

City and private property's social functions: a study of urban law application in Brazil

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1. Introduction

Brazilian urban law has been changing in the last few years, including some juridical instruments related to low classes habitat. Among them there are some that involve the possibility to legalize occupied land, like slums and other kinds of illegal settlements. But innovations presented by law are not immediately absorbed by society.

This paper analyzes part of the research, "A City's Social Functions in Urban Master Plans and Jurisprudence about land use and occupation in the state of Rio de Janeiro", coordinated by Sônia Azevedo Le Cocq d'Oliveira with the aide of several researchers (1). The research talks about several laws effective application of legislative power and public administration, in regards to Urban Master Plans, and the application of laws by the state courts of Rio de Janeiro, that relates land use and occupation and city and urban property social functions. The part analyzed in this paper refers to jurisprudence in the state of Rio de Janeiro related to urban land use and occupation between 1980 and 2004.

2. Social functions in Brazilian law

The Brazilian Constitution, published in 1988, introduced an important new concept with a chapter related to Urban Policy (Fernandes, 1998), including articles 182 and 183. Article 182 states:

The urban development policy, which is executed by town administration and in accordance to general rules established by the law, has the purpose to order the full development of a city's social functions and to guarantee the inhabitants' welfare.

The general rules established by the law appeared in 2001 by the publication of the City's Statute – Law N° 10.257 – and contains articles that place limits on private property rights (Cardoso, 2003). These limiting articles are 1° and 2° of the City's Statute:

Art. 1° – On executing the urban policy, treated by articles 182 and 183 of Brazilian Constitution, it will be forecasted by this law.

Single clause – For all effects, the City's Statute, settles public order and social interest rules that arrange the urban property use to benefit the collective good, the citizens' security and welfare, as well as environmental equilibrium.

Art, 2° - The urban policy has the purpose to order the full development of city and urban property's social functions, through these general routes: (...).

(1) The research group is joined by Rodrigo Sgarbi and Claudia Bartoly (students at Faculty of Architecture and Urbanism of Rio de Janeiro Federal University), and Bruno Freitas (student at Faculty of Law/Rio de Janeiro Federal University) and Rosângela Cavallazzi (law consultant and teacher/researcher at Rio de Janeiro Federal University).

According to the Brazilian Constitution, the purpose of urban development policy is the full development of the city's social functions. So what does this mean? It means that when we analyze the City's Statute, we see that this concept expands to city and urban property social functions and their general routes; organized in 16 items:

- I. The right to live in sustainable cities;
- II. Democratic administration;
- III. Cooperation among government, private interests and all urban sectors;
- IV. To plan the city development with environmental equilibrium;
- V. To offer urban equipment, transport and public services suitable to the population;
- VI. To regulate and control land occupation to avoid inadequate and inconvenience uses; like the lack of urban services or pollution;
- VII. To join urban and rural activities;
- VIII. To adopt patterns of urban production, consumption and growth compatible to the environmental, social and economic sustainability of the municipality;
- IX. To distribute the urbanization process advantages and damages with justice;
- X. To fit the economic and taxation policies to benefit all society;
- XI. To pick up the public investment which increased the value of private properties;
- XII. To protect the natural and cultural environment;
- XIII. To have public hearings or meetings in cases of constructing or acting in a potentially damage way;
- XIV. To legalize land occupation and make the urban equipments and services in poor settlements by creating special rules;
- XV. To simplify the land division process, use and occupation to reach lower prices and to increase the availability of housing;
- XVI. To offer the same conditions for public and private agents when promoting urbanization.

Unlike the Brazilian Constitution, the City's Statute has a large significance for the social functions of the city and urban property. The significance is so grand that we can almost put all urban problems inside it. So, if it is useful as a law that points to a democratic view, the meaning of city and urban property is a constructing process, formulated by the way it is applied by people in general. This paper will present the analyzed research of jurisprudence of land use and occupation in the state of Rio de Janeiro between January of 1980 and December of 2004.

3. Law and reality

The Brazilian Constitution and the City's Statute exist in a society that has the tradition to make written codes to some characteristics of peoples behavior, both individually and as a group, following a universal practice. In this way, the law regulates and controls part of social life, where people appear as equals under a superior power that owns a different nature, the State. With this status the State legitimates itself as sovereign power "... above which there is, in a social group, anything, and then, as it is, has the power monopoly." (Bobbio, 1997).

When brought to urban law, the equality means that everybody has the right to a good urban environment, with adequate urban services, the chance of self development, sufficient income

to consume urban goods and the republican right to come and go. These are the minimum levels in an industrialized country organized under a democratic regime. Currently Brazilian cities present increasingly unequal situations (Fernandes and Alfonsin, 2003) that demand strong answers. One answer to these problems is to create significance for social functions of the city and urban property that results in social justice and effective access to urban benefits (Maricato, 1996).

The introduction of new concepts about urban regulation reflects the obsolescence of old rules and is an attempt to create new ways of city planning and administration (Abramo, 2001) that are more central to the realities that Brazilian cities incur. Unfortunately, the introduction of new concepts rarely has an immediate impact on the cities (Oliveira, 2001). As an example, municipalities rarely apply City's Statute.

On the other hand, the term "city and urban property social functions" occupies an important place in specialized literature produced by city planners or jurists, and is frequently used by urban experts and administration technicians. In all cases, the term is functioning as a new profile to order cities use and occupation. This research is based in the sense that the meaning of this important term has been constructed by the ways it is applied.

4. Methodology

This paper presents the jurisprudence available in the Courts of Law within the State of Rio de Janeiro, and uses the terms social functions of the city and private property and other words related to urban land use and occupation. The jurisprudence analyzed refers to judgment of a collective court of appeals, which is the second level of decision in the court system. The information was collected between 1980 and 2004. The configuration available on the site does not allow searching for the term "city social functions", but "city and social and functions" is admissible. The first step was to select the cases related to the research. After that, the judgments were put together by theme and their meanings analyzed.

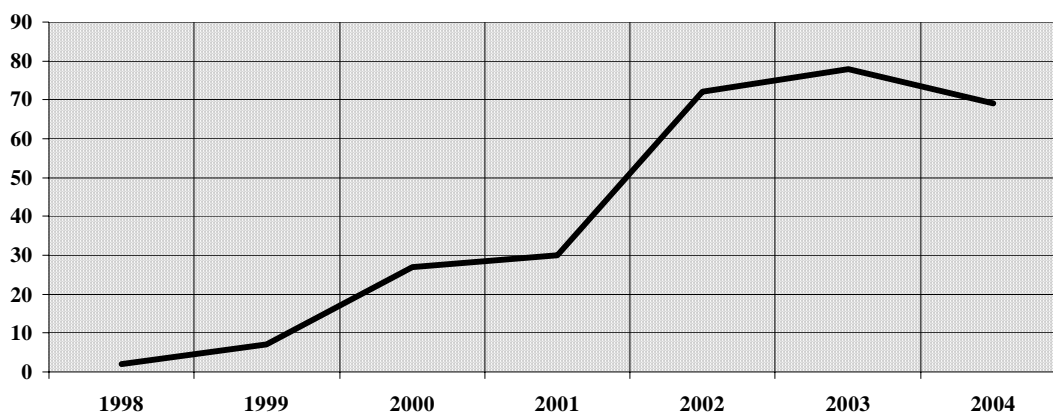
5. Results

The search was made by using the following key words:

1. "Function and social and slum" returned no results/sentences.
2. "Slum" returned 60 results, most of them related to State civil responsibility in death caused by shooting. A few cases refer to expropriation.
3. "Function and social and plot" returned two results. The first one denies a claim to the right of using another person's lot to access a public route. The second sentence refers to environmental damage caused by an illegal plot, pointing the responsibility to the residents and the plot manager.
4. "Plot" returned 299 results, most of them related to environmental damage.
5. "Function and social and city" returned 14 results, all of them belonging to the following group, "function and social and property".
6. "Function and social and property" returned 285 results, appearing as the biggest group.

It is important to say that the results using the words "social" and "functions" began in 1998, ten years after the Brazilian Constitution was published. Another important fact is the large increase of sentences that appear using the words "functions and social and property" from 2001, when the City's Statute was published. This fact suggests the possible influence of the City's Statute in court decisions.

Chart – Number of sentences using the term “function and social and property” from 1998 until 2004.



Font: The State of Rio de Janeiro’s Court of Law site.

5.1. The 285 results

Among these 285 results, 232 present the term “property social functions” and 53 present other similar terms, as follow:

Similar terms	Results
Social function of property right	16
The property does not exercise a social function	13
Property social finality	8
Property obligation to exercise its social function	6
The property right is restricted by its social function	1
Property right glimpses at its social function	1
Urban property is submitted to social function	1
Juridical principles change the property to a social function	1
To give a social function to property	1
Social function of this property	1
Property with social function	1
Common security and welfare considering social function	1
Vehicle social destination, moving good property	1
Moral damage responsibility, social constraint	1
Total	53

5.2. The 285 sentences have the following thematic distribution:

Themes	Results
Urban land and building tax, progressive tax to urban building and land not used, garbage collection tax and public lighting system tax, unconstitutionality	146
Urban land and building tax, progressive tax to urban building and land not used, unconstitutionality	55
Urban land and building tax, garbage collection tax, unconstitutionality	18
Urban land and building tax	10
Property social function	8
Moving good	6
Inspection of electronic games	5
Single judgment	4
Urban land and building tax, progressive tax to urban building and land not used, public lighting system tax, unconstitutionality	4
Condominium	4
Declaration attachment	4
Donation	3
Rent	3
Restriction to administrative regulation	3
License for building	2
Usucaption of urban land	1
Subversion of legislative elaboration	1
Failure	1
Real Estate Enterprise	1
Appropriation	1
Employer civil responsibility, work accident	1
Municipality tax collection	1
Fuel station close	1
Civil responsibility of concessionary	1
Fuel station	1
Total	285

The biggest group, “urban land and building tax, progressive tax to urban building and land not used, garbage collection tax and public lighting system tax”, represents 51.23% of the results. The sentences texts are similar and refer to the Brazilian Constitution, expressing that “...these services are public, not specific and indivisible, involving benefits to all society.” In regards to the progressive tax for unused urban buildings and land, the text says that it must be applied if the property is not performing its social function. But a decision of Superior Court denied this tax before the City’s Statute was published in 2001 and based its decision upon a constitutional law to regulate this article.

The judgment about moving goods (car taxes) affirms the municipality's role to guarantee the social functions of property as it is in the Federal Constitution. The two judgments on building licenses were about illegal plots that were damaging the environment. The sentence about a (lighting) concessionary denies its claim to build in a place allowed only for residential use. The sentence refers to the municipality's role in controlling the use and occupation of urban land to guarantee city social functions and the population's welfare. The sentence of usucaption recognizes the squatter's right. The sentence, related to civil responsibility in a work accident, displays the property social function to benefit the victim. The sentence related to a building break down assures the owner the right to compensation, according to the property social function in the Federal Constitution.

6. Conclusion

The Brazilian Federal Constitution was published in 1988, establishing a new way to plan and order the cities, particularly in relation to urban property. Since the creation of the City's Statute in 2001, the City's Statute has increasingly benefited the way cities within Brazil are planned and how issues with urban property are resolved. On the other hand, we have verified the limited use of its social means in the jurisprudence within the State of Rio de Janeiro; a metropolis with 9 million people, plenty of urban poverty and precarious housing (Burgos, 1998). Most of the cases analyzed refer to urban taxes, where people who can afford a lawyer probably made the majority of the claims. It is important to note that there existed no cases involving slums and social function. The same is happening to the City's Statute, demonstrating how it is not entirely being assimilated into the court system in Rio de Janeiro. For the future, the research will be enlarged to include other keywords within the area of jurisprudence; especially oriented towards illegal occupation modes. The state of Rio de Janeiro has many conflicts related to land use that the jurisprudence research failed to show. Maybe the outcomes of these cases have already been determined on the first level of court. This possibility may lead to new avenues for further research.

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