



B1

ISSN: 2595-1661

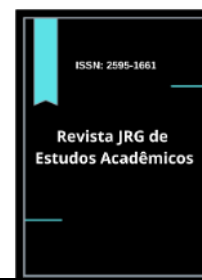
ARTIGO DE REVISÃO

Listas de conteúdos disponíveis em [Portal de Periódicos CAPES](#)

Revista JRG de Estudos Acadêmicos

Página da revista:

<https://revistajrg.com/index.php/jrg>



Dynamics of Modern Property in Brazil: social function, land regularization, and challenges for effectiveness

Dinâmicas da Propriedade Moderna no Brasil: função social, regularização fundiária e desafios para efetividade

DOI: 10.55892/jrg.v7i15.1369

ARK: 57118/JRG.v7i15.1369

Recebido: 10/06/2024 | Aceito: 30/07/2024 | Publicado *on-line*: 01/08/2024

Leonardo Matheus Barnabé Batista¹

<https://orcid.org/0000-0003-2875-3787>

<http://lattes.cnpq.br/1566159634562298>

Universidade Federal do Tocantins, TO, Brasil

E-mail: prof.leonardomatheus@gmail.com

Lucas Barbosa e Souza²

<https://orcid.org/0000-0001-7957-088X>

<http://lattes.cnpq.br/8310303536103062>

Universidade Federal do Tocantins, TO, Brasil

E-mail: lbsgeo@uft.edu.br

Jéssica Painkow Rosa Cavalcante³

<https://orcid.org/0000-0002-6325-5735>

<http://lattes.cnpq.br/4024280261959707>

Universidade Estadual do Tocantins, TO, Brasil

E-mail: jessica.pr@unitins.br



Resumo

Este artigo aborda a evolução da propriedade moderna no Brasil em três partes distintas. Inicialmente, examina-se o surgimento da propriedade moderna no contexto dos fenômenos codificadores ocidentais, destacando sua fundamentação liberal e o embate em torno do conceito individualista de coisa. A segunda parte centra-se na ideia de função social da propriedade na Constituição Federal Brasileira, destacando a mitigação do caráter absolutista da propriedade. O Estatuto da Terra de 1964 é identificado como um marco legal que introduziu requisitos para o cumprimento da função social da propriedade da terra. A terceira seção analisa o direito de propriedade como efetividade, concentrando-se na política de regularização fundiária. Examina a construção dos direitos das comunidades tradicionais e questiona a adequação das categorias jurídicas atuais à garantia efetiva desses direitos, considerando o novo constitucionalismo latino-americano e a perspectiva socioambiental. A conclusão

¹ Ph.D. candidate in Environmental Sciences at the Federal University of Tocantins (UFT). Holds a Master's degree in Agrarian Law from the Federal University of Goiás (UFG). Bachelor of Law from the Catholic University Center of Tocantins (UNICATOLICA). Specialized in Civil Law and Civil Procedure (UNICATOLICA) and in Philosophy and Theory of Law (PUC-MG). Currently a professor at Faculdade de Palmas (FAPAL). Professor at the State University of Tocantins (UNITINS). Lawyer, OAB-TO.

² Ph.D. and Master's degree in Geography (Spatial Information Analysis) from São Paulo State University "Júlio de Mesquita Filho" (UNESP), Rio Claro Campus. Postdoctoral research (2018) in Geography at the Federal University of Goiás (UFG). Full Professor at the Federal University of Tocantins (UFT).

³ Ph.D. in Public Law from the University of Vale do Rio dos Sinos (UNISINOS). Master's degree in Human Rights from the Federal University of Goiás (UFG). Bachelor of Law from the Pontifical Catholic University of Goiás (PUC-GO). Specialized in Agrarian Law and Agribusiness (FACAB) and in Civil Law and Civil Procedure (UCAM). Professor at the State University of Tocantins (UNITINS). Lawyer, OAB-TO.

destaca a tensão entre o individualismo consagrado na propriedade e as demandas sociais, apontando para a necessidade de uma revisão profunda dos paradigmas vigentes e um compromisso renovado com a justiça social na implementação efetiva dos direitos conquistados legalmente.

Palavras-chave: Propriedade Moderna. Função Social. Regularização Fundiária.

Abstract

This article addresses the evolution of modern property in Brazil in three distinct parts. Initially, it examines the emergence of modern property in the context of Western codifying phenomena, highlighting its liberal foundation and the debate surrounding the individualistic concept of ownership. The second part focuses on the idea of the social function of property in the Brazilian Federal Constitution, emphasizing the mitigation of the absolutist nature of property. The 1964 Land Statute is identified as a legal milestone that introduced requirements for the fulfillment of the social function of land property. The third section analyzes property rights as effectiveness, focusing on land regularization policy. It examines the construction of the rights of traditional communities and questions the adequacy of current legal categories for the effective guarantee of these rights, considering the new Latin American constitutionalism and socio-environmental perspective. The conclusion highlights the tension between individualism enshrined in property and social demands, pointing to the need for a profound revision of existing paradigms and a renewed commitment to social justice in the effective implementation of legally acquired rights.

Keywords: Modern Property. Social Function. Land Regularization.

1. Introduction

The discussion surrounding modern property in Brazil is inherently linked to the unfolding of Western codifying phenomena, solidifying itself under a state perspective rooted in liberal principles. In this context, possession has emerged as a central theme, necessitating the defense of the individualistic concept of ownership and sparking debates on belonging in the modern approach of the 19th century. Modern property and individualism have converged, adopting contours shaped by a liberal bias, wherein the construction of property manifests through the concept of subjective rights, intertwining with the idea of individual sovereignty outlined by the social contract.

This article aims to explore this complex scenario in three distinct parts. Firstly, the instauration of modern property in Brazil will be examined, highlighting its emergence and consolidation amidst the foundations of contemporary legal thought. Subsequently, the idea of the social function of property in the light of the Brazilian

Federal Constitution will be addressed, analyzing how legal provisions evolved to mitigate the absolutist view of property, culminating in the enactment of the Land Statute in 1964. The research problem here involves investigating how the social function of property developed in the Brazilian legal context and how this evolution impacts the relationships between property, the state, and society.

Lastly, the third part will delve into property rights as effectiveness, focusing on land regularization policy and the need for a reinterpretation of legal concepts in light of the rights of traditional communities and peoples. This section confronts normative promises with concrete reality, exploring alternatives to ensure access to land and territory.

2. Establishment of Modern Property in Brazil

The modern discussion of possession emerges concurrently with Western codifying phenomena, taking on a state-oriented character and stratified on a liberal basis. With the need to defend the individualistic concept of ownership, the debate arises concerning belonging within the modern approach and the necessity to develop doctrines compatible with legal and institutional demands. Modern property and individualism intertwine, shaped by a distinctly liberal bias. Thus, the construction of modern property unfolds with the notion of subjective rights – where the individual transforms into a fiction of sovereignty.

Through the social contract, the state emerges as the entity wielding power over all and for all: that which is not prescribed in state law takes shape as individual freedom. Consulting Michel Villey (2005) provides a deeper understanding of the formation of modern legal thought. The construction of this concept confines itself to the scope of the phenomenon being conceptualized, gradually carving out the structure that would later shape the modern state.

The process of formalizing the law or appropriating complexity through “modern rationality” constructs a monism around the state order, ignoring social realities in their true dimension. For Sérgio Said Staut Júnior (2015, p. 83), “*trata-se porém de um processo muito lento, permeado de contradições e reitências*”.

In Brazil, the ambiguity of the fusion of liberal forms over oligarchic content structures stands out in this process, and as an example of this phenomenon, Antonio Carlos Wolkmer (2002, p. 75-76) recalls the “*conciliação liberalismo-escavidão*”. Contrary to Europe, Brazilian liberalism emerges without any kind of bourgeois revolution and merely represents an adaptation of liberal ideals with the aim of maintaining the structure of oligarchic domination.

Wolkmer (2002) points out that it is possible to observe a paradoxical convergence between the bureaucratic and patrimonialist colonial heritage on one side, and on the other, a socio-economic structure that historically served not for the benefit of society as a whole or the majority, but exclusively for those in power.

In the context of the establishment of modern property in Brazil, it is crucial to emphasize the influences, both political and legal, that permeated the country's historical trajectory. Initially, the inherent complexity of the contemporary definition of possession and property stands out, attributing this complexity to specific events in the political and legal realms.

When examining the construction of possessory theory, the strong influence of German and Portuguese legal traditions becomes clear. Before the promulgation of the Civil Code of 1916, the Philippine Ordinances, the Law of Good Reason, and the Royal Charter of 1808 played fundamental roles in regulating the relationship between man and land. With Brazil's Independence, the Imperial Constitution of 1824 established the creation of codes, providing, in its Article 179, guarantees for individual security and property. However, formally assured, the right to property had a gap regarding the legal regulation of land acquisition methods, as noted by Staut Júnior (2015). This regulation only materialized more than twenty years later with the promulgation of the Land Law.

After the suspension of new sesmarias grants (1822) and without any discussion during the Brazilian Constituent Assembly (1823), the debate on land policy only gained momentum in 1842. Through the notices of June 6th and June 8th, 1842, the then Minister of the Empire, Cândido José de Araújo Viana, requested the Imperial Council's Section of Empire Affairs to propose legislation on sesmarias and foreign colonization (Carvalho, 1996). After lengthy debates and being shelved in the senate

for over seven years, the Land Law (Law No. 601, of September 18, 1850) came to light. In Article 1, the decree prescribed the prohibition of acquiring public lands by any means other than purchase.

Much speculation arises regarding the right carved by the existence of the legal concept of 'culture': does the law bring an end to a customary practice? However, the rights associated with 'culture' are employed as prescribed by Articles 5, 6, and 8 of the Land Law. These articles establish criteria to legitimize land possession, prioritizing those that are cultivated and inhabited. Article 5 emphasizes that possessions in cultivated lands or breeding grounds must include the utilized land and an adjacent extension, provided it does not exceed the limit established for sesmarias in the region. Article 6 specifies that simple practices such as clearing land, cutting brush, and building huts are not considered principles of culture unless accompanied by effective agricultural practices and habitual residence. Article 8 stipulates that possessors who fail to measure within the deadlines set by the government will lose the right to granted lands, considering them as vacant, except those with effective cultivation.

In Brazil, the legal framework on land ownership is seen as a landmark of institutional transition, although it brings with it several contradictions, likely stemming from the multiple interests that surrounded the legislative discussion leading to the law's approval. As Staut Júnior (2015) highlights, there were numerous intentions behind the enactment of the Land Law, such as addressing old sesmarias and possessions, establishing clear distinctions between public and private lands, outlining the processes for acquiring vacant lands, addressing challenges related to agricultural labor, and implementing a rural land tax system.

However, the law did not carry through its promulgation and enforcement, and many of its objectives, such as the implementation of rural land tax, the revalidation and legitimization of numerous sesmarias and possessions, the demarcation of vacant lands, and colonization in Brazil through an immigration policy, were not realized.

Embracing legal journalism, a movement championed in Brazil by Armando Formiga (2010), Staut Junior (2015) scrutinized the magazine titled '*O Direito*' and observed the scarcity of references to the Land Law. This absence is evident when analyzing the judgments and rulings published in the magazine, which was in circulation during the period of validity of Law No. 601/1850.

When examining the compilation of works related to the theme of Possession, spanning the period from the second half of the 19th century to the approval of the 1916 code, as surveyed by Staut Júnior (2015), it is noted that, amid agreements and disagreements, the Brazilian possessory theory fragments into two sets of perspectives: the subjective (with special mention to Savigny) and the objective (associated with Ihering). There is a temporal segmentation in publications linked to the theme, where the initial works date approximately from the second half of the 19th century to the penultimate decade of the same century (the first group or generation); in turn, the second group (or generation) made its main contributions to the subject during the period covering the last decade of the 19th century and the beginning of the 20th century.

In the second half of the 1800s, it can be affirmed that, in Brazil, there was no author who did not depart from the thought of Friedrich Karl von Savigny or the ideas of Rudolf von Ihering to explain the possessory legal regime. Understanding the formation (or shaping) of the legal thought supporting the possessory institute ends up being linked to the 'even if in general terms' understanding of the theories of these two Germans, even though their theories were not the only (or exclusive) ones, always depending on the period analyzed. It is interesting to note that during the time Teixeira

de Freitas elaborated the '*Consolidação das Leis Civis*' (1857) and the '*Esboço do Código Civil*' (1864), under the strong influence of the theory developed by Savigny. Ihering had not even published his main works on possession at that time: '*Sobre o Fundamento da Proteção Possessória*' (1868) and '*A Vontade Possessória: Para uma crítica do método dominante*' (1889). Therefore, Teixeira de Freitas was not acquainted with Ihering's possessory theory.

Another fact that highlights the so-called cultural context is found in Article 1,298 of Joaquim Felício dos Santos 'Civil Code project, stating that possession produces, in favor of the possessor, the presumption of ownership. According to Staut Júnior (2015), this is precisely the foundation defended by Ihering for the defense of possession. Thus, authors like Teixeira de Freitas, Joaquim Felício dos Santos, Antônio Joaquim Ribas, and José de Alencar anticipate concepts that would later be developed and strengthened by writers of the second generation.

Among the main Portuguese authors cited and echoed by Brazilian jurists, elements of both subjective and objective theories can be identified in the works of Pascoal José de Mello Freire, José Homem Corrêa Telles, Corrêa Telles, Coelho da Rocha, and Antônio Ribeiro Teixeira even before their formulation. It can be concluded that these references to Portuguese authors, as observed by Staut Júnior (2015), signal that the roots of possession concepts in Brazilian law are somewhat deeper and more complex than is commonly presented by contemporary Brazilian legal doctrine.

Thus, it is evident that formally, from the discovery (or conquest) of Brazilian lands, Brazilian law was strongly influenced by Portugal. During the colonial period, the first legal norms used to try to regulate the relations between man and land were of Portuguese origin and are important for understanding the conception of the relationship between man and land that was created. Holanda (2014) emphasizes that during this period, rural properties concentrated colonial life, with cities considered dependencies of rural centers.

The colonization of Brazil reflected an alliance between mercantile bourgeoisie, the Crown, and the nobility, resulting in a land policy that incorporated feudal and mercantile conceptions. The Sesmarias system, implemented by D. Fernando in Portugal, aimed to solve problems of food supply and labor, establishing obligations to cultivate the land (Silvia, 1996).

Marés (2003; 2021) points out that despite the disuse of Sesmarias in Portugal, they continued to be used in Brazil until the end of the colonial period, although they did not follow the fundamental rules. From the analysis of this institute, the concept of use as the foundation of property is perceived, and it is a law of obligations to have rights. The lack of effective control resulted in granted areas becoming true latifúndia, contributing to the creation of a chaotic legal situation.

Attempts at control, such as the Royal Letters of 1695 and 1698, in addition to the decree of 1808, were unsuccessful, leading to the suspension of the Sesmarias system in 1822. It can be concluded that the legal regulation of relations between man and land began to be rethought in the country slowly and permeated by contradictions during this period. Staut Junior (2015) points out other difficulties that arose from the form of control in the application of the institute, such as the fact that the donation letters were vague about the location's precision and the absence of registration of buying and selling transactions of the donation letters.

Gonçalves (2014) points out that the implementation of Sesmarias in Brazil occurred in two distinct phases. The first was characterized by the initial cultivation during the application of the Sesmarial regime, emphasizing the importance of land

use as an essential requirement. The second stage, initiated with the October 5, 1795 Decree and ended with the July 17, 1822 Resolution, introduced its own normative set, strongly influenced by Portuguese Enlightenment, shaped by the legal transformations resulting from the Pombaline Reform.

The transition to the 19th century marked the consolidation of an effectively Brazilian law, with the creation of the Juridical Faculties in Olinda and São Paulo in 1828 standing out. The year 1850 was particularly significant with the promulgation of the Commercial Code and the Land Law, contributing to the growth of scholars and debates on possession and property. Discussions turned to the prudent modernization of agrarian property, considering issues related to labor and the control of land acquisition methods.

During the colonial period, Brazilian law evolved in spaces left by classical common law, incorporating local regulations and facing significant changes. The influence of Portuguese Enlightenment, intensified by the Pombaline policy, triggered the search for a more rational and systematic law, resulting in the production of new laws and an increase in the legislative production of the Portuguese Empire. Liberal law, by redefining land ownership as a commodity, directly impacted the understanding of possession and property in Brazil, leading to a transitional phase marked by the golden age of squatters between 1822 and 1850 (Gonçalves, 2014).

With the promulgation of the Land Law in 1850, the squatter phase in Brazil came to an end, inaugurating a new era marked by attempts to establish modern property, focusing on the cautious modernization of agrarian property, considering labor and methods of land acquisition and control.

Thus, in general terms, Staut Júnior (2015) argues that, in the objective theory, possession is understood as a manifestation of ownership. However, this conception faced difficulties in development in Brazil due to the delay and complexity in the legal understanding of territorial property in a modern way, despite initiatives such as the Land Law. The Civil Code of 1916 defined possession as an externalization of property, excluding possession of personal rights and, consequently, possessory protection for these rights. Clóvis Beviláqua (1941) highlighted the extensive correlation between property and possession, arguing that where property is not conceivable, possession is also not admitted. In this context, Staut Júnior (2015) observes that the conceptual transition from pre-modern to modern in relationships between people and things, reflected in the Civil Code of 1916, is marked by a transitional tension.

However, it is important to emphasize the need for a review of the theory of possession and its meaning in law, considering history. It is crucial that the analysis of the past promotes a critical view of the present, questions established ideas and concepts, and generates new inquiries.

3. The Idea of Social Function and the Brazilian Federal Constitution

The debate about the social function of property intensifies with the emergence of legal provisions that mitigate the absolutist nature of property that had been constructed until then, for example, the formulations in the Weimar Constitution (Germany - 1919), the Mexican Constitution (1917), and the Constitutions of Bolivia (2009) and Colombia (1991).

The social function of property is seen as the primary limitation to the idea of absolute property, “the right of doing anything,” in the Hobbesian version. It is generally related to the concept of the Welfare State and is marked by the Constitution of the German Empire (Weimar Constitution), especially in Article 153 § 2, which prescribes

that property imposes obligations and that its use must simultaneously constitute a service for the highest common interest.

Only in 1964, with the promulgation of the Land Statute, did the Brazilian state conceptually (and legally) gain the requirements for fulfilling the social function of land property (Article 2, § 1). Article 2 of the Land Law establishes that land ownership fully achieves its social function when, simultaneously: (a) contributes to the well-being of owners and workers who work on it, as well as their families; (b) maintains satisfactory levels of productivity; (c) ensures the preservation of natural resources; (d) complies with the legal provisions that regulate fair labor relations between owners and cultivators.

Despite the clear requirements listed in the law, the text established, as a consequence of non-compliance with the social function, the state proceeding with social expropriation, without producing many practical results at the time.

In the view of Edson Fachin (1988), while linked to ownership, possession is a fact with some legal value, but as an autonomous concept, possession can be conceived as a right. Although this is not specifically the possessory context addressed by the author, possession as an autonomous concept qualifies as a right: either the right of regularization or originating from ownership, depending on the case.

By directly relating the existence of possession to ownership, the author of the objective theory of possession conferred the right to possess protection (as externalization) in addition to its functional protection of ownership. According to Luiz Edson Fachin (1988), in Ihering's view, possession is linked to the orbit of ownership to the extent that possessory protection is the advanced guard of ownership. The concept of possession is seen as the externalization or visibility of ownership, which, in this way, makes an exception to possessory defense that benefits the non-owner because it is based on an appearance. Therefore, there is a need to exercise the social function of property.

Zavascki (2005) emphasizes that the social function of property refers to the use of goods, not their legal ownership. This principle has normative force regardless of who holds the title of owner. He points out that it is the goods and properties, as phenomena of reality, that are subject to a social destination, not the right of ownership itself.

In Brazil, the model of property takes on its own configurations, shaped by the context provided by each era. It would be necessary here (if possible) pages and pages to try to contextualize each era and, within its current structure, each power play that built the prevailing order (as well as all its characteristics). In the various proprietary models already adopted, the shallow reasoning that productivity (or culture, cultivation, utilization) would legitimize the legal value of the land has always been privileged.

The custom that consolidates itself based on the culture of the land begins to incorporate notions quite similar to the ideas that underlie the social function of property, although, in the socioeconomic context, they are entirely distinct. It is not intended to argue here that the notion of the culture of the land gave rise to the concept of the social function of property. The intention is merely to point to an interpretation that takes into account the vast continental expanse of Brazil (with its 8,515,759.09 km²): despite the numerous norms on the subject, effective land regularization has never been promoted. In many regions of Brazil, irreversibly, possession as occupation through use still has (and will continue to have) for a good while the sense of acquiring rights to the land through cultivation, at various levels.

Carlos Frederico Marés (2003; 2021) emphasizes that fulfilling the social function is related to the use of property, emphasizing that what fulfills this function is

not the property as an abstract concept, but rather the land and human action when intervening in it, regardless of the title of ownership conferred by law or the state.

Despite the struggle for minority rights beginning before the 1988 Federal Constitution, it was during the redemocratization process between 1985 and 1988 that new legal concepts were incorporated into the Constitution, ensuring the formal recognition of the right to property of lands occupied by Traditional Communities, as per infraconstitutional provisions.

The 1988 Federal Constitution was the first to adopt the principle of the social function of property, marking a significant advance. The 1988 constitutional text, the result of a complex constituent process, is considered the most advanced in Brazil (Fidelis, 2016). Article 5, which deals with fundamental rights and guarantees, ensures equality before the law and the inviolability of the right to life, liberty, equality, security, and property.

Sections XXII and XXIII of Article 5 highlight the guarantee of the right to property, emphasizing the need to meet its social function. Article 170, in sections II and III, provides for private property and its social function, something that was already stated in the Statute of the Land (Law No. 4,504/1964), in Article 2.

According to the words of Lenio Streck (2019), the text resulting from the complex constituent process of 1986-1988 represents the most advanced legal-political text produced in Brazil. The 1988 Federal Constitution draws inspiration from post-World War II constitutions and aligns itself with committed, diligent, and social constitutionalism, which has yielded such good results in the countries where it has been implemented.

Gabrielle Sarlet (2018) analyzes Article 170(I) of the 1988 Federal Constitution, highlighting its intention to enunciate principles of the economic constitutional order related to private property. This provision reinforces the symmetry between capital and labor, aligned with the values of individual freedom and social justice that shaped the constituent project.

Eugênio Facchini Neto (2018) addresses the conception of the social function of property, present in Article 170(III). He emphasizes that this idea has roots in 1967, but its substantial formulation was maintained in the 1988 Constitution. The author notes that the innovation of the provision is not significant, since the notion of restricting the absolute character of property already existed in previous constitutions, such as those of 1934 and 1946.

The inclusion of the principle of the social function of property in the Legal System transformed the agrarian issue, historically associated with the notion of absolute civil private property. Modern society no longer tolerates land accumulation for speculation purposes and to display wealth and power.

Therefore, when resolving agrarian possessory disputes, it is essential to consider this principle, which has the ability to promote and protect peace and social justice, essential goals of both possessory protection and the constitutional principle of the social function of property.

Constitutionally speaking, it was the 1988 Federal Constitution that solidified this matter, establishing criteria for fulfilling the social function of property, going beyond fundamental rights and reaching the general principles of economic activity. These provisions confer on private property a break from the concept of exclusively individual rights, relativizing its meaning in favor of achieving the higher end: ensuring a dignified existence for all, according to the dictates of social justice.

However, the social function of property is a legal concept that goes beyond the fundamental rights provided for in Article 5 of the Federal Constitution of Brazil. It

extends to the general principles of economic activity, as per Article 170, item III, of the same Constitution. This approach gives private property a broader dimension, breaking the exclusively individual concept of this right, relativizing its meaning in favor of social justice (Facchini Neto, 2018).

José Afonso da Silva (2001) emphasizes that the legitimacy of property is conditioned by its function directed towards social justice. This contemporary perspective goes beyond individualistic ethics, adopting a solidarity-based view that recognizes not only the right to property but also the right to property as a fundamental social right.

In this context, the discussion about the social function of property is not limited to urban areas alone, as evidenced by broad considerations that encompass both urban and rural properties. This broader view of property as a socially responsible instrument gains prominence not only in Brazil but also in international contexts, as illustrated by the comments of Guido Alpa, Mario Bessone, and Andrea Fusaro (2004) on the social function of property in the Italian Constitution: *“La funzione sociale modifica «la struttura tradizionale riconosciuta alla proprietà» (scrive M. Costantino). Non si tratta quindi di una semplice modificazione della terminologia delle norme, ma una radicale innovazione nel modo di disciplinare la proprietà – pubblica e privata –, nel modo di analizzare la proprietà, nel modo di coordinare gli interessi dei privati con l’interesse generale. E si tratta, ancora, di una formula con evidenti valenze ideologiche”* (Alpa; Bessone; Fusaro, 2004, n.p.).

With this, the evolution of this concept is noticeable in Brazilian legislation, which, after the 1988 Constitution, incorporated the environmental function of property, imposing limits on the right to property in favor of collective interest and the preservation of natural resources. Giuliano Deboni (2011) emphasizes that the environmental function and the social function are inherent elements of property, requiring a positive obligation for the owner to fulfill these functions.

The social function of property also had an impact on urban dynamics, as evidenced by Pedro Cantisano (2018) when describing the transformations in Rio de Janeiro between 1903 and 1909. Although initially used to justify urban segregation, the social function of property became a fundamental concept in the struggles for the right to housing, redefining itself in the interpretations of social movements and legal doctrine after the 1988 Constitution.

The influence of jurists like Léon Duguit (1912) in Latin America, particularly in Brazil, resized the concept of property in the 1920s and 1930s. The Constitutions of various countries, such as Chile, Bolivia, El Salvador, Germany, South Africa, and Brazil, began to condition the exercise of property on the fulfillment of the social function.

Brazilian jurisprudence reflects the importance of the social function of property as a parameter for positive behavior, even in cases of expropriation. Access to land, the resolution of social conflicts, and the rational use of the property are crucial elements for the fulfillment of this function, demonstrating its active and dynamic dimension (Cavalcante, 2023).

In summary, the social function of property transcends traditional notions of individual rights, incorporating a solidarity and environmental perspective. Its evolution reflects social transformations, democratization, and access to fundamental rights, giving property a dynamic role in promoting social justice and harmonizing with collective interest.

However, it is possible to perceive how the constitutional phenomenon influenced the debate about the social function of property, acquiring a dynamic

connotation and opening space for social transformations. Thus, the Comtean notion ended up being replaced, bringing about a certain improvement concerning the process of democratization and access to fundamental rights provided for in the Brazilian Constitution, considering that the previous concept of property assumed static roles in a fundamentally organic society.

4. Property Rights as Effectiveness and Land Regularization Policy

The construction of property rights becomes evident as arbitrary, individual, absolute, and detached from the majority of the population. The conception of property has been modified through studies in human and fundamental rights theories, which, through the constitutionalization of fundamental rights, fragmented the public and private law dichotomy. This implies a consequent functionalization and depersonalization of the privatist pillars and their influences in the sphere of criminal protection, as pointed out by Sarlet (2018).

The right to property was fully protected by the 1891 Constitution, thus not allowing any relativized interpretation of the concept of property, even though there was a constitutional provision for expropriation for public interest. The comprehensive protection of property by the 1891 Constitution gave way to more flexible interpretations, especially with the advent of the 1988 Federal Constitution (CRFB/88), which elevated property to the status of a fundamental human right.

Article 5 of the 1988 Federal Constitution plays a fundamental role in the context of the right to property, elevating this guarantee to the status of fundamental human rights. The norm recognizes diversity, especially by endorsing, through Article 68 of the Law of the Interim Constitutional Provisions (ADCT), the right to definitive property for quilombolas, breaking with the old protection that apparently persisted for indigenous peoples. However, despite the legal establishment of a “Plurinational State” in Brazil, there are deficits in the implementation and compliance with laws and government actions that promote ethnic awareness. The expansion of the concept of “traditionally occupied lands” has been reaffirmed since the ratification of the International Labour Organization (ILO) Convention No. 169 of 1989, by Legislative Decree No. 143/2002.

The Federal Decree No. 6,040/2007 defines traditional territories as spaces necessary for the cultural, social, and economic reproduction of traditional peoples and communities, whether used permanently or temporarily. This takes into account, concerning indigenous peoples and quilombolas, respectively, the provisions of Articles 231 of the Federal Constitution of 1988, 68 of the Law of the Interim Constitutional Provisions (ADCT), and other regulations (Article 3, I, Federal Decree No. 6,040/2007).

Gabrielle Sarlet (2018) highlights the right to property as a perfect model of civil-constitutional law, especially in light of the wording of Article 1,229 of the Civil Code of 2002. In this regard, Facchini Neto (2018) points out that the affirmation of property as a fundamental right and guarantee, enshrined in Article 5 of the Constitution of 1988, reflects the inclusion in the legal system of new modalities of recognition of guarantees, covering both movable and immovable, material and immaterial goods, and dimensions of personality. This change implies a reorganization of the normative system, requiring social cooperation and pointing to the need for diversification of duties and rights arising from property protection to give new meaning to possession in the face of patrimonial transformations, including challenges related to virtual assets.

The recognition of traditionally occupied lands, the social function of property, and the need for social cooperation have redefined the legal and social dynamics of

property in Brazil. The social function, encompassing environmental aspects, labor relations, and well-being, is essential for the constitutional protection of property. The structural and functional approach to property, as well as the distinction between internal and external aspects, is discussed, highlighting the protective and punitive duality of legislation.

The debate on the social function becomes crucial for the recognition and application of rights related to traditional communities, especially in the context of agrarian law. Owners who do not fulfill the social function may face punitive measures, highlighting the importance of social cooperation in the evolution of the concept of property (Cavalcante, 2023).

The debate on the social function of property is addressed by Gustavo Tepedino (1999), emphasizing the regulation of structural aspects by the Civil Code and functional aspects by the Federal Constitution. The author highlights the protective and punitive function, integrating requirements such as environmental protection and labor relations into the constitutional protection of the social function, arguing that the owner's status deserves protection only when meeting the pre-established social function in the Constitution.

In the field of agrarian law, the social function of property is central, influencing the acquisition of property rights. The debate becomes crucial for the recognition and application of rights related to traditional communities, especially in the context of agroecological possession. The supremacy of possession over the title of property is recognized in agrarian law, considering the importance of possession for agrarian activities (Marques; Marques, 2017).

Carlos Frederico Marés (2003; 2021) emphasizes that the social function falls on the land, not the property, highlighting that the social function is relative to the good and its use, not the right. The social function limits private autonomy, being determined by society. Social transformations and the broadening of material priorities favor the emergence of new forms of legality, challenging classical paradigms.

Ibraim Rocha (2019) discusses agroecological possession as a special form of relationship with the land, reconciling possession with restrictions in defense of the environment. Ethnic possessions, such as indigenous and quilombola possession, are recognized, and the legislation seeks an intercultural reinterpretation to deal with conflicts in the field. Thus, the Federal Constitution of 1988 represents a paradigm shift by adopting a posture of respect for the cultural identity of indigenous peoples.

The current debate seeks to contribute to conflict resolution in traditional communities, adopting an intercultural approach and considering practical knowledge as formal legal instruments.

Almeida (2006; 2011) highlights the importance of “traditionally occupied lands,” covering various collective identities such as caíças, gypsies, backcountry communities, among others. These lands were recognized in the 1988 Constitution and in infraconstitutional legislation, but their implementation faces challenges, straining formal legal recognition and impacting agrarian structure.

Advancements in the application of legal concepts to plural realities have been recognized since the 1988 Federal Constitution, albeit slowly. Examples include judicial decisions like Direct Action of Unconstitutionality (ADI) No. 3239, which deemed constitutional Decree No. 4,887/2003 on quilombola territories. The Special Appeal No. 931.060 from the Superior Tribunal of Justice in Brazil (STJ) in 2009 rejected the repossession against a quilombola community on Ilha da Marambaia, emphasizing constitutional protection for remnants of quilombos, based on art. 68 of the ADCT. The decision highlights the importance of ensuring possession of these

areas until definitive titling to preserve cultural and ethnic traditions, in accordance with the 1988 constitutional pact.

Regarding the Roma people, there was a case in 2019 when the 1st Civil Chamber of the Minas Gerais Court of Justice overturned a repossession decision against Acampamento São Pedro, occupied by 12 Roma families in the city of Ibitité, state of Minas Gerais. Judge Armando Freire highlighted that the initial decision ignored the reality of the camp as a Roma community established about seven years ago. He emphasized the impossibility of applying the repossession injunction against people not originally involved in the process, defending the constitutional guarantee of contradictory and full defense. He recommended the annulment of the decision to consider the new factual reality of the community. In 2020, the Calon Roma Community obtained from the Municipality the assignment of land in Ibitité for 20 years, intended for housing and cultural activities by the State Cultural Association for the Rights and Defense of the Roma People (CPT, 2023).

The State's delay exacerbates conflicts in the Brazilian countryside, according to some authors who argue that, even with the 1988 Federal Constitution, the State has not shown a true intention to enforce the social rights related to property. José do Carmo Alves Siqueira (2016) highlights the lack of resolution of the agrarian reform issue in Brazil, despite three identified opportunities for its realization, where social movements pressured the government. He attributes state inaction to the influence of opposing forces, such as Tradition, Family and Property (TFP), Democratic Association of Ruralists (UDR), Brazilian Agricultural Society (SRB), and the ruralist caucus. The first opportunity, in the 1950s, ran aground on the requirement of cash compensation for expropriation for social interest, financially unfeasible for agrarian reform (Prado Júnior, 2014). The other two opportunities, after the military regime, were marked by unfulfilled promises, including during the government of Tancredo Neves and José Sarney, where the proposed National Agrarian Reform Plan (PNRA) had little relation to the original proposal, as argued by José Gomes da Silva (1987) in his book *"Caindo por Terra."*

José Gomes da Silva (1987) expresses frustration for missing the opportunity to carry out agrarian reform and comments on the difficulty of telling those living in precarious conditions to wait for the new 1988 Federal Constitution. The third opportunity occurs with the constituent assembly, marked by mobilizations, including the emergence of the MST in 1985. The 1989 Constitution incorporates the agrarian reform agenda but was hindered by Article 185, which grants absolute immunity to properties classified as "productive," hindering effectiveness (Silva, 1987). After 34 years, the realization of the right to agrarian reform is still not a reality for traditional communities, facing bureaucracy, contradictory decisions, and political obstacles.

According to Cavalcante (2023), in daily life, bureaucratic solutions arise that confront practical reality in sectors such as agriculture, education, health, housing, and food security. These actions include decisions guided by temporal frameworks, territorial concessions to quilombos (based on the precision and naturalness of quilombola "origin"), imposition of fines and environmental infractions on quilombola extractivists, and various scattered laws that sometimes conflict with the cultural practices they aim to protect. Additionally, political and bureaucratic-administrative barriers are employed to delay the effective implementation of the norm and ensure the legal-formal recognition of traditionally occupied lands.

Consequently, it is evident that acts aiming to implement the constitutional norm end up becoming bureaucratic obstacles to its realization, particularly in the homologation of indigenous lands and the titling of quilombola lands. The intention

here is to prompt the reader to reflect on the following: to what extent do norms that seemingly seek to streamline demarcation processes actually facilitate them? How to reinterpret the concepts surrounding property? And the social function?

In 2021, Treccani, Benatti, and Monteiro (2021) analyzed violence in rural areas and land regularization policies. Contrary to expectations of conflict reduction due to the pandemic in 2020, the report reveals an alarming increase since 1985, with 1,576 conflicts involving 171,625 families. It has intensified in the last two years, with a focus on indigenous peoples and quilombolas, accounting for 7.23% of the total occurrences in 2020. The authors attribute the worsening to the intensification of land grabbing, with farmers, businessmen, and the government as responsible parties, mainly affecting landless people, squatters, indigenous peoples, quilombolas, and settlers.

In this scenario, the regression of rights (and the consequent effectiveness of constitutional and international norms) concerning people from traditional territories is notable, with greater justification in the public policies developed in the last government (2019-2023), which explicitly opposed the existence of these peoples, attacking their rights.

Treccani, Benatti, and Monteiro (2021) state that peace depends on the recognition and respect for the territorial rights of traditional peoples. They propose guiding public and social actions to prioritize respect for life and fundamental human rights. They advocate for a change in the approach to land policy, emphasizing the importance of Territorial Planning instead of focusing solely on land regularization. The right, as a promise embedded in the legal system, is not realized solely by its formalization in the Constitution.

Analyzing the construction of the rights of traditional communities and peoples, it becomes apparent that these rights were forged through constant struggles for positivation, waged by social movements, doctrine, and jurisprudence. The law initially emerges as a promise to realize rights but often remains masked by gaps that enable and continue to enable their usurpation. Changing the paradigm of interpreting legal dogma regarding these peoples is an insurgent issue; it is necessary to reinterpret concepts and demand compliance with what was laid out in the Constitution, starting from this reinterpretation.

Thus, the central aim here is to engage in the debate on the construction of legal dogma, with the consequent positivation of rights made possible through the constitutionalizing movement. However, analyzing concrete data reveals that the norm is still insufficient, incapable of conferring a right to property or possession or access to land as effectiveness, as a guarantee.

However, it is not enough to merely recognize rights; it is necessary to ensure, apply, and guarantee that they will be enforced. The ensuing debate in the next chapter revolves around a possible reinterpretation of concepts related to guaranteeing the rights of traditional peoples and communities, done through the analysis of the new Latin American constitutionalism and the socio-environmental perspective. How will it be possible to reinterpret current legal categories? Are there alternative ways to approach Brazilian land policy? Who has the right to have the right to land and territory?

5. Conclusion

At the end of this analysis of modern property in the Brazilian legal context, the complexity of interactions between the individualism enshrined in property and social and institutional demands becomes evident. The trajectory outlined from the establishment of modern property to the current discussions on social function and

effectiveness reveals a constant tension between individual autonomy and the need to address collective interests.

Despite being previously envisaged, the social function of property was solidified in the Brazilian Federal Constitution and represented a milestone in the quest for balance, mitigating the absolutist view and imposing obligations on property. However, gaps in the implementation of these principles, especially in the field of land regularization, demand a profound review of current paradigms.

In light of this scenario, the conclusion of this study not only points to the need for reinterpretation and normative improvement but also emphasizes the importance of a more effective approach in ensuring the rights of traditional communities and peoples. The real implementation of these legal achievements represents the next challenge, requiring a renewed commitment to equity and social justice in shaping land policies in Brazil.

References

ALMEIDA, Alfredo Wagner Berno de. Terras Tradicionalmente Ocupadas - Terras de Quilombo, Terras Indígenas, “Babaçuais Livres”, “Castanhais do Povo”, Faxinais e Fundos de Pasto: terras tradicionalmente ocupadas. Manaus: Ppgsca - Ufam, 2006.

ALMEIDA, Alfredo Wagner Berno de. Traditionally Occupied Lands in Brazil: terras de Quilombo, Terras Indígenas, “Babaçuais Livres”, “Castanhais do Povo”, Faxinais e Fundos de Pasto. Manaus: Ppgsca - Ufam, 2011.

ALPA, Guido; BESSONE, Mario; FUSARO, Andrea. Costituzione economica e diritto di proprietà. In: Poteri dei privati e statuto della proprietà. Roma: casa editrice S.e.a.m, 2004. Disponível em:

<https://www.altalex.com/documents/news/2004/06/29/costituzione-economica-e-diritto-di-proprieda-la-funzone-sociale-della-proprieda#nota>. Acesso em 29 de dezembro de 2023.

BEVILÁQUA, Clóvis. Direito das Coisas. Rio de Janeiro: Freitas Bastos, 1941.

CANTISANO, Pedro Jimenez. Políticas urbanas, conflitos sociais e direito de propriedade no Brasil da virada do século XIX. In: UNGARETTI, Débora et al (ed.). Propriedades em transformação: abordagens multidisciplinares. São Paulo: Blucher, 2018. p. 17-38.

CARVALHO, José Murilo de. A construção da ordem - Teatro de sombras. Rio de Janeiro: UFRJ, Relume-Dumará, 1996.

CAVALCANTE, Jéssica Painkow Rosa. Comunidades tradicionais e direitos de posse e propriedade: uma visão crítica. 2023. 286 f. Tese (Doutorado) - Curso de Direito, Programa de Pós-Graduação em Direito Público, Universidade do Vale do Rio dos Sinos, São Leopoldo, 2023.

CPT. Comissão Pastoral da Terra. Acampamento Cigano São Pedro, em Ibitité, MG, conquista território para morar em sete Anos de Luta! Disponível em: <https://www.cptmg.org.br/portal/acampamento-cigano-sao-pedro-em-ibirite-mg-conquista-territorio-para-morar-em-sete-anos-de-luta/>. Acesso em: 29 dez. 2023.

- DEBONI, Giuliano. Propriedade Privada: do caráter absoluto à função social e ambiental. Sistemas jurídico. Italiano e brasileiro. Porto Alegre: Verbo Jurídico, 2011.
- DUGUIT, Léon. Les transformations générales du droit privé depuis le Code Napoléon. Paris: Librairie Félix Alta, 1912.
- FACCHINI NETO, Eugênio. Artigo 5º, inciso XXIII. In: CANOTILHO, J. J. Gomes et al (org.). Comentários à Constituição do Brasil. 2. ed. São Paulo: Almedina, 2018.
- FACHIN, Luiz Edson. A função social da posse e da propriedade contemporânea (uma perspectiva da usucapião imobiliária rural). Porto Alegre. Fabris, 1988.
- FIDELES, Júnior Divino. A justa indenização nas desapropriações agrárias: como se formam as superindenizações. 1ª ed. Rio de Janeiro: Lumen Juris, 2016.
- FORMIGA, Armando Soares de Castro. Periodismo Jurídico no Brasil do Século XIX. Curitiba: Juruá, 2010.
- GONÇALVES, Albenir Itaboraí Querubini. O regramento jurídico das Sesmarias: o cultivo como fundamento normativo do regime sesmarial no Brasil. 1ª ed. São Paulo: Leud, 2014.
- HOLANDA, Sérgio Buarque de. Raízes do Brasil. 27. ed. São Paulo: Companhia das Letras, 2014.
- MARÉS, Carlos Frederico. A função Social da Terra. Curitiba: Arte e Letra, 2021.
- MARÉS, Carlos Frederico. A função Social da Terra. Porto Alegre: Sergio Antonio Fabris Editor, 2003.
- MARQUES, Benedito Ferreira; MARQUES, Carla Regina Silva. Direito Agrário Brasileiro. 12. ed. São Paulo: Atlas, 2017.
- PRADO JÚNIOR, Caio. A Revolução Brasileira: A questão agrária no Brasil. 1ª Ed. São Paulo: Companhia das Letras, 2014.
- ROCHA, Ibraim et al. Manual de Direito Agrário Constitucional: lições de direito agroambiental. 3. ed. Belo Horizonte: Fórum, 2019.
- SARLET, Gabrielle Bezerra Sales. Artigo 5º, caput - direito à propriedade. In: CANOTILHO, J. J. Gomes et al (org.). Comentários à Constituição do Brasil. 2. ed. São Paulo: Almedina, 2018.
- SILVA, José Afonso da. Curso de Direito Constitucional. 19. ed. São Paulo: Malheiros, 2001.
- SILVA, José Gomes da. Caindo por terra: crises da reforma agrária na Nova República, São Paulo: Busca Vida, 1987.

SILVA, Lúgia Osorio. Terras devolutas e latifúndio: efeitos da lei de 1850. Campinas: Editora da UNICAMP, 1996.

SIQUEIRA, José do Carmo Alves. Direito como efetividade e luta pela terra no Brasil. 2016. 363 f. Tese (Doutorado) - Curso de Direito, Programa de Pós-Graduação em Direito, Estado e Constituição, Universidade de Brasília, Brasília, 2016.

STAUT JÚNIOR, Sérgio Said. Posse e dimensão jurídica no Brasil: Recepção e reelaboração de um conceito a partir da segunda metade do Século XIX ao Código de 1916. Curitiba: Juruá, 2015.

STRECK, Lenio Luiz. Jurisdição Constitucional. 6ª ed. Forense: Rio de Janeiro, 2019.

TEPEDINO, Gustavo. Temas de Direito Civil. Rio de Janeiro: Renovar, 1999.

TRECCANI, Girolamo Domenico; BENATTI, José Heder; MONTEIRO, Aianny Naiara Gomes. Agravamento da violência no campo: reflexões sobre a política de regularização fundiária. In: CENTRO DE DOCUMENTAÇÃO DOM TOMÁS BALDINO. Conflitos no campo: Brasil 2020. Goiânia: Comissão Pastoral da Terra Nacional, 2021.

VILLEY, Michel. A formação do pensamento jurídico moderno. São Paulo: Martins Fontes, 2005.

WOLKMER, Antônio Carlos. História do direito no Brasil. 3. ed. Rio de Janeiro: Forense, 2002.

ZAVASCKI, Teori Albino. A tutela da posse na Constituição e no Novo Código Civil. Revista Brasileira de Direito Constitucional, n. 5, p. 50-61, jan./jun. 2005.