of property, whether urban and/or

rural, was highlighted on several occasions in the constitutional text. This social function appears expressly in articles 182, §2, which translates the social function of urban property, bringing in the caput the social function of the city, while articles 184 caput, 186, items I to IV, highlight the social function of rural property.

As highlighted above, the property guarantee was included in the list of individual rights and guarantees - article 5, item XXII, as well as that the property will fulfill its social function, item XXIII. The sectioning of the sections remained in article 170, where among the principles to be observed are private property – section II - and the social function of property – section III. The social function of property was also expressly highlighted in article 39, of Law Number: 10,257/01 <sup>1</sup>, and article 1,228, § 1 of the Civil Code <sup>2</sup>.

When preparing an interesting work to defend her master's degree with the theme "Social function of urban property and the master plan", Lilian Regina Gabriel Moreira Pires, when making a digression on the constitutional provisions that addressed the issue of the social function of private property, highlights what:

"Considering that words are not used without a specific purpose, the fact that the Federal Constitution maintains separately the guarantee of the right to property and the fulfillment of its social function, leads us to understand that the second (function) as an imposed legal duty" (PIRES, 2005, p. 73).

It can be seen from the analysis of the constitutional provisions that the social function is in the internal structure of property

1. Article 39. Urban property fulfills its social function when it meets the fundamental requirements for ordering the city expressed in the master plan, ensuring that citizens' needs are met in terms of quality of life, social justice and the development of economic activities, respecting the guidelines provided for in article 2nd of this Law.

2. Article 1,228. The owner has the right to use, enjoy and dispose of the thing, and the right to recover it from the power of anyone who unjustly possesses or holds it.

§ 1º the right to property must be exercised in accordance with its economic and social purposes and in such a way that the flora, fauna, natural beauty, ecological balance and historical and historical heritage are preserved, in accordance with the provisions of special law. artistic, as well as avoiding air and water pollution.

rights. When analyzing the constitutional aspects of property, José Afonso da Silva (1989, p. 273) asserts that "the social function of property cannot be confused with property limitation systems. These concern the exercise of the right, the owner; that, to the structure of the right itself, to property".

Alongside the constitutional guarantee of the right to property, our Magna Carta (Brazil, 1988) also guarantees housing as a social right. It is noted that both property and housing are constitutionally considered a right, which demonstrates the intimate relationship between them.

The owner's duty goes beyond the social destination that must be granted to the property. This is because, in the chapter of the Constitution dedicated to the economic and financial order, property and social function aim to ensure a dignified existence for everyone, in accordance with the dictates of social justice, article 170, caput c/c items I and II. Furthermore, the fundamental objectives of the Federative Republic of Brazil are listed in article 3 of the Magna Carta and are, among others, the construction of a free, fair and supportive society, the eradication of poverty, marginalization and the reduction of inequalities. social.

Turning our eyes more specifically to the function of urban property, it is worth highlighting that it is closely linked with the concept of city, therefore, with life in the city. It is clear that currently the vast majority of the population lives in urban areas, a fact that brings with it a complex of problems that must be addressed globally, to guarantee a minimum quality of life for its inhabitants.

Using the conclusions provided by Lilian Regina G. M. Pires, she clarifies that with urbanization.

[...] The city now has as essential functions housing, work, leisure, circulation and all of this aimed at quality of life. All of these functions are linked, mainly, to the form of land use, therefore presenting urban property with special importance. This reality was stamped in our Federal Constitution, which dedicated a chapter to urban policy Pires” (2005, p. 79).

As highlighted above, urban property, in order to fulfill its social function, must necessarily respect the right to housing. This concern with housing was outlined in the Federal Constitution, as it established urban adverse possession, article 183, and rural adverse possession, article 191 (BRAZIL, 1988), as well as later, with Amendment 26, it was objectively listed in the caput of the article 6th of the Federal Constitution as a social right. Thus, the city will be fulfilling its social function when it guarantees the possibility of decent housing for its inhabitants, preventing the use of urban land from becoming a form of segregation and social exclusion.

Thinking about putting this constitutional provision into practice, Federal Law Number: 10,257/01 was published, the purpose of which was to regulate articles 182 and 183 of the Federal Constitution, establishing the general guidelines of urban policy. The so-called Statute of Cities, sought to regulate the most varied sectors affected by increasing urbanization, such as housing, transport/commuting (infrastructure and travel conditions), the environment, popular participation through public hearings, in short, it sought to discipline a series of obligations, whether on the part of the owner or on the part of the State, aiming to achieve the desired social function of urban property.

When analyzing articles 5th, XXII, XXIII, 182 and 183 of the Federal Constitution

(BRAZIL, 1988), the constituent's concern is noted in improving the adequacy of urban spaces in cities, seeking to achieve this purpose, among others, that the property fulfills its social function. It is noted that we hear a combination of two ideas: the first highlighted by the Frenchman Henri Lefebvre, author critical of the negative transformations caused in urban space due to industrialization/urbanization, and the need for a public policy to organize the occupation of urban land; the second, defended by Duguit, preaches the need for property to fulfill its social function, or rather, he considers property itself a social function.

These apparently contradictory thoughts made Colin Crawford ponder three observations regarding the combination of these ideals. He highlights that:

[...] In view of this intellectual marriage in urban planning practice in Brazil, it is worth making some observations. First, this integration, in purely theoretical terms, is remarkable. Duguit attempted to articulate a vision of property that rejected purely socialist notions, but that avoided the brutalities of complying with the classical-liberal conception of property within a capitalist economy. In contrast, the father of the notion of the right to the city, Henri Lefebvre, was an avowedly Marxist theorist. So, this means that the marriage between two conceptions arising from such different theoretical sources must be considered distinct. Second, like Duguit, Lefebvre was not, as a thinker, someone given to detailed and concrete proposals. On the contrary, his vision was somewhat utopian. (...). Thus, the marriage of these two ideas can be seen as a Brazilian legal novelty, responding to the special characteristics of urban development in the country. Third and most important of all, I find it useful to remember the value of legally marrying the notion of the social function of property with the idea of the right to the city. As this text explored previously, a challenge for the institution of social function is precisely the need to



fill it with content that protects everyone's interests, and this marriage allows us to do exactly that. Furthermore, at the end of the day, both institutes deal with property in the context of today's rapidly urbanizing world. This way, conceptual union requires reflections and initiatives to face the serious consequences of urban growth" (GRAWFORD, 2017, p. 19).

Given the conclusions highlighted above, it can be concluded that the City Statute sought to combine the thoughts of Lefebvre and Duguit, thus reconciling public interests (social function of property) with private interests. This way, the City Statute expresses the need to combine cooperation between governments, the private sector and other sectors of society in the urbanization process, in response to social interests.

Aware of this social issue, the City Statute on several occasions demonstrated concern with the land issue of urban spaces. This fact can be seen in article 2º, XIV, 4º, V, f, g, h and q, 9º to 14. When analyzing the existing instruments in the City Statute aimed at promoting land regularization, Adilson Abreu Dallari states that:

"It is not about creating privileges for the economically weak, nor about giving them fewer guarantees of health and safety, but rather about applying the law reasonably, promoting a compromise between the different objectives and constitutionally enshrined values. These considerations also apply to the legal or political instrument in urban matters designated by the City Statute as land regularization. This designation does not correspond to any specific legal institute, but rather identifies the practice of facing situations that do not comply with urban planning, registration or civil legislation (such as, for example, in irregular or clandestine subdivisions), with the aim of providing legal security to purchasers of good faith" (DALLARI, 2006, p. 81).

Articles 5 and 7 of the Statute (BRAZIL, 2001) provide restrictive/punitive measures

for non-compliance with the social function of private property. In addition to those mentioned, other devices instrumentalizing urban land regularization are expressed in the Statute, imbuing it with a social character. As we see in articles 8, which considers expropriation with payment in public debt securities; 26, where the Public Authorities will have preference in the acquisition of area for regularization purposes; 31 with the allocation of resources obtained from the onerous granting of the right to build; 32, §2º, item II, which enables consortium urban operations; 35, item III, transfer of the right to build.

Without prejudice to the advances brought by Law number: 10,257/01 (BRAZIL, 2001), with the edition of Law number 11,977/09 (BRAZIL, 2009), later revoked by the current Law (Law number: 13,465/17[BRAZIL, 2017]), which regulated the land regularization of both urban and rural properties, a new normative instrument was published by the Federal Government, which among other purposes, sought through REURB, to fulfill the constitutional precept of the social function of property, with the implementation of Urban Land Regularization, as a social measure to dignify housing.

After having an idea of what the social function of property is and its direct impact on the social right to housing, it is up to us from now on to dedicate space in this work to study a little about the right to decent housing.

## **RIGHT TO DECENT HOUSING**

Closely linked to the social function of property, the right to decent housing reflects one of the aspects of the unfolding of the initial individualist vision of property, which over the years, mainly influenced by the phenomenon of uncontrolled urbanization, gave its understanding a public aspect, where The exercise of this right must take into

account not only the interests of the owners, but also the entire community, with decent housing being one of the main elements of the sociality of property.

For a better understanding of what the “Right to Decent Housing” is, it is necessary to begin this study by providing a brief history of the origin of the right to housing and adherence to this right, the character of the dignity of the human person.

As highlighted above, the attribution of a social character to some rights provided for in the legal systems of some countries was the result of historical events, which changed the private and individualistic view of several categories of rights, which until then were systematically applied singularly to their holder. The change in this vision began with the Declaration of the Rights of Man and the Citizen of 1789 (ORGANIZATION OF THE UNITED NATIONS, 1789), which until that moment still preached an individualistic vision of human rights.

In 1976, the Conference on Human Settlements was held in Vancouver, Canada, where for the first-time adequate housing was expressly highlighted as a right for every human being. The right to housing, offered within a minimum of dignity, was clearly foreseen when the Declaration on Human Settlements in Vancouver, Canada, known as Habitat Agenda 1, in 1976, according to which human settlements policies, from then on, they must be in accordance with the propagation of principles and the Universal Declaration of Human Rights (as

3. BRAZIL. Decree Number: 591, of July 6, 1992. International Acts. International Covenant on Economic, Social and Cultural Rights. Promulgation. Available at: <[https://www.planalto.gov.br/ccivil\\_03/decreto/1990-1994/d0591.htm](https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0591.htm)>. Accessed on: May 26, 2023.

4. UNITED NATIONS. Conferences / Habitat. Available at: <<https://www.un.org/en/conferences/habitat/vancouver1976>>. Accessed on: May 26, 2023.

5. PANSIERI, Flávio. Efficacy and linkage of social rights: reflections from the right to housing. São Paulo: Saraiva, p. 21, 2012.

6. Item 17 of article 113 of the Constitution of the Federative Republic of Brazil of 1934: “The right to property is guaranteed, which cannot be exercised against the social or collective interest, in the manner determined by law. Expropriation due to public necessity or utility will be carried out in accordance with the law, through prior and fair compensation. In the event of imminent danger, such as war or internal commotion, the competent authorities may use private property to the extent that the public good requires it, subject to the right to subsequent compensation.”

per Section III [8] and Chapter II [A.3]). The aforementioned declaration was internalized by Federal Decree n° 591/92<sup>3</sup> (BRAZIL, 1992), where Brazil committed to fully complying with it.

At that time, governments began to recognize the need to have sustainable human settlements, given the disastrous consequences of rapid urbanization, especially in the developing world. Although at that time the phenomenon of urbanization and its impacts were still little considered by the international community, the world was beginning to witness the largest and fastest migration of people to cities in history, as well as the increase in the urban population through natural growth resulting from medical advances<sup>4</sup>.

In 1992, the International Conference known as Rio-92 was held in the city of Rio de Janeiro, with the participation of more than 175 countries. among other topics, it was discussed and concluded that access to healthy and safe housing is an essential element for a person’s economic, social, psychological and physical well-being.

At the level of Brazil, the right to property had already been highlighted in the Imperial Charter of 1824, which later, with the first Constitution of the republic (1891), was added to the protection of the home.<sup>5</sup>, that with the Political Charter of 1934<sup>6</sup>, a certain social aspect was added to the notion of property, by conditioning the property to social well-being, highlighting, albeit in a timid way, the need to mitigate the right to property in view

of the needs of housing policy and urban and rural land tenure.

Despite being approved under the aegis of a dictatorial government, the 1967 Constitution also followed this logic of conforming property to a social function, in section III, of article 157, in the title of the Economic Order. The current Magna Carta, in turn, consolidated, in terms of domestic law, the idea that property had left its absolute character to suffer limitations in its exercise, establishing the social function of property as a fundamental constitutional guarantee, according to article 5, item XXIII <sup>7</sup>.

Regarding the right to housing, the 1988 Constitution (BRAZIL, 1988) initially addressed the respective right indirectly Article 7, IV, of the Constitution, defined housing as one of the criteria for valuing the minimum wage. Article 24, IX, in turn, attributed common competence to the Union, the States, the Federal District and the Municipalities to promote housing construction programs and improve housing conditions and basic sanitation. Also noteworthy is the elevation of the principle of human dignity as the foundation of the Democratic Rule of Law and, why not say, essential to the existence of the Federative Republic of Brazil <sup>8</sup>.

Although the right to housing was expressly materialized only with Constitutional Amendment Number: 26/2000, there were already several scholars on the subject who argued that the absence of textual provision was not an obstacle to its characterization as a fundamental right. Ingo Sarlet, for example, extracted the fundamental right to housing from the protection of life and human dignity (SARLET, 2011, p. 107 et seq.). With a similar thought, however, based on a different element, Flávio Pansieri argued that the

fundamentality of the right to housing would result from the internalization of international treaties (PANSIERI, 2012, p. 183).

It is important to highlight that the existence of a fundamental right to housing, however, does not mean affirming the existence of a subjective right to own a home. What we seek to ensure is that everyone has access to a place that permanently and adequately houses the family entity<sup>9</sup>.

Although purchasing your own home is an obvious way to guarantee housing, it cannot reasonably be expected that the State will assign each individual a property and grant ownership of it. It is possible to realize the right to housing through several other means, such as financing social housing, establishing social rent, opening facilitated credit lines, granting special use for housing purposes in permanent preservation areas, among others.

When studying how the international system understands the notion of adequate housing, Mary Jane Paris Spink and others consider that:

“is introduced and defined as comprising: sufficient intimacy, appropriate space, adequate security, sufficient lighting and ventilation, basic infrastructure and adequate location in relation to the workplace and essential services [...]. Adequate housing must provide more than four walls and a roof. Several conditions must be met for specific types of shelter to be considered “adequate housing”. These elements are as fundamental as the supply and availability of housing (United Nations, 2009, p. 3, our translation)” (SPINK; SILVA; MARTINS and SILVA, 2020, p. 06).

Although the universalization of the right to housing is materialized in international declarations and/or treaties, it is clear that meeting the minimum standards required

7. Item XXIII of article 5 of Federal Constitution /1988: “XXIII – the property will fulfill its social function; [...]”.

8. “Article 1. The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as its foundations: [...] III – the dignity of the human person; [...]”.

9. SILVA, Jose Afonso da. Curso de direito constitucional positivo. 27<sup>a</sup> ed. São Paulo: Malheiros, p. 314, 2006.



by the international legal order demands attention to the peculiarities of each country. The minimum degree of realization of the right to decent housing is closely related to the concrete reality of each region. Conceptions of security, habitability and infrastructure, for example, vary according to culture, environment and resource availability. This requires the analysis to move from the international level to the domestic context.

To conclude the studies on this topic, we will use another opportunity to use the teachings of Spink, Silva, Martins and Silva, who, when analyzing the national scenario regarding the right to housing, highlights the two main elements that most affect the dignity of housing, which the lack of infrastructure stands out, followed shortly after by land inadequacy. The authors in vogue highlight that:

“Among the criteria for home inadequacy, the lack of infrastructure is what most affects Brazilian homes and continues to be an important challenge to be faced by the bodies responsible for the basic services that make up this type of inadequacy. However, land inadequacy (properties on unlegalized land) continues to be the second inadequacy criterion that most affects urban permanent private homes. In 2014, 1.888 million units in Brazil were in a situation of urban land inadequacy. Much of the problem is concentrated in metropolitan regions, which account for 50.5% of the 954,000 homes in this condition. In absolute terms, land inadequacy is concentrated in the Southeast region, with 1.119 million households affected. Of these, a large proportion, 637 thousand, are located in São Paulo, mainly in its metropolitan region. It is worth noting that, on July 11, 2017, Law Number: 13,465 (Brazil, 2017) was approved, which institutes a new urban land regularization policy. The law is quite controversial, as it changes several previous pieces of legislation and introduces measures that do not have the approval of experts in the field” (SPINK; SILVA; MARTINS and SILVA, 2020, p. 09).

In short, the current understanding of the right to housing is not limited to the existence of a place to live, as it also necessarily involves the notion of the sociability of private property, permeated by contours of the dignity of its holder, and by policies public policies that effectively need to be implemented.

## CONCLUSION

From reflection on the topic addressed, it was seen that the understanding of the right to property associated with its social function, has now dissociated itself from that initial negative view, where such function would be fulfilled if there was no invasion of other people's rights by its holder, for a positivist view, that is, it is not enough to simply respect the property rights of others, but rather, it is required that when exercising such right, it brings benefits beyond the personal figure of its holder, with consequences for the whole of society.

We saw that among the normative instruments published with the purpose of effectively implementing the social function of urban policy, Law Number: 10.257/01 (City Statute [BRAZIL, 2011]) was published, which among several objectives, conditioned the need for property urban area must fulfill its social function, under penalty of the relevant sanctions. Specifically, in the housing sector, Law Number: 11,977/11 (BRAZIL, 2011) was also published, later replaced by the current Law Number: 13,465/17 (BRAZIL, 2017), which has the disciplinary merit of urban land regularization of irregular properties, guaranteeing beneficiaries the dignity of a registered home.

Finally, it was considered that the elevation of housing to the category of a social right (E.C. n° 26/98 [BRAZIL, 1998]), currently supported by human rights, was the result of international influences, which combined with the internal needs arising from the

growing uncontrolled urbanization motivated the adoption of public policies that added the need to implement the social function of

private property as a form of instrument to guarantee decent housing.

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