

SOCIAL FUNCTION OF URBAN PROPERTY: ENVIRONMENTAL DIMENSION OF THE SOCIAL FUNCTION OF PROPERTY AND THOSE RESPONSIBLE FOR ITS IMPLEMENTATION

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INTRODUCTION

The understanding that urban property has a social function is not new, however, delving deeper into the environmental dimension of the social function is still a topic that deserves greater attention.

Society is constantly progressing, cities are gaining more and more inhabitants and urban property needs to be increasingly planned. The urban challenge of orchestrating sustainable growth in zoning for land use in cities is increasingly complex.

Notably, the media reports cases of climate change in urban centers resulting from the lack of planning by the Government in the dimensioning of urban properties. At this point we can mention erosion that causes soil weakening (Castro & Ferreira, 2006), floods and their various causes, among other problems faced by climate change.

What we seek to delve deeper into is the impact that urban properties have on the context of climate events.

In a hypothetical situation, a city in which 70% of the land (urban property) has the capacity to capture and filter river water requires less flow of these river waters into rivers and streams. When the percentage capacity of the land to capture filtered river water is reduced, the demand for flow of these river waters into rivers and streams will be greater, causing structural impacts resulting from climate change.

The development of urban centers expands the urban fabric and land occupation, generating a true massive waterproofing of the soil in urban areas.

Studies demonstrate the importance of advocating an approach that integrates awareness of the scale of the problems resulting from soil waterproofing in interventions

on the territory caused by the urbanization process (Teixeira, 2005).

The ecologically appropriate use of urban property, ensuring compliance with the social and environmental function of urban property, mitigates environmental damage and, consequently, climate change.

However, it is not enough to understand the environmental function of property, but to identify those responsible for promoting and preserving the environmental function of urban property. This way, we intend to contribute to the scientific universe by dedicating attention to the relevant circumstances in urban occupation as an instrument in sustainable regional development.

THEORETICAL BASIS

The concept of property and its recognition as a positive right went through a long transition process, always the subject of dispute since the beginning, men built a legal system to guarantee legal security to human relations in the discipline of domain, ownership, use and enjoyment of property.

Property, under the influence of canon law, a strong exponent as a source of law in the medieval period, was recognized as a natural right granted to men by God, granted to all humankind without establishing which part of the property man must possess, leaving it to men to delimit private possessions and their exercise (Paupério, 1987).

In the conception of the liberal John Locke, property is a natural right arising from human labor: "The labor of his body and the work of his hands... are his property. Therefore, whatever he has taken from the state which nature has provided and left there, he has mixed with it his labor, adding something of his own, and so makes it his property" (Locke, 1994).

The transition from property as a natural right to a positive right has its origins in the

Magna Carta of 1215, signed by John Lackland, in the concern of the English Barons to guarantee their freedoms (CARDOSO, 1986).

The 1988 Federal Constitution enshrines the right to property as a fundamental guarantee, and provides in article 5 for the inviolability of the right to property, stating:

Article 5: All are equal before the law, without distinction of any nature, guaranteeing Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms: (...)

XXII - the right to property is guaranteed

The relevance of property in the constitutional text enshrined as a fundamental right demonstrates its importance in the legal system, however, just as every right is not absolute, it finds limits in the Constitution itself “nevertheless, the right to property is not absolute (as are all other rights)” (MARTINS, 2021).

In this sense, it is worth highlighting the work of Pedro Lenza (2014):

As a general rule, the right to property is guaranteed, which must fulfill its social function, in the exact terms of articles 182, §2, and 186 of the 1988 Federal Constitution. This right is not absolute, since property may be expropriated due to public necessity or utility and, as long as it is fulfilling its social function, fair and prior compensation in cash will be payed (article 5, XXIV).

With the transformation of the concept of property rights throughout history, currently, under the aegis of the Citizen Constitution of 1988, property gains a social function in society, the recognition of property (housing) as a fundamental element of human dignity.

The constitutional text innovates by recognizing a modality of access to property through adverse possession of unproductive rural property or abandoned urban property *res nullius*. In contrast, the fulfillment of

the social function of property requires obligations from the owner.

The concept of the social function of property was developed by Leon Duguit, in 1912, based on the concept that people living in society have a social function to fulfill.

In this vein, Attanásio Júnior (2005) highlights Duguit's thinking:

DUGUIT's theory (1975) is developed based on the positivist thinking of Auguste Comte, according to which there are no individual or collective rights, but rather a social function to be fulfilled by all members of society. Individual property is protected by law because of the social benefit that results from its use, that is, private property is protected to the extent that it fulfills its social function and is used productively, increasing wealth for the benefit of the entire society.

In the Brazilian legal system, article 182, §2 of the 1988 Federal Constitution states: “Urban property fulfills its social function when it meets the fundamental requirements for the city's organization expressed in the master plan”. The work of the constituent parliamentarians in drafting the constitutional text has a significant social impact, based on the Welfare State.

The term social is covered by a social function (Júnior, 2005) synonymous with the expression of social well-being, social utility, social interest, social purpose. These synonyms corroborate the social maxim regarding the protection of property due to the productive use of goods, the increase in production and wealth, in harmony with the idea of prosperity.

The property that fulfills the social function must necessarily fulfill all its dimensions, in this context, the environmental function of the property reflects the environmental dimension of the social function of the property, therefore, the environment must be appropriated in a sustainable way to promote

the quality of life in any property.

The environmental function of property refers to the responsibility of property owners to protect and preserve the environment. It recognizes that private property must not be exercised in a way that causes environmental damage, but rather in a way that promotes sustainability and the conservation of natural resources.

In his criticism of the lack of knowledge of the environmental function of property in Brazilian doctrine, Benjamin (2003) states:

Given that there is, in fact, such a lack of adequate treatment of the social function of property in our current legal practice, it is not surprising that the socio-environmental function of property is not known, as it has been a late development – legislatively, doctrinally and jurisprudentially – of the former. However, it must not be this way: few constitutions link the social function and the environment as closely as the Brazilian one.

The definition of environment, contemplated by Brazilian legislation, consists of a set of actions that aim at active participation in the defense of the environment, in this step, article 3, I of Law 6.938/1981 states “environment, the set of conditions, laws, influences and interactions of physical, chemical and biological order, which allows, shelters and governs life in all its forms”.

Environmental property is based on the idea that property owners have an obligation to act responsibly with respect to their land and natural resources, taking into consideration, the environmental impacts of their activities. This responsibility is based on the notion that the environment is a common good and that everyone has the right to enjoy a healthy and balanced environment.

METHODOLOGICAL PROCEDURES

The study uses a deductive and documentary methodology, prepared through a bibliographic review of the most relevant subjects applied to the conceptual framework. The study is limited to the concept of urban property, seeking to analyze the existence of obligations to comply with a set of civil standards to fulfill the social function established in the Federal Constitution. In this step, we evaluate the environmental dimension of this social function that shelters and governs life in all its forms.

Finally, the concept of urban property and its environmental dimension in the social function of property were analyzed and the potential parties responsible for ensuring the suitability of urban property to implement a relevant role in combating climate change were identified.

RESULTS AND DISCUSSION

From the legal system, we can see that property is a right guaranteed under the foundation of fundamental guarantees and in the economic order. The constitutional text states:

Article 170: The economic order, based on the valorization of human work and free initiative, aims to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles:

(...)

II - private property;

III - social function of property;

The guarantee of the right to property is linked to the fulfillment of specific obligations based on urban development to meet the social function of property. These constitutional objective requirements consist of:

Article 182. The urban development policy, implemented by the municipal government, in accordance with general guidelines established by law, aims to organize the full development of the city's social functions and ensure the well-being of its inhabitants.

§ 1° the master plan, approved by the City Council, mandatory for cities with more than twenty thousand inhabitants, is the basic instrument of the urban development and expansion policy.

§ 2° Urban property fulfills its social function when it meets the fundamental requirements for organizing the city expressed in the master plan.

Finally, the consequences of non-compliance with the social function of property were also contemplated by the constitutional text, as follows:

Article 182 (...)

§ 4° the municipal government may, by means of a specific law for an area included in the master plan, require, in accordance with federal law, that the owner of undeveloped, underutilized or unused urban land promote its adequate use, under penalty of, successively:

I - compulsory subdivision or construction;

II - tax on urban property and land progressive over time;

III - expropriation with payment by means of public debt securities issued previously approved by the Federal Senate, with a redemption period of up to ten years, in annual, equal and successive installments, ensuring the real value of the compensation and legal interest.

The master plan is the instrument prepared by the Executive Branch with the participation of society and approved by the municipal Legislative Branch, in which it defines the objectives of each territorial zone of the municipality to guide all public and private

activities that interest or affect society.

The property that complies with the discipline of the municipal master plan fulfills the social function of the property. However, we have found that the master plan is normally a technical instrument that organizes the urban expansion of society through land zoning.

To consider the full fulfillment of the social function of the property, especially with regard to the environmental function, it is necessary to take a critical look at each property individually.

The owners have the responsibility to sustainably preserve the natural resources present on their properties, adopting interventions that consider the exercise in the enjoyment of the rights of use and balanced enjoyment with sustainability. Adopting measures to avoid pollution and minimize the negative impacts of their activities on the environment is the fundamental premise for fulfilling the environmental dimension of the property.

Furthermore, it is the duty of property owners to comply with environmental laws and regulations to protect the environment, through the necessary licenses and authorizations to ensure environmental quality standards and compliance with environmental protection standards.

The environmental function of property aims to balance the rights of property owners with the need to protect the environment and ensure long-term sustainability.

It is a concept based on the idea that private property must not be exercised in a way that is harmful to the environment, but rather with the responsibility of preserving natural resources and ensuring the quality of the environment in which one lives.

Although the Federal Constitution ensures freedom and property as a fundamental right, the constitutional rules themselves impose

limits on these fundamental guarantees by providing that property has a social function, and its environmental dimension must be understood.

In the words of Attanásio Júnior (2005), we have:

Thus, when it is said that the social and environmental function of property is a legal principle, it means that there must be no doubt as to the fulfillment of the social and environmental function by the holder of the property right in order to protect the environment in the best possible way; that the rules must be interpreted in accordance with the dictates of this principle, that is, the owner, whether public or private, is required to exercise his right to property, not only according to his own interests, but also for the benefit of the quality of life of the entire community, and it is the fulfillment of the social and environmental function of property that legitimizes the exercise of the right to property by the owner.

Equalizing rights and principles are a function of Law, of the legal sciences that, through legal institutes, interpret the application of the law. In this step, legal principles serve as a parameter for interpreting the normative system, establishing the coherence of the system as a mandatory norm.

As it was already noted above, it can be understood that there is no talk of absolute rights in the national legal system, especially in the face of an apparent conflict of rights, legal science itself in the application of the law seeks support in the theory of weighing up of principles.

Corroborating the subject, Prof. Ricardo Martins (2020) teaches:

Neoconstitutionalism, especially the theory of balancing, presents another answer. The Constitution contains values that are explicitly and implicitly enshrined; it is up to the legislator to identify these values and establish, on an abstract level, means of implementing them. To do so, the legislator must weigh up the constitutional

values: the prohibition of a conduct restricts freedom, and this restriction is only valid to the extent that it proportionally satisfies another constitutional value; the imposition of a prison sentence further restricts freedom and requires proportionally greater satisfaction of another constitutional value. For example, the protection of life (P1), a value enshrined in the Constitution, justifies the prohibition of killing and the imposition of a custodial sentence on anyone who violates it (P2). Thus, a conduct is prohibited in view of the result of the weighing of constitutional principles carried out by the legislator. Every law, to be valid, must respect proportionality, that is, it must adequately weigh up the constitutional values.

The understanding of the social function of property is categorical in the constitutional plan, in turn, the dimension of the environmental function of property is inseparable from the social function, reflecting the purpose of well-being of the Brazilian State attributed to property.

Urban properties can ensure compliance with the environmental function of property through several actions, we present an exemplary list, namely:

- a) Energy efficiency: adopt measures to improve the energy efficiency of their properties, aiming to reduce energy consumption and greenhouse gas emissions. This may involve the installation of efficient lighting systems, adequate thermal insulation, use of renewable energy and energy conservation practices;
- b) Waste management: adopt adequate waste management practices on their urban properties. This includes the implementation of selective collection systems, the promotion of recycling, the correct disposal of solid and liquid waste, and the reduction of waste;
- c) Water conservation: use water responsibly,

implementing conservation practices such as installing water-saving devices, reusing rainwater and monitoring water consumption;

- d) Pollution control: adopt measures to minimize pollution from urban properties. This may include preventing air, soil and water pollution, properly managing hazardous chemicals, adopting effluent treatment systems and reducing pollutant emissions;
- e) Preservation of the urban environment: property owners have the responsibility to contribute to the preservation of the urban environment, respecting the architectural and historical characteristics of buildings, promoting urban landscaping and the creation of green areas, and participating in initiatives to revitalize public spaces.

In environmental law, the constitutional text assigns the responsibility to the Public Authorities and the Community to ensure the preservation of the environment for present and future generations.

The infra-constitutional legislation mentions the objective liability of the polluter for activities that cause environmental degradation, in addition the National Environmental Policy, established by law 6,938/1981, provides:

Article 4: The National Environmental Policy shall aim to:

(...)

VII - impose on the polluter and predator the obligation to recover and/or compensate for the damages caused and, on the user, the contribution for the use of environmental resources for economic purposes.

Article 14 - Without prejudice to the penalties defined by federal, state and municipal legislation, failure to comply with the measures necessary to preserve or

correct the inconveniences and damages caused by the degradation of environmental quality shall subject the offenders to:

(...)

§ 1 - Without preventing the application of the penalties provided for in this article, the polluter is obliged, regardless of the existence of fault, to compensate or repair the damages caused to the environment and to third parties affected by its activity. The Public Prosecutor's Office of the Union and the States shall have the legitimacy to file a civil and criminal liability action for damages caused to the environment.

§ 2 - In the event of omission by the state or municipal authority, the Secretary of the Environment will be responsible for applying the financial penalties provided for in this article.

The rule imposes objective liability on the polluter to repair environmental damages, noting that the polluter is the individual or legal entity, under public or private law, directly or indirectly responsible for an activity that causes environmental degradation.

In principle, we can see that environmental liability falls primarily on the owner of the property that fails to fulfill its environmental function.

Therefore, it is worth noting Machado's (2003) definition of environmental liability:

Objective environmental liability means that anyone who damages the environment has a legal duty to repair it. The damage/repair binomial is therefore present. The reason for the degradation is not asked in order to have the duty to compensate and/or repair. Liability without fault applies to compensation or repair for "damages caused to the environment and to third parties affected by the activity" (article 14, §1, of Law 6.938/81).

Meanwhile, environmental liability has a dual function: the preventive function that seeks to avoid damage and the restorative

function that reconstitutes or compensates for losses that have occurred (MACHADO, 2003).

In the preventive sense of environmental liability, the Government has the duty to defend and preserve the environment. The State's responsibility consists of preventing or mitigating environmental risks.

The Government's failure to take preventive and control actions in compliance with urban planning actions, project licensing and measures necessary to mitigate vulnerabilities in order to prevent the occurrence of disasters, generates liability for the Government.

In view of the above, it can be concluded that the historical transformation of the

concept of property has succeeded in assigning property a social function, through prerogatives and obligations, in favor of an ecologically balanced environment.

The environmental function of property, encompassed by the social function of property, consists of the responsibility of owners to enjoy the property in a way that meets urban, civil and environmental standards.

The responsibility for ensuring compliance with the social and environmental function of the property falls to the owner, subsidiarily to the Public Authority due to the duty of prevention in mitigating environmental risk.

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