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THE PROCESS OF TRANSITION FROM PUBLIC TO PRIVATE OWNERSHIP AND POSSESSION IN BRAZIL: AN ANALYSIS OF THE LEGAL-NORMATIVE FRAMEWORK

O PROCESSO DE TRANSIÇÃO DA POSSE E DA PROPRIEDADE PÚBLICA PARA PRIVADA NO TERRITÓRIO BRASILEIRO: UMA ANÁLISE DO ARCABOUÇO JURÍDICO-NORMATIVO

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RESUMO

O artigo busca compreender o processo de transição da posse e da propriedade enquanto bem público e coletivo para posse e propriedade privada. Para isso, apresentam-se como objetivos a descrição histórica da ocupação do território brasileiro e a construção do conjunto normativo da posse e da propriedade enquanto direito no ordenamento jurídico. O método de abordagem utilizado é o dedutivo. Como técnica de abordagem, utiliza-se a revisão teórico-bibliográfica interdisciplinar, com suporte da historiografia jurídica, a fim de analisar a história social da posse e da propriedade no sistema legal brasileiro, além da abordagem legal-normativa com enfoque analítico-crítico. Ao final, conclui-se que o conceito de posse e de propriedade, inicialmente pautado por uma dimensão coletiva, conforme o primeiro regime fundiário (sesmarias), transformou-se em um direito de posse e de propriedade privada, próprios do mercado econômico.

Todavia, essa visão mostra-se excludente porque desconsidera as demais formas coletivas de uso da terra.

Palavras-Chave: Posse. Propriedade. Bem Coletivo. Direito Excludente.

ABSTRACT

This article seeks to understand the process of transition from public and collective possession and property to private possession and property. To this end, the objectives are the historical description of the occupation of Brazilian territory and the construction of the normative set of possession and property as a right in the legal system. The approach used is deductive. The technique used is an interdisciplinary theoretical-bibliographical review, supported by legal historiography in order to analyze the social history of possession and property in the Brazilian legal system, as well as a legal-normative approach with an analytical-critical focus. In the end, it is concluded that the concept of possession and property, initially based on a collective dimension, according to the first land regime (sesmarias), was transformed into a right to private possession and property, typical of the economic market. However, this view is exclusionary because it disregards other collective forms of land use.

KEYWORDS: Possession. Property. Collective Good. Exclusionary Right.

INTRODUCTION

The normative study on property in the Brazilian legal system is intertwined with the historical construction of tenure, since it was the first form of land concession and use, besides characterizing the way in which the territory was occupied since the colonial period.

The relevance of discussing the process of transition from public ownership - and possession - to private property is supported by the existing relationship between human beings and land. The land good, in this context, is characterized as essential to the survival of all species, because it gives identity to the individuals who inhabit these territories, such as indigenous peoples, quilombolas and squatters. Likewise, the other element of this relationship,

individuals, understands the earth from a social and collective vision, on which it develops its activities.

The normative evolution of property right, product of the process of occupation of Brazilian lands, defined the owner as that which follows from a title, and the squatter as that which has in fact the exercise, full or not, of some of the powers inherent to the property (arts. 1.196 and 1.228, both of the CC).

It is observed, therefore, that both are conceptualized as individual rights and destined to the market. At this point, it lies the problem of the present work: the need to investigate the process of transition of land use in the Brazilian territory in a collective-public conception for the individual and absolute concept of private ownership and property, that prevails in the legal system.

The proposed investigations were carried out by the deductive approach method. As an approach technique, it is used the interdisciplinary theoretical-bibliographical review, with the help of legal historiography, through which we have the contribution on the social history of possession and property in the legal system, and legal-normative, inserting in the critical analytical perspective.

Thus, once such points are delimited, it is necessary to examine the history of the Brazilian land that, in this work, was organized into three periods that correspond to the chapters: the possession of lands in Brazil colony and the implementation of private property in Brazil; the land regime in the republic and after re democratization; and possession in the civil code: relationship with property right.

1 LAND OWNERSHIP IN COLONIAL BRAZIL AND THE IMPLEMENTATION OF PRIVATE PROPERTY IN BRAZIL

The possessory right in the Brazilian legal system began at the time of Brazil colony, with the sesmarian regime. This system was created in Portugal in 1375, by D. Fernando I, and it had as its objective the regulation of distribution of communal lands destined to agricultural production (Lima, 2002).

It should be noted that in the Colony, the sesmarias[1] were destined for the occupation of uncultivated land, because men did not work it. The sesmaria was a way to force the owner to produce the land (Marés, 2003). Already in the colony of Brazil, the sesmarias were aimed at occupying territories not yet inhabited, so that the law of sesmarias became a set of legal norms to solidify colonization,

[1] Sesmarias vem do latim caesinae cuja tradução significa cortes ou rasgões na superfície da terra (Silva, 2008).

configuring itself as an instrument of force of the Crown over its colonized (Motta, 2012).

The sesmarian period of Brazil was marked by the edition of several norms, such as the Provision of October 20th of 1753; the Decree of December 10th of 1796; the Decree of June 22nd of 1808; and the Alvará of 1795. The first laws of the Sesmarias, the Ordinations of the Kingdom, did not specify the dates of their concessions. However, after detecting that large plots of land were concentrated in the hands of the relatives of the donataries, the Crown adopted measures to restrict the areas to be granted. Only at the end of the 18th century limitation become an obligation, as it was an instrument to prevent land conflicts (Motta, 2012).

In the normative set of the sesmarias, it is worth highlighting the Permit of 1795, because it signaled the end of this regime. The 1795 License established requirements for the concession of sesmarias, such as the delimitation of land and the implementation of a mechanism to monitor and fix a league of lands as maximum extension for concessions near urban centers, what are indications of similarity with the institute of possession (Varela, 2005).

It is true that the law has established a scenario of political instability between the interests of the metropolis and the local elite in view of the possibility of losing the political and economic power that large areas of land confer on them. This circumstance led to the suspension of the Permit of 1798 by the Decree of December 10th of 1796 (Smith, 1990).

The normative instrument that put an end to the sesmarian regime was the Resolution of June 17th, 1822, which, in the view of Lima (2002, p. 48), "sanctioned only a fait accompli: the institution of the sesmarias had already rolled out of the orbit of our social evolution". Add to this the fact that the sesmarias regime was extinguished without the definition of another form of land occupation (Silva, 1996).

After the extinction of the sesmarias regime, a period of absence of legal regulation about land appropriation in Brazil began that remained until the promulgation of the Law of Lands. During this time span, between 1822 and 1850, there was the strengthening of the possession institute as a legitimate means to be on land and make it their livelihood (Lima, 2002).

It is important to note that at that time there was no interest for a new land regulation to be created, since the permanence of land ownership and the use of

slave labor favored the landowner who could continue to take possession of the lands indiscriminately, in the way that occurred in the regime of the sesmarias.

The Constitution of 1824 merely mentioned that the right to property would be guaranteed in its entirety, making it clear that there was no state control over land distribution from that moment on (Silva, 1996)[2].

The land, as property in the legal system, was thus characterized only with the Law of Lands (Brazil, 1850). Under this Law, title is the element that establishes ownership. This imposition closed the conception that possession (use/cultivation) could legitimize the use of land as property, just as it occurred in the sesmarias regime (Silva, 1996; Varela, 2005).

The Law of Lands was published during the period when slave labor was in decline and at the time of coffee expansion (Varela, 2005). The break with slavery in the producing regions of sugar cane in the Caribbean corroborated for that the Brazilian sugar reintegrated to the market in Europe, being sold for a cheaper price due to the exploitation of slave labor that now competed for space with other forms of work with higher costs (Smith, 1990).

In addition, Brazil has violated a trade agreement signed in England, in the context of which the English state promulgated the document called Aberdeen Act that authorized the British to monitor the Atlantic Ocean, so as to verify the existence of ships destined for the being able to destroy or imprison them (Sodré, 1968).

The Law of Lands, besides representing a historical period of replacement of slave labor for wage labor, presented as characteristic the absolutization of the land. Thus, the only way to acquire it is through the purchase[3].

Thus, it turns out that the Law of Lands was a will of the State, and not of the farmers, because there was a need to regain control over the vacant lands[4], here understood as those that should have been returned to the Crown for non-compliance with the requirements required by the regime of the sesmarias, whose destination was the land market of the Brazilian Empire (Smith, 1990).

[2] Constituição de 1824: "Art. 179. A inviolabilidade dos Direitos Civis e Políticos dos Cidadãos Brasileiros, que tem por base a liberdade, a segurança individual e a propriedade, é garantida pela Constituição do Império, pela maneira seguinte. XXII – É garantido o Direito de Propriedade em toda a sua plenitude. Se o bem público legalmente verificado exigir o uso e emprego da Propriedade do Cidadão, será ele previamente indenizado do valor dela. A Lei marcará os casos em que terá que lograr esta única exceção, e dará as regras para se determinar a indenização" (Brasil, 1824).

[3] Art. 1º: "Ficam prohibidas as acquisições de terras devolutas por outro título que não seja o de compra" (BRASIL, 1850).

[4] Para Marés (2021, p. 82) terra devoluta "[...] não quer dizer terra desocupada, mas terra sem direito de propriedade definido, é um conceito, uma abstração, uma invenção jurídica" [...].

In the period after the edition of the Law of Lands, the duty of supervision of lands by the State presents a new treatment, very different from that observed in the time of the sesmarian system. This is because the State begins to discriminate and demarcate its land - vacant land - on its own initiative, whereas in the previous regime, the identification of land was the responsibility of the private owner (Varela, 2005).

However, the Law of Lands did not prevent possession from continuing to be used as a form of land acquisition. Possession was still an instrument of legitimization for the use of land by both squatters and landowners. Possession was a custom contrary to the mens legis of the new legal regulation in force in the country (Lima, 2002).

The political will to prevent people from becoming landowners by using land stems from the conservative doctrine inspired by Edward Wakefield, according to which, "[...] the unoccupied lands should have a 'sufficient price' to discourage free workers from acquiring them [...], that is, the release of land would mean the production [...] more expensive" (Mares, 2021, p. 84).

In this scenario, the free working classes did not have sufficient purchasing power to acquire land if the state sold it (the vacant land). This is because the land ownership was inaccessible to the poor worker and, in return, this worker would sell his labor in companies (Marés, 2021).

During the Law of Lands it was published the Regulation of 1854, which established the Vicar's Register. This rule introduced changes that changed the way of land regularization allowing squatters and sesmeiros "demarcate their lands according to law, so that the State would discriminate against their own lands" (Smith, 1990).

This favored the failure to comply with the duty of demarcation of land and perpetuated the illegal possession by landowners because, in practice, the Registry of the Vigário, differently from the initial destination, became a proof of land ownership (Linhares and Teixeira, 1999). The large land squatters, because they had more economic conditions, began to register in their own name the occupations of small squatters; real estate were registered with dates before 1850 and, In addition, many counties omitted information about the existence of vacant lands (Smith, 1990; Silva, 1996).

Thus, the elasticity of the probative value of the documents of the Vicar's Registry favored, significantly, the situation of the large squatters who remained to use possession as a way of acquiring land, especially because the extensive

areas were fundamental for the preservation of monoculture agriculture and extensive livestock that characterized the Brazilian economy at that time.

It should be noted that the acquisition by the landowners was also guaranteed by the Land Law itself, since its article 8º[5] It was not necessary to take away the penalty of comisso to the squatters who proved the cultivation in the land, that is, in these cases, it was not necessary to speak about vacant lands (Silva, 1996). This rule favors the action of the large squatter, because the expansion of his agricultural or livestock activity is used as evidence and foundation of the cultivation necessary to maintain the possession of a certain area, not being relevant to public institutions of the time if the use of these lands was preceded by occupations of small groups of farmers.

In short, the land structure was marked by the formation of latifundium - areas of unproductive extension and under the power of a small group of people -, as well as the figure of the burglar who regularized the titles of land ownership through the falsification of documents and registered them with the approval of the officers of the notaries (Martins, 1996).

It is important to note that the Empire did not succeed in breaking the action of landowners in using possession as a means of acquiring land already occupied by small producers or public lands, even though this measure was prohibited by legislation. The Law of Lands was used as an instrument of land concentration.

2 THE LAND REGIME IN THE REPUBLIC AND AFTER REDEMOCRATIZATION

The legislation that succeeded the Law of Lands was the Decree 451-B of 1890, drafted by Rui Barbosa, which instituted the Torrens Registry. The aim of this registry was to provide more security for mortgages and land deals, given the situation in the real estate market due to the lack of revalidation of the sesmarias and legitimization of possession, as well as the continuity of the land grabbing process when the Law of Lands was in force (Silva, 1996). The Torrens Registry is currently in force in the legal system through the Law of Public Records of 1973.

During the Old Republic, the Civil Code of 1916 was promulgated, which restored the legal figure of possession through the objective theory of Ihering, according to which "factual possession, in the Brazilian civil law, is that which is

[5] Art. 8º Os possuidores que deixarem de proceder à medição nos prazos marcados pelo Governo serão reputados cahidos em commisso, e perderão por isso o direito que tenham a serem preenchidos das terras concedidas por seus titulos, ou por favor da presente Lei, conservando-o sómente para serem mantidos na posse do terreno que occuparem com effectiva cultura, havendo-se por devoluto o que se achar inculto (Brasil, 1850).

tame and peaceful, in good faith and with a proper title [...]" (Paolielo, 1992, p. 4).

Government of Getúlio Vargas (1930-1945) launched the March to the West, which aimed to expand agriculture and colonize the interior of Brazil. Although the purpose of the March to the West was to boost agricultural production in the consolidated latifundium, the result of the movement affected the regions inhabited by indigenous people and squatters who practiced farmland agriculture based on a surplus economy that did not resemble the market economy intended by the government program (Martins, 2018).

In this way, the March to the West meant a policy in favor of the small rural producer through the creation of agricultural colonies. The colonization project served to get peasants, squatters and indigenous people to work on the land, paving the way for its valorization as an element of the capitalist market, only to be expelled by land grabbers at the behest of the landowners who held power (Martins, 2018; Mesquita, 2001).

The next period and government in Brazil that had an impact on the agrarian debate was that of Juscelino Kubitschek (1946-1951). Government of Kubitschek was marked by a dispute between two political sectors, one conservative and ruralist and the other seeking national development based on industrialization (Moreira, 2003).

The new government abandoned the policy of agricultural colonies and began to promote the development of the interior. In the 1950s, the project to build the new federal capital in the middle of the savannah of the state of Goiás began. At the same time as Brasília was being conceived, numerous federal highways were built, such as the Transbrasiliana, also known as BR-153. The intention was to connect Brasília to the rest of the country.

During this period, the construction of Brasília was fundamental to the development of the existing pact between the rural and industrial sectors, as it represented the development of capitalist production in these regions, while at the same time making it possible to take advantage of the land market that its construction would provide (Moreira, 2003).

It should be noted that, despite the developmentalist concept, Juscelino Kubitschek did not regulate the process of land occupation or create a system to protect the peasantry. Wherever the highways passed, numerous agrarian conflicts arose, because the peasants who had settled in these regions were expelled. This was due to "land speculation, land grabbing, the formation of new

latifundium, the strengthening of large property and countless ethnic, social and land conflicts" (Moreira, 2003, 187).

Under government of João Goulart (1961-1964), we saw a breakthrough for rural workers with the enactment of the Statute of Rural Workers in 1963, through which they were given equal status with urban workers, which also meant the opening up of unions for workers in the countryside (Machado, 2017).

During the military government, precisely in the first year, the draft agrarian law from government of João Goulart was modified and the Land Statute, Law No. 4,504 of 1964, and the Constitutional Amendment No. 10 were enacted, which altered some constitutional provisions relating to land policy.

These normative acts, especially the Land Statute, represented innovations in the regulation of the Brazilian agrarian question. Article 4 of the Land Statute defines latifundium, minifundia, rural enterprises, among other concepts. It also contains the concepts of Agrarian Reform, Agricultural Policy and the Social Function of Land (articles 1 and 2). Constitutional Amendment 10 regulates the procedure for expropriation in the social interest for the purposes of the Agrarian Reform and provides for the payment of compensation in public debt securities.

Although the legal institutes defined in the Land Statute and the Constitutional Amendment No. 10 were innovative for the agrarian question, they perpetuated the conservative policy of the military, since there was a belief that the Agrarian Reform was necessary for the implementation of the modern model of agricultural expansion according to the logic of the capitalist market and, for this purpose, the new legislation was used (Palmeira, 1989).

The Land Statute also had the effect of shifting the struggle for land into the hands of the State. The enactment of the Statute of Workers (1963), which gave rural workers social recognition, and the Land Statute (1964), which legitimized the direct action of the State in the countryside, led to peasants becoming the specific object of public policies, "creating conditions for the emptying of the functions of mediation between peasants and the State, until then exercised by large landowners or their organizations" (Palmeira, 1989, p. 101).

In this way, the modernization spread during the military regime further underpinned the existence of latifundium, consolidating the problem of land concentration in the country and the situation of misery and oppression in the countryside. Furthermore, this technological model represented an act of violence against peasants, indigenous people and traditional communities "whose

existence and experience were denied, wasted and often extinguished by power structures" (Escrivão Filho, 2013; Sousa Júnior, 2016-b).

In these terms, the military regime legitimized the political control of the rural oligarchy, the landowners and the concentration of land, which further enhanced the expropriation and exploitation that, in the sociologist's view, are the characteristics of the Brazilian agrarian history (Martins, 1980).

The Federal Constitution of 1988 was drafted in such a way that various rights, guarantees and public policies were protected. Among the topics discussed during the drafting of the new constitutional text was the struggle of social movements for land and Agrarian Reform, important points for this study, as the aim was to revive the concept of possession and property as social rights through the redistribution of land.

3 POSSESSION IN THE CIVIL CODE: RELATIONSHIP WITH THE RIGHT TO PROPERTY

In the context of legislation on possession, it is worth highlighting the Civil Code of 2002, which, like the Civil Code of 1916, adopted the Objective Theory of Possession of Rudolf von Ihering[6]. According to this theory, a possessor is one who acts with the appearance of being the owner, even if there is no intention of being the owner. In fact, what matters to Brazilian civil legislation is being in possession of the property (Pereira, 2013).

In the view of Pontes Miranda (2012, p. 124), "possession, when considered as a legal fact, is the source of rights, claims, duties, obligations, actions and exceptions of a possessory nature. So, we have to talk about the factual support of possession, which is the factual power over the thing, and its entry into the legal world". The Civil Code attributes the title of possessor to anyone who exercises some of the powers inherent in property, defined as the faculty to use, enjoy and dispose of the thing, the right to recover it from anyone who unjustly possesses or detains it (article 1228).

In this sense, possession is the manifestation of ownership, being the means by which the owner exercises his power over the thing, his right of ownership. Possession is a mere externalization of ownership and it is linked to the right to property. Thus, possession can be understood as indirect, identified by the

[6] Pontua-se que, para além da teoria objetiva, também existem a subjetiva (Savigny) que pressupõe o corpus, elemento material de posse, poder físico sobre a coisa, e o elemento subjetivo. Além delas, nos últimos tempos tem-se discutido acerca da teoria sociológica da posse, que tem como expoentes Silvio Perozzi, Raymond Salielles e por Antônio Hernandez Gil. Conforme esta teoria a posse tem a função social enquanto direito.

person who owns the property but does not have the thing, and direct possession, having the thing but not being the owner.

It so happens that the distinction made between possession and property in the way that the Civil Code of 2002 provides for should not prosper, since possession is an attributive form of giving use to things linked to the inherent needs of human beings, serving as a human and social support, whereas property itself is empty and depersonalized (Fachin, 1988). Thus, from the point of view of facts and externalization, there is no fundamental distinction between owner and non-owner possessors (Fachin, 1988).

It is against this backdrop of the link between possession and the right to property that we can find the basis for the actions of various state bodies, such as the Judiciary, which, in possessory actions, understand the possession exercised by people who are not the owners, tenants, employees or have any other link supported by a contract, as a practice of dispossession of rural property, and are automatically subject to compliance with a court order to remove themselves from the land (Tárrega, Maia and Ferreira, 2012).

For this reason, and because of the various ways in which squatters, peasants, indigenous peoples and traditional communities have been evicted from their land on the basis of their title deeds, the concept of rural property ownership requires specific legal rules that are detached from the idea of ownership. The social movements fighting for land, in the view of Paulo Torminn Borges (1998, p. 125), changed "the civilist angle by which domain and possession were defined, altered the importance of these two legal institutes, riding on the idea of land use".

The link between possession and ownership was built up over the course of the legislative changes that governed the Brazilian territorial system. José de Souza Martins (2018) describes this premise when he says that in the sesmarias regime, the first land of laws of Brazil, useful possession was separated from ownership, so that the sesmeiro who failed to fulfill the duties of cultivating the land had to return it to the Crown[7]. Furthermore, the author points out that "even today, when a squatter in the Amazon justifies his right to the land, he does so by invoking the right that would have been generated by working the land"

[7] Na história do ordenamento jurídico sobre o território brasileiro, a posse entendida como costume remonta ao período das sesmarias, como nos lembrou José de Souza Martins. Mas, na construção do sistema de terras no mundo, a garantia da posse como costume era a lei da época medieval, época em que, por meio de um título de posse, o servo e sua descendência poderiam permanecer na terra e usá-la por toda vida (Huberman, 1985, p. 12-18).

Therefore, the transition of land use from a collective perspective to a model of private appropriation reflects a historical and normative process that has transformed territory into a market product, moving away from the collective and community dimension that characterized the first Brazilian land regime, the sesmarias, based on the cultivation and use of the land, i.e. possession.

This evidence demonstrates the need to re-evaluate the importance of land in the social and legal context, in order to balance individual rights of ownership and possession with the existence of collective forms of understanding the good of the land.

FINAL CONSIDERATIONS

The purpose of this article is to investigate the process of transition from public ownership and possession to private ownership and possession in the Brazilian legal system. It is important to note that the study of property as a legal institute is associated with possession, because the latter, previously known only as use/concession, was the first way of using the land.

At this point, the historical, social and legal knowledge of the occupation of Brazilian territory also comes into play, because, as a colony, the rules that dealt with the use of land were incorporated from Portuguese law. For example, we have the law of the sesmarias, according to which cultivation was a requirement for the use of the property.

Thus, historically, possession was the way in which land was distributed, and at that time (the sesmarias regime) there was no discussion about the existence of title as a formal instrument guaranteeing individuals the right to remain there and enjoy it. Furthermore, the idea of granting sesmarias was not linked to the use of land, but rather to the concept of conquering a territory that was already occupied by the original peoples.

In order not to lose control of the occupation of Brazilian territory and to adapt to the European mercantilism, the decision was made to recognize property as an individual right represented by the title, so that the legal system did not allow the transfer of public land to private individuals (Law of Lands).

Land, therefore, became a private property right, measured economically, based on contracts, such as buying and selling, while the duty of cultivation - understood as possession - lost its force in the legal system. In this way, we can see that individual and absolute property in the Brazilian legal system comes

from the process of transitioning land from the public domain of the Portuguese Crown to land as an individual right.

The individualistic constitution of property has removed the concept of land as an essential asset for human life, characterizing it as a complex legal relationship. This is justified because property, from a modern perspective, represents different interests, because while for the market property means economic power, for rural people it represents a vital element for human survival.

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